Review of the operation and effectiveness of the serious violent offences scheme under the *Penalties and Sentences Act 1992* (Qld)

Submission to Queensland Sentencing Advisory Council

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The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

The ALA office is located on the land of the Gadigal of the Eora Nation.

[1] www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input into the review of the operation and effectiveness of the Serious Violent Offences (SVO) scheme in the *Penalties and Sentences Act 1992* (Qld) currently being undertaken by the Queensland Sentencing Advisory Council ('QSAC').

2. This submission raises the following concerns about the SVO scheme as it currently operates:

    - The failure of the SVO scheme to act as a deterrent for further serious offending and recidivism;

    - The SVO scheme operates to provide a disincentive for offenders to plead guilty to offences thereby creating an additional burden on the courts;

    - The concern that the SVO scheme may have a disproportionate effect on people with extensive and severe mental health issues;

    - The over-representation of First Nations People across offence categories attracting an SVO declaration;

    - The SVO scheme operates as a form of mandatory sentencing which serves to remove judicial discretion in sentencing and is contrary to Australia's international human rights obligations;

    - The SVO scheme is not compatible with the rights protected under the *Human Rights Act 2019* (Qld) and cannot be justified as a reasonable limitation on those rights.

Issues of concerns raised in the preliminary submission

3. In its Preliminary Submission dated May 2021, the ALA recommended that as part of this review, the following questions should be considered for further research and discussion:

    - Whether the SVO scheme is predominantly used for people with extensive criminal histories;

    - Whether the SVO scheme causes a disincentive to plead guilty to offences;

- The extent to which the SVO scheme is used for people with extensive and severe mental health issues i.e. paranoid schizophrenia and paranoid personality disorder.

4. The ALA notes that the Council's Issues Paper issued in November 2021[2] states that an analysis of offenders' prior history of being sentenced to imprisonment found that cases attracting a mandatory SVO declaration had a higher proportion of prior imprisonment compared to cases without an SVO declaration.[3] This supports the ALA's concern that there is a relationship between recidivism and serious violent criminal offending. The ALA further submits that the SVO scheme fails to provide a deterrent effect for further serious offending in such cases.

5. The ALA notes that the Issues Paper also indicates that there is evidence showing that the rate of guilty pleas were lower for declared SVO offences across all offences, except for grievous bodily harm. The ALA notes that the Issues Paper's comment that the difference was particularly stark for attempted murder, manslaughter and sexual offences. The ALA remains concerned that that the SVO scheme causes a disincentive to plead guilty to serious offences, thereby creating an additional burden on the courts.

6. The ALA notes that there is still insufficient information regarding the extent to which the SVO scheme is used for people with extensive and severe mental health issues. The ALA remains concerned that people with extensive and severe mental health issues may be over-represented across most offence categories commonly attracting an SVO declaration.

The over-representation of First Nations Peoples in the SVO scheme

7. The ALA notes with concern that based on preliminary analysis, the Council has found that Aboriginal and Torres Strait Islander peoples were over-represented across all offence categories attracting an SVO declaration, with the exception of trafficking in dangerous drugs.[4] According to the data presented in Background Paper 4, of the 437 SVO cases analysed over the data period, 20.1 per cent of sentenced cases involved an Aboriginal or

[2] Queensland Sentencing Advisory Council. 2021. *The '80 percent rule': the Serious Violent Offences (SVO) scheme in the Penalties and Sentences Act 1992 (Qld)*. November 2021.

[3] Ibid 22.

[4] Ibid, 18, 28.

Torres Strait Islander person (while Aboriginal and Torres Strait Islander peoples make up only 3.8 per cent of the Queensland population aged 10 years or over).

8. The ALA notes that the proportion of SVO cases in which an Aboriginal or Torres Strait Islander person was sentenced to imprisonment with an SVO declaration was higher for discretionary SVO declarations (30.3 per cent) compared to mandatory SVO declarations (16.4 per cent).[5]

9. The ALA submits that the SVO scheme has a disproportionate and discriminatory impact on Aboriginal and Torres Strait Islander peoples and contributes to the over-representation of Aboriginal or Torres Strait Islander peoples in prison/detention. The ALA submits that this provides further grounds justifying its abolition.

Inappropriateness of mandatory sentencing schemes

10. The ALA agrees with the Council that the mandatory application of the SVO scheme to sentences of 10 years and higher is a form of mandatory sentencing, as is the mandatory minimum non-parole period (MNPP) of 80 per cent when a declaration is made (either as a mandatory or discretionary declaration).[6] The application of the scheme restricts courts in their ability to recognise mitigating factors which may result in unfair sentencing outcomes.

11. The ALA is strongly opposed mandatory sentencing schemes, including the SVO scheme, for the reasons below.

Mandatory sentences – removing judicial discretion

12. The ALA agrees with the Law Council of Australia that mandatory sentencing schemes remove the ability of courts to consider relevant factors such as the offender's criminal history, individual circumstances or whether there are any mitigating factors, such as mental illness or

[5] Ibid 28.

[6] Ibid 51.

other forms of hardship or duress. This can result in sentencing outcomes that are disproportionately harsh, unjust and anomalous.[7]

13. The ALA submits that it is not appropriate for the Parliament to prescribe mandatory minimum sentencing schemes for particular offences, such as the SVO scheme, as it does not enable consideration of individual circumstances or nuances for particular factual scenarios. Ultimately, it is only the courts that have access to the facts, circumstances and contexts in which a particular offence is committed. It is therefore appropriate the that courts have the ultimate discretion in determining the appropriate sentence for a particular offence that has been proved, subject to the principles and maximum sentence that has been determined by the legislature.

14. The Law Council of Australia noted that in jurisdictions where mandatory sentencing schemes have been introduced, lawyers, judges and juries will increasingly resort to accepted mechanisms such as plea bargaining to circumvent the harsh and unjust effects of mandatory minimum sentences.[8] While proponents of mandatory minimum sentencing state that such sentences are transparent, mandatory sentences tend to transfer decision-making powers in relation to the sentence from the judiciary to the prosecution and the police, given that the choice of the charge will determine the sentencing outcome. If prosecution agencies wish to avoid the imposition of mandatory penalties, they will charge an offender with offences that do not carry mandatory sentences.[9]

15. Accordingly, the ALA submits that mandatory sentencing schemes undermine the role of the courts in determining sentencing outcomes. Ultimately this serves to undermine community confidence in the criminal justice system.

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[7] Law Council of Australia, 'Mandatory Sentencing' (Policy Discussion Paper), May 2014, 20-21, <https://www.lawcouncil.asn.au/docs/ff85f3e2-ae36-e711-93fb-005056be13b5/1405-Discussion-Paper-Mandatory-Sentencing-Discussion-Paper.pdf>.

[8] Ibid, 18.

[9] Andrew Ashworth, Andrew, *Sentencing and Criminal Justice,* Cambridge University Press, 6th ed, 2015, 107; Nicholas Cowdery, *Mandatory Sentencing*, Sydney Law School Distinguished Speakers Program, 15 May 2014, 13

Mandatory sentencing and Australia's international human rights obligations

16. The ALA submits that mandatory sentencing schemes are also contrary to Australia's international human rights obligation, as set out in the *International Covenant on Civil and Political Rights* (*ICCPR*). This includes:

    - the right to be free from arbitrary detention (Article 9(1));
    - the right to a fair trial (Article 14(1));
    - the right to have one's sentence reviewed by a higher court (Article 14(5)).

17. The ALA submits that mandatory sentencing schemes that prohibit the court from attributing the weight it deems appropriate to the seriousness of the offending and the circumstances of the offender is bound to result in terms of imprisonment that are arbitrary, thereby breaching Articles 9(1) and 14(1) of the *ICCPR*. As an appellate court cannot on review, reduce a mandatory minimum sentence that is imposed, there is also a breach of Article 14(5) of the *ICCPR*.

The financial cost of mandatory sentencing

18. The ALA submits that mandatory sentencing schemes involve an increase in the costs of the administration of justice. The effect of such a sentencing regime is to remove the incentives for offenders to assist authorities with investigations (in the expectation that such assistance will be taken into account in sentencing). They will also remove an incentive for defendants to plead guilty, thereby earning the right to a sentencing discount. Accordingly, mandatory minimum sentences result in more contested hearings requiring the use of extra resources.

19. The ALA also notes that mandatory sentencing increases the use of imprisonment as a sentencing option and the length of sentences served by offenders, thus increasing the costs to the state for incarceration of convicted offenders.[10] The ALA also notes that mandatory

[10] Adrian Hoel and Karen Gelb, *Sentencing Matters: Mandatory Sentencing* (Sentencing Advisory Council, Victoria, 2008), 15.

sentencing has also been associated with greater difficulty for offenders being granted bail thereby increasing the number of offenders held in custody.[11]

Mandatory sentencing does not achieve its aims

20. The ALA submits that mandatory sentencing fails to achieve its aims of providing a general deterrence for the applicable offences and sending a strong message to the community. The ALA submits that mandatory sentencing is based on flawed assumptions about the nature of human decision-making: that a more severe sanction will deter more effectively and that imprisoning offenders will necessarily lead to a lower crime rate. This assumption is based on the notion of deterrence theory, which suggests that one will avoid committing criminal acts through fear of punishment. According to Ritchie, implicit in this definition is the assumption that individuals have a choice whether or not to commit criminal acts and, when successfully deterred, deliberately choose to avoid that commission through fear of punishment. The critical focus of deterrence is on the individual's knowledge and choice and the way in which the criminal justice system – through the threat and imposition of punishment – informs, and influences, that choice.[12]

21. Hoel and Gelb state that the notion of deterrence assumes a rational link between human behaviour and punishment. It presupposes that an individual can rationally weigh up the advantages and disadvantages of a given behaviour and choose a course of action based on this deliberation. Deterrence assumes that rational individuals, in seeking to advance their own self-interest, will only engage in illegal conduct where the expected benefits outweigh the expected costs after allowing for the risks of detection and the costs of prosecution.[13]

22. Accordingly, the notion of deterrence presupposes that would-be offenders are rational actors who are capable of weighing up the costs and benefits of a particular course of conduct. However, given that criminal offending is often impulsive in nature, such a capacity to consider the costs and benefits of a particular course of conduct is often not present. Also, given the high incidence of behaviour affected by mental illness or substance abuse in criminal

[11] Law Council of Australia, n 7, 28.

[12] Donald Ritchie, *Does Imprisonment Deter? A Review of the Evidence*, Victorian Sentencing Advisory Council, April 2011, 11.

[13] Hoel and Gelb, n 10, 13.

offending, the assumption that would-be criminal offenders are rational actors is often mistaken.

23. In part, the failure of mandatory sentencing to secure its aims is also because public perceptions of crime and sentencing are not always accurate or informed, and relies significantly on information derived from reports published in mass media. According to Gelb, the mass media have a vested interest in sensationalising news reports so as to attract a larger audience, while at the same time conveying very limited factual information due to time and space constraints. This tends to result in a significant expression of public opinion about crime that reflects the impression of crime that has been presented in the media, overestimating rates of offending and underestimating the nature and severity of the sanctions imposed by the courts.[14] However, where members of the public are provided with more detailed information regarding the background of an offender, the context in which offending occurred, the availability of other sentencing options to address particular characteristics of disadvantage or illness, then the tendency to support severe mandatory sentences diminishes, with a greater preparedness to accept the important role of courts to fashion appropriate sentencing responses to particular offenders and offending situations.

The SVO scheme and the Queensland *Human Rights Act 2019*

24. As noted above, the ALA submits that that mandatory sentencing schemes such as the SVO scheme are contrary to Australia's international human rights obligation, as set out in the *ICCPR*. The relevant rights are also protected rights in the *Human Rights Act 2019* (Qld) ('*QHRA*'):

    - the right to be free from arbitrary detention (Right to liberty and security of person) – section 29(2) *QHRA*;
    - the right to a fair hearing – section 31 *QHRA*;
    - the right to have one's sentence reviewed by a higher court (Rights in criminal proceedings) - section 32(4) *QHRA*.

[14] Karen Gelb, *Myths and misconceptions: Public opinion versus public judgment about sentencing*, Sentencing Advisory Council, Melbourne, July 2006, 14.

25. The ALA submits that the SVO scheme is also in breach of the following rights in the *QHRA*:

    - The right to equality – section 15 *QHRA*;

    - Protection from cruel, inhuman or degrading treatment – section 17 *QHRA*;

26. The ALA submits that the SVO scheme does not meet the requirements of section 13(2) of the *QHRA* in determining whether the limitations placed on the abovementioned rights are reasonable. The ALA submits that the limitations cannot be demonstrably justified in a free and democratic society based on human dignity, equality and freedom. The reasons for this include the following:

    - The nature of the human rights involved – the SVO scheme places limitations on at least five rights that are protected under the *QHRA*. One of these rights (Protection from cruel, inhuman or degrading treatment – section 17 *QHRA*) is considered to be an absolute, non-derogable rights under International Human Rights Law;

    - The relationship between the proposed limitation and its purpose – the purpose of the SVO scheme (to address a reasonable community expectation that the sentence imposed will reflect the true facts and serious nature of the violence and harm in any given case) is not addressed by the limitation by virtue of the fact that the SVO scheme removes the ability of courts to consider relevant factors such as the offender's criminal history, individual circumstances or whether there are any mitigating factors, such as mental illness or other forms of hardship or duress. This is discussed in more detail above. This means that in many cases the sentence imposed will not reflect the true facts. In addition, as noted above, the SVO scheme fails to achieve its other aims of providing a general deterrence for the applicable offences and sending a strong message to the community;

    - Whether there are any less restrictive and reasonably available ways to achieve the purpose – allowing judicial discretion in sentencing to consider all relevant facts and circumstances in the commission of an offence, including the offender's criminal history and individual circumstances, will facilitate the imposition of a sentence that reflects the true facts. Moreover, the SVO scheme actually inhibits the consideration of all relevant factual material in sentence consideration.

Conclusion

27. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the review of the operation and effectiveness of the regarding the Serious Violent Offences scheme in the *Penalties and Sentences Act 1992* (Qld) currently being undertaken by the Queensland Sentencing Advisory Council. For the reasons outlined in this submission that ALA does not support the SVO scheme and submits that the SVO scheme has not achieved its aims. The ALA therefore submits that the SVO scheme should be abolished.

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