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Office of the President

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Queensland Sentencing Advisory Council
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By email: [redacted]

Dear Queensland Sentencing Advisory Council

Serious Violent Offences (SVO) Scheme Review

Thank you for the opportunity to provide feedback on the Issues Paper: The '80 per cent rule': Serious violent offences scheme in the *Penalties and Sentences Act 1992* (Qld) (**the Issues Paper**). The Queensland Law Society (**QLS**) appreciates the opportunity to contribute to this important review.

This response has been compiled with the assistance of the QLS Criminal Law Committee whose members have substantial expertise in this area.

At the outset, whilst QLS acknowledges there may be significant community interest in sentencing outcomes, community expectations should not justify the removal of, or restrictions to, judicial discretion. A fundamental principle of the rule of law is that legislation should not limit judicial discretion. The judiciary should always have sufficient discretion to carefully weigh the full range of factors to be considered in sentencing.

Our members have raised significant reservations about the SVO regime's application in practice. In this context, QLS welcomes a review of the SVO scheme and would strongly support QSAC's consideration of repealing the SVO scheme in its entirety on the basis that it does not achieve its proposed policy intent and risks unfair and unsatisfactory outcomes including those which may be contrary to community protection.

We note there are a number of questions and options outlined in the Issues paper. Our response is limited to those questions outlined below (adopting QSAC's headings).

7.5 Automatic operation of the scheme and parole eligibility

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

The SVO scheme requires a person convicted of certain listed offences (in Schedule 1 Serious violent offences) to serve 80 percent of their sentence (or 15 years, whichever is less).[1] The declaration is mandatory in circumstances where there is a conviction for a listed offence and the sentence imposed is 10 years or more.

QLS has maintained a strong stance against any form of mandatory sentencing. In our *Call to Parties Statement - Queensland State Election 2020*, we repeated previous calls for a commitment to refrain from creating new mandatory sentencing regimes and to take steps to repeal current mandatory sentencing regimes. The reasons for our support for judicial discretion are based on cogent evidence.[2] Mandatory sentencing laws have the potential to lead to serious miscarriages of justice, are costly and there is a lack of evidence to support their effectiveness as a deterrent or their ability to reduce crime.[3]

Mandatory sentencing laws also artificially lower the proper sentencing tariff by creating perverse incentives. In this respect, QSAC, in its *Sentencing for Criminal Offences Arising from the Death of a Child Final Report*, has previously observed:

> *the SVO scheme may have had the unintended consequence of placing downward pressure on head sentences for child manslaughter – including due to courts' consideration of the impact of the non-parole period should a sentence for 10 years or more be imposed. When setting a sentence of 9 years, the court still has the ability to take an offender's plea and other mitigating factors into account in setting the appropriate parole eligibility date; however, once the sentence is set at 10 years or higher, the court's discretion to set the date for parole eligibility is removed.*[4]

With respect to serious violent offences, the Issues Paper refers to findings from the University of Melbourne literature review (**the literature review**) including findings from Australian research that persons '*who have been convicted of more serious offences and who have served longer sentences will require longer periods of supervision in the community*' and similar observations by the now Court of Appeal President Walter Sofronoff in the 2016 Queensland Parole System Review report.[5]

The Society's opposition to the use of mandatory sentencing schemes is premised on the basis that such schemes impose unacceptable fetters on judicial discretion. QLS supports the observations of the literature review which state:[6]

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[1] *Corrective Services Act 2006* (Qld) s 182.
[2] See, e.g., Law Council of Australia, 'Law Council of Australia: Mandatory Sentencing Policy' (May 2014) 1 <https://www.lawcouncil.asn.au/publicassets/2c6c7bd7-e1d6-e611-80d2-005056be66b1/1405-Policy-Statement-Mandatory-Sentencing-Policy-Position.pdf>.
[3] Ibid 1.
[4] Queensland Sentencing Advisory Council, *Sentencing for Criminal Offences Arising from the Death of a Child* (Final Report, 31 October 2018) xxxix, 158 [9.4.4].
[5] Issues paper at p 37.
[6] Andrew Day, Stuart Ross and Katherine McLachlan, *The Effectiveness of Minimum Non-Parole Period Schemes for Serious Violent, Sexual and Drug Offenders and Evidence-based Approaches to Community Protection, Deterrence and Rehabilitation* (University of Melbourne, August 2021) 19.

'A wide range of approaches are required to meet the needs of specific groups of people who have committed serious offences… This speaks to the need to incorporate high levels of discretion into judicial decision making, allowing consideration of how gender-, age-, cultural-, and disability-responsive sanctions and programmes can best be incorporated into effective sentencing.'

Accordingly, the Society's position is that the SVO scheme ought to be abolished rather than replaced with a modified version.

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

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

(b) a higher non-parole period?

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

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

(b) a higher non-parole period?

QLS does not consider it necessary to impose statutory criteria in circumstances where: firstly, there is strong empirical evidence supporting the view that the interests of justice are best served by enabling wide judicial discretion; and secondly, where the relevant sentencing principles are well established from the PSA and case law in the higher courts.

7.6 Offences included in the scheme

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

The Society's position is that the SVO scheme ought to be abolished rather than replaced with a modified version. However, if the SVO scheme is retained, a fixed schedule of offences should not be the basis for its application. The legislation should provide that the SVO scheme, in whatever form it is retained, apply to '*offences of violence against the person*'. Where there is uncertainty or disagreement between the parties as to the regime's application to an offence, the question whether or not an offence is a 'serious violent offence' should be one to be settled by the sentencing judge. This is similar to the question whether a person is 'drug dependent' for the purpose of determining the maximum penalty applicable to a drug offence.

It is QLS' view this would be preferable to the schedule of offences for two primary reasons. Firstly, the circumstances of each offender and offence are varied. Broad judicial discretion should be preferred to promote individualised justice in sentencing outcomes. Allowing for the

exercise of discretion by the sentencing judge, both in terms of the application of the regime and its affect, would, in QLS's view, better achieve this aim.

Secondly, limiting the application of the scheme to offences of violence against the person more properly achieves the aim of its introduction, being '*a separate regime for the punishment of criminals convicted of serious violent offences… reflect(ing) (our) concern for community safety as well as community outrage with this form of crime…*'[7] In our view, including offences of which violence is not a feature confuses the purpose of the regime's implementation, and creates the prospect of miscarriages of justice.

Should parliament deem it necessary to introduce a statutory regime for the sentencing of drug trafficking offenders which reflects the 'damage done in the community by drug trafficking', a separate and distinct regime should be introduced for that purpose. Of course, any such regime should also retain judicial discretion in sentencing.

5. *If a separate schedule is retained, should the schedule be separate to that which applies for the purposes of section 156A(1)(a) of the PSA?*

Section 156A(1)(a) of the PSA requires a sentencing court to order a sentence of imprisonment imposed for a Schedule 1 offence to be served cumulatively in certain circumstances, thereby broadening the application of Schedule 1 offences beyond the SVO scheme.

During QSAC's data reporting period of 2011-12 to 2019-20, the SVO scheme was applied to only 15 of the 60 offences included in Schedule 1 (four of those 15 only received one declaration).[8]

If a separate schedule is retained for the application of the SVO scheme reflecting this trend, it should be drafted separately to the schedule applied for the purposes of section 156A(1)(a) to provide clarity to the sentencing court, reduce the possibility of misinterpretation of the scheme's purpose, and so as not to unduly fetter the discretion of the sentencing court.

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

It is the view of our members that the current list of offences to which the scheme can, or must, be applied is not appropriate.

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

We refer to our response to question 4 above regarding the Society's views with respect to a fixed schedule of offences. We also note QSAC's review of the scheme did not reveal any criteria for deciding which offences would be part of the SVO scheme and that there are offences in Schedule 1 that do not have violence of any kind as an element.[9]

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[7] Second Reading Speech of then-Attorney-General and Minister for Justice Denver Beanland.
[8] Issues paper at p 55.
[9] Issues paper at p 53.

Our members are of the view there are no additional offences that should be included in Schedule 1.

(b) Should any offences be removed?

The Society's primary position is that the Schedule ought to be removed and judicial discretion as to whether or not to declare an SVO ought to be left to the court based on the facts of the individual case. If, despite this view, a schedule is retained, we submit there are a number of offences which should be removed from the scheme, noting the scheme is intended to address offences of a violent nature.

In our view, it should only include offences that have an element of violence. This would mean removing all offences under the *Drugs Misuse Act* 1986 (**DMA**). It follows that any remaining offences listed in the Schedule that do not have an element of violence would also be removed. In place of a Schedule, our members have suggested the wording of s 161B(4) should form the *only* basis of declaring an SVO. That is:

> *(4) Also, if an offender is—*
>
> *(a) convicted on indictment of an offence—*
>
> *(i) that involved the use, counselling or procuring the use, or conspiring or attempting to use, serious violence against another person; or*
>
> *(ii) that resulted in serious harm to another person; and*
>
> *(b) sentenced to a term of imprisonment for the offence; the sentencing court may declare the offender to be convicted of a serious violent offence as part of the sentence.*

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

The Issues Paper suggests this section has not been the subject of significant use, therefore comments on its effectiveness and issues are limited.[10] Whether or not the section should be retained also depends on whether the SVO scheme as a whole is reviewed to facilitate an increase in judicial discretion. As noted throughout this submission, QLS has long held the view that the court should maintain significant discretion in sentencing matters. As such, maintaining s 161B(4), in some form would be appropriate.

Our members report the primary issue with s 161B(4) as it stands, is that it provides little guidance to sentencing courts in deciding whether to make a discretionary SVO declaration. Therefore, we further suggest a clearer framework should be established as to when the discretion should be applied and the relevant criteria. This should include the circumstances in which it may be exercised. QLS welcomes further consultation in this regard.

[10] Council's analysis over the date period found that of the 119 discretionary declarations, only 7 were made under section 161B(4).

8.2 Reform options

QLS strongly supports QSAC's consideration of whether the SVO regime should be repealed for the reasons outlined throughout this submission.

If reform, rather than repeal is considered, QLS supports removal of the arbitrary 10 year figure, which has in practical effect created a ceiling approach to sentencing practices. We note for example the concerns raised by QSAC in the 2018 'Sentencing for criminal offences arising from the death of a child' final report, that the SVO scheme may be exerting downward pressure on head sentences for child manslaughter.[11] As noted in the Issues Paper, the Court of Appeal has similarly observed the distorting effect of the SVO scheme in sentencing.[12]

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

(a) retained in its current form – with no changes to its operation or scope;

As highlighted earlier, QLS does not support the scheme being retained in its current form. The risk in the scheme's continued operation in its present form is that artificial sentences will continue to be imposed which emphasise punishment over rehabilitation, particularly in the case of drug offenders. It is important to recognise the most serious sexual offenders are likely to be caught by the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) regime. In relation to other offences caught by the current application of the scheme, it has already been highlighted that those who are convicted of more serious sentences require longer periods of supervision in the community.

(b) automatically applied to sentences for listed offences of 5 years or more, but less than 10 years;

A risk to this approach is that it would further restrict judicial discretion and apply to offences that would not ordinarily attract the SVO scheme.

(c) presumptive (as to sentences of 10 years or more for listed offences) rather than mandatory;

A benefit to this approach is that it would allow judicial discretion in the sentencing process. Nonetheless, it would still remove some discretion as it would create a presumptive burden, and depending on what listed offences remain, this may lead to unjust outcomes and/or artificial sentences.

(d) presumptive (as to sentences of 5 years or more, but less than 10 years) rather than discretionary;

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[11] Queensland Sentencing Advisory Council, *Sentencing for criminal offences arising from the death of a child* (Final Report, October 2018) xxxiv <https://www.sentencingcouncil.qld.gov.au/__data/assets/pdf_file/0005/587669/Sentencing-for-criminal-offences-arising-from-the-death-of-a-child-Final-report.pdf>.

[12] *R v Sprott; Ex parte Attorney-General (Qld)* [2019] QCA 116; Issues paper at p 45.

While some judicial discretion is beneficial, this approach would further widen the current regime by creating a presumptive burden, and creates the risk that sentences which do not require an SVO will have them applied. In our view, this risks eroding the significance of the scheme in its entirety, and further prioritises punitive penalties over rehabilitation for those who may need it the most.

(e) entirely discretionary (applying to listed offences dealt with on indictment, in a discretionary way, regardless of sentence length); or

This model would allow for sentencing courts to take a wide variety of factors into account to arrive at a just sentence, and promote individualised justice which is more likely to support positive outcomes. As elaborated on further, a discretionary approach would also correct sentencing anomalies in mandatory-based schemes and may positively impact the rates of overrepresented offenders within the criminal justice system.

(f) abolished completely, without replacing it?

For the reasons outlined earlier in our submission, QLS supports the abolition of the SVO scheme in its entirety.

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

(a) Aboriginal and Torres Strait Islander peoples; and

(b) people who are vulnerable or marginalised?

Aboriginal and Torres Strait islander Peoples

(a) retained in its current form – with no changes to its operation or scope;

If retained in its current form, the over-representation of Aboriginal and Torres Strait Islander Peoples will continue. The Issues Paper notes Aboriginal and Torres Strait Islander offenders are over-represented across all offence categories which commonly attract an SVO, accounting for 20.1% of the 437 SVO cases during the data reporting period.[13] The data also highlights that a consequence of the SVO scheme is that offenders will often experience longer periods of imprisonment past the 80% non-parole period and therefore, shorter periods of time on parole.[14]

[13] Issues paper at p 23.
[14] Background paper 4 at p34; Issues paper at p 37.

There is a significant lack of appropriate rehabilitative courses and programs offered in the custodial environment. For example:

- The Sexual Offending Program for Indigenous Males is only available in Lotus Glen and participation also requires that offenders must have sufficient time left on their sentence to complete the program;

- The offence category with the highest proportion of Aboriginal and Torres Strait Islander offenders was non-sexual violence offences, which accounts for 24.6 per cent of all offenders who received an SVO for this category of offence.[15] However, the Issues Paper references the Queensland Corrective Services (**QCS**) Annual Report 2020-21 which did not refer to any specific programs to address violence.[16] Whilst QCS offers some violence programs, these are limited, particularly with respect to domestic and family violence offending;[17] and

- The Positive Future Program, a culturally sensitive program offered to eligible Aboriginal and Torres Strait Islander males is available in all correctional centres but is only offered as a 32-36 hour program.

Where Aboriginal and Torres Strait Islander prisoners are released on parole, culturally sensitive programs available within the community are limited. Frequency and accessibility of appropriate and tailored programs is heightened for those who reside in remote communities.

Appropriate funding is critical to enhancing the availability of culturally appropriate rehabilitation programs for offenders serving lengthy periods of imprisonment and upon release.

(c) to (e) presumptive for sentences of 10 years or more, or 5 years or more, or entirely discretionary

QLS notes the proportion of cases in which an Aboriginal or Torres Strait Islander offender was declared under the SVO regime was higher at 30.3% for discretionary SVOs compared to 16.4% for mandatory SVOs.[18] As such, if the SVO scheme was presumptive, there remains the risk the over-representation of Aboriginal and Torres Strait Islander offenders will continue. These concerns stem from the over-representation of Aboriginal and Torres Strait Islander offenders in the criminal justice system more broadly.

Significant legislative, policy and structural changes are required to assist in addressing the unacceptable over-representation of Aboriginal and Torres Strait Islander Peoples. These issues were extensively examined by the Australian Law Reform Commission's 2018 'Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples' consultation and report.

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[15] Issues paper at p 23.
[16] Issues paper at p 17.
[17] Issues paper at p 17-18.
[18] Background paper 4 at p 18.

Whilst there may be some positive impact for Aboriginal and Torres Strait Islander offenders if the SVO scheme were entirely discretionary, broader changes are also required. For example, improved cultural competency for all who are involved in the criminal justice system, funding to facilitate pre-sentence reports prepared by culturally appropriate people and increasing the availability and long term funding of culturally appropriate programs and wrap around services offered, including to those on remand.

People who are vulnerable or marginalised?

The judiciary should always have sufficient discretion to carefully weigh the full range of factors to be considered in sentencing. Mandatory sentencing of any form can have disproportionate impacts on vulnerable persons within the community. An entirely discretionary SVO scheme may assist in ensuring that relevant factors can be considered by a judicial officer at the time of sentence.

However, consideration must also be given to other barriers which impact vulnerable persons, for example:

- People who are vulnerable or marginalised typically rely on Legal Aid for legal representation and therefore may have financial constraints in their ability to access pre-sentence reports to properly explore all relevant factors and provide an expert opinion on their risk to the community;

- There are also limited programs on offer to vulnerable groups including those with cognitive impairment, intellectual disability or mental illness which may require extensive and regular treatment and/or additional supports.

The lack of programs to rehabilitate those offenders in custody combined with the short time they are subject to supervision on their release does not serve to protect the community. When these offenders are released, the lack of programs coupled with limited or no periods of supervision in the community, means they have no assistance to safely reintegrate back into society.

Further, depending on their particular vulnerability, they may not be applying for parole when they are able to do so. Additional legal and other supports are needed to ensure that where parole is granted subject to supervision, that any requirements are able to be understood and appropriate services are in place to support transition from prison into the community.

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

Whilst repeal of the SVO scheme is our preferred option, QLS agrees with the Issues Paper's observations that in circumstances where the SVO scheme is retained, it is likely several elements of the existing SVO scheme will remain, including:

- an identified list of offences to which the scheme can be applied;

- limiting the scheme to cases dealt with on indictment in the District and Supreme Courts; and

- a requirement that a sentence of immediate imprisonment be imposed.[19]

With this in mind, and noting the Society's strong stance against mandatory sentencing, the Society's preference for a reformed SVO scheme would be in line with a discretionary model indicated as Option C-1: *Discretionary when a person is dealt with on indictment and sentenced to imprisonment for a listed offence. If a court does not make a declaration, the usual approach to the setting of a parole eligibility date would apply.* The Society's preference for this option is appropriate in circumstances where Schedule 1 is amended so as to remove the large majority of offences which have never been captured under the SVO regime.

QLS submits this model type will allow the sentencing courts to continue to take an integrated approach to sentencing without constraint, permitting the court to take a wide variety of factors into account (seriousness of the offence, plea mitigation and personal circumstances of the offender) to arrive at a just sentence. This option is preferred as it is an approach that promotes individualised justice which is more likely to support positive outcomes than a 'one size fits all' or 'one size fits most' method.[20] In this regard, we note the observations from the literature review that reduced judicial discretion is viewed as leading to poorer decision making as it restricts the capacity to take all relevant factors into account.

A discretionary approach will also correct sentencing anomalies observed in mandatory-based schemes (for example, issues relating to parity and the distortion of sentencing practices by exerting downward pressure on head sentences).

Further, QLS considers that if the SVO scheme is remodelled to a discretionary one, it may have a positive impact on the rates of overrepresented offenders within the criminal justice system, including Aboriginal and Torres Strait Islander offenders, as the court will be permitted to factor in circumstances unique to this cohort when sentencing. For example, a scheme involving a mandatory component will not allow a court to consider factors such as profound social disadvantage (*Bugmy)*,[21] whereas a discretionary one like Option C-1 will take this critical factor into account.

This model is preferred over Option C-2: *Discretionary when a person is dealt with on indictment and sentenced to imprisonment for* ***any offence to which broad statutory criteria apply*** *(for example: offence involving serious violence or resulting in serious harm). If a court does not make a declaration, the usual approach to parole would apply.* While the discretionary nature of Option C-2 is appealing and preferred over a mandatory-based model, this model may be problematic as it is open to wide interpretation therefore creating a level of uncertainty to the sentencing court and to parties. This approach would also create an additional level of complexity to the sentencing process. That is, first the court will need to find the offence involved

[19] Issues paper at p 61.
[20] Andrew Day, Katherine McLachlan and Stuart Ross (n 5) 12-13.
[21] *Bugmy v The Queen* [2013] HCA 27 (2 October 2013).

'serious violence' or caused 'serious harm' (which is subjective). If this is found in the affirmative, the court would then move to whether a SVO declaration is warranted and third, proceed to imposing a sentence.

Currently, there is limited legislative assistance as to when a SVO declaration should be made, with such lack of guidance having been subject to judicial commentary by the Court of Appeal (see *R v Collins)*.[22] In circumstances where a discretionary model is adopted, it is recommended that the PSA be amended to include statutory guidance as to when a SVO declaration should be made. This will not only provide guidance and clarity to the judiciary and legal representatives but also to an offender.

It is the Society's view the statutory guidance should be framed in similar (but not identical) terms to that attached to indefinite sentencing under Part 10 of the PSA with the incorporation of circumstances considered necessary for a SVO declaration, as indicated by the Court of Appeal.[23] A framework for legislative assistance should include, for example, consideration of the following factors:

- The severity of the offence;
- The offender's antecedents, character, age, health or mental health condition/intellectual capacity;
- Any medical, psychiatric, prison or other relevant report in relation to the offender;
- The prospect of rehabilitation;
- The risk of harm to the members of the community if an SVO declaration was not made; and
- The need to protect members of the community from the risk.

9. Alternative approaches

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

For example:

(a) give courts full discretion to set a parole eligibility date applying current legal principles about the setting of a parole eligibility date;

(b) introduce a requirement that if a court sets a parole eligibility date for a listed offence, it must not be set below the statutory 50 per cent that applies where no parole

[22] [2000] 1 Qd R 45, 51 [29] (McMurdo P).
[23] Issues paper at p 41.

eligibility date is set — or only be set below 50 per cent if the court considers it unjust not to do so or there are exceptional circumstances;

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

(d) *introduce a standard sentence model (similar to Victoria) (expressed as a number of years, rather than as a standard percentage) for specific offences as another guidepost as to the appropriate sentence, with presumptive minimum non-parole periods;*

(e) *other?*

QLS's position is that the SVO scheme is an unnecessary and undesirable statutory modification of pre-existing sentencing principles, with a distorting effect: see, *R v Sprott; Ex parte Attorney-General (Qld)* [2019] QCA 116, 9 [41] (Sofronoff P, Gotterson JA and Henry J agreeing).

There are many types of offences. The circumstances surrounding the commission of an offence and the circumstances of the offender are myriad. Individualised justice is an essential pre-condition to achieving reasonable predictability and consistency in sentencing.

There is enduring utility in maintenance of the general propositions that:

- where a sentence of imprisonment does not involve immediate release, a suspension or parole release or eligibility date should *prima facie* be set at the one-third mark of the head sentence for an offender who enters an early guilty plea accompanied by genuine remorse; and

- for sentences involving parole eligibility, if a court makes no express order, the eligibility date should be the day after reaching 50 per cent of the period of imprisonment (i.e. for offenders who have been convicted after a trial).

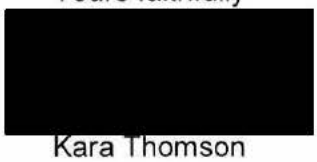
Otherwise, the discretion as to fixing of a parole date should not be circumscribed by a statutory scheme that has demonstrably operated to preclude consideration of relevant factors in the individual case.

Other considerations:

QLS highlights consideration must be given to both practical and financial consequences of any reform on persons already in custody.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully



Kara Thomson
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