knowmore
free legal help for survivors

Queensland's serious violent offences (SVO) scheme

Submission to the Queensland Sentencing Advisory Council

13 January 2022

Table of Contents

About knowmore

Our service

knowmore legal service (knowmore) is a nation-wide, free and independent community legal centre providing legal information, advice, representation and referrals, education and systemic advocacy for victims and survivors of child abuse. Our vision is a community that is accountable to survivors and free of child abuse. Our mission is to facilitate access to justice for victims and survivors of child abuse and to work with survivors and their supporters to stop child abuse.

Our service was established in 2013 to assist people who were engaging with or considering engaging with the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission). From 1 July 2018, knowmore has been funded to deliver legal support services to assist survivors of institutional child sexual abuse to access their redress options, including under the National Redress Scheme (NRS).

knowmore is funded by the Commonwealth Government, represented by the Attorney-General's Department and the Department of Social Services. knowmore also receives funding to deliver financial counselling services to people participating in the NRS, and to work with other services in the NRS support network to support and build their capability.

knowmore uses a multidisciplinary model to provide trauma-informed, client-centred and culturally safe legal assistance to clients. knowmore has offices in Sydney, Melbourne, Brisbane and Perth. Our service model brings together lawyers, social workers and counsellors, Aboriginal and Torres Strait Islander engagement advisors and financial counsellors to provide coordinated support to clients.

Our clients

In our Royal Commission-related work, from July 2013 to the end of March 2018, knowmore assisted 8,954 individual clients. The majority of those clients were survivors of institutional child sexual abuse. Almost a quarter (24%) of the clients assisted during our Royal Commission work identified as Aboriginal and/or Torres Strait Islander peoples.

Since the commencement of the National Redress Scheme for survivors of institutional child sexual abuse on 1 July 2018 to 30 November 2021, knowmore has received 56,299 calls to its 1800 telephone line and has completed intake processes for, and has assisted or is currently assisting, 10,318 clients. Thirty-two per cent of knowmore's clients identify as Aboriginal and/or Torres Strait Islander peoples. A fifth (20%) of clients are classified as priority clients due to advanced age and/or immediate and serious health concerns including terminal cancer or other life-limiting illness.[1]

1 As of 30 November 2021. See knowmore, *Service Snapshot November 2021*, <knowmore.org.au/wp-content/uploads/2021/12/Infographic-November-2021.pdf>.

Our clients in Queensland

knowmore has a significant client base in Queensland — 30 per cent of our current clients reside in the state. Our client group and our service therefore have a strong interest in sentencing practices impacting victims and survivors of child sexual abuse.

knowmore's submission

We thank the Queensland Sentencing Advisory Council (the Council) for the opportunity to make a submission to this important review.

In considering the Issues Paper released on 4 November 2021, knowmore has reflected on key findings and recommendations from the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission), in addition to its own work with survivors of child sexual abuse. These perspectives inform our submission and the suggestions made as to how sentencing practices in Queensland can be improved.

Our submission addresses some, but not all, of the questions set out in the Council's Issues Paper. In the following sections, we discuss:

- Victim satisfaction with the serious violent offences (SVO) scheme and court sentencing practices, given victim-survivor perspectives with regard to the sentencing of perpetrators of child sexual abuse.
- The automatic operation of the SVO scheme and parole eligibility.
- Mandatory sentencing practices and human rights considerations.
- Consequences of the SVO scheme for survivors of child sexual abuse who are themselves convicted of an SVO, especially in terms of their eligibility for the National Redress Scheme (NRS).

In summary, perpetrators of child sexual abuse should receive and serve significant sentences that reflect the terrible abuse survivors experience and the enduring impacts of that abuse. Rather than a mandatory sentencing scheme, knowmore supports a model that includes a presumption that perpetrators of child sexual abuse will spend a significant amount of time in custody, in conjunction with appropriate supervision upon release on parole. Our submission outlines the importance of judicial discretion in striking a balance between this, and the original objectives of the SVO scheme. A presumptive model would provide courts with discretion in imposing appropriate sentences, avoid human rights concerns regarding mandatory sentencing, and avoid the unintended consequences of the SVO scheme, as detailed later in our submission.

Victim satisfaction with the SVO scheme and court sentencing practices

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

24. Does the SVO scheme impact on victims' satisfaction with the sentencing process and if so, in what ways?

26. What considerations are important to victims in enhancing their satisfaction with the sentencing process for offences that could attract an SVO declaration?

Through our work with survivors of child sexual abuse, we have gained insight into the views of our client group about sentencing. The common view of survivors is that sentences for child sexual offences should be more severe, based upon the increasing societal understanding of the ongoing impact of the abuse on the survivor.[2] Survivors also report feeling let down after the stress and often trauma of the trial process, when they find that the offender has received what they consider a lenient sentence.[3]

We have found that for our clients, meaningful and significant sentencing is achieved when the seriousness of the offence is reflected in the sentence. Survivors live with the impact of each offence against them and feel that this reality should be reflected in the prison time served by the perpetrator/s.[4] This relates both to the length of the sentence, and the actual length of time that a perpetrator spends in prison (i.e. the non-parole period of the sentence).

For many reasons, it is often the case that the criminal charges that constitute the basis for the eventual trial and/or plea are not reflective of all of the incidents of abuse that the survivor suffered, especially due to difficulties with particularising offences and obtaining evidence. This means that survivors can feel that what the perpetrator is being sentenced for does not reflect the full extent of their criminality and the survivor's experience of abuse.[5]

In a narrow sense, the SVO scheme can contribute to victims' satisfaction with sentencing, as the 80 per cent rule ensures that perpetrators serve a large part of their sentence. However, knowmore is of the view that a mandatory scheme significantly fetters judicial discretion, which can impact the appropriateness of sentences and thereby negatively affect

2 For more information, please see knowmore, *Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse: Consultation Paper — Criminal Justice*, 31 October 2016, p. 33, <www.childabuseroyalcommission.gov.au/sites/default/files/file-list/Consultation%20Paper%20-%20Criminal%20Justice%20-%20Submission%20-%2032%20knowmore.pdf>.

3 Ibid.

4 This is also reflective of the community's views about sentencing perpetrators of child sexual abuse offences. The Royal Commission recommended that legislation be introduced to "provide that sentences for child sexual abuse offences should be set in accordance with the sentencing standards at the time of sentencing instead of at the time of the offending, but the sentence must be limited to the maximum sentence available for the offence at the date when the offence was committed". See Royal Commission, *Criminal Justice Report: Parts VII–X and Appendices*, 2017, Recommendation 76, <www.childabuseroyalcommission.gov.au/sites/default/files/file-list/final_report_-_criminal_justice_report_-_parts_vii_to_x_and_appendices.pdf>.

5 For more information, please see knowmore, *Submission to the Royal Commission: Consultation Paper — Criminal Justice*, p. 33.

victim-survivors' satisfaction with sentencing decisions. This is particularly evident where offences straddle the 10-year mark.

An example highlighted in the Issues Paper describes the sentencing of an offender where maintaining a sexual relationship with a child was the most serious offence charged. The sentencing judge noted that while "a sentence in the order of nine to 10 years imprisonment would be the appropriate range", a sentence of 10 years imprisonment would result in the automatic declaration. In order for the judge to take into account the defendant's guilty plea, the judge reduced the sentence to 9.5 years with no parole eligibility date set (meaning the offender would be eligible to apply for parole at the half-way mark).[6]

This issue is clearly encapsulated by the following sentencing remarks by the President of the Court of Appeal who observed that the SVO scheme impaired the court's ability to sentence appropriately:

> *But for the distorting effect of the Penalties and Sentences (Serious Violent Offences) Amendment Act 1997 (Qld) […] this was a case which might have been dealt with by the imposition of a sentence of 10 to 12 years accompanied by a parole eligibility date after about four years. But that option was unavailable.*[7]

These examples of fettered judicial discretion show that sentencing choices are sometimes made to avoid enlivening the SVO scheme. This is an unintended consequence of the SVO scheme and presents the following issues:

1. Survivor satisfaction with the sentencing process, in terms of both the length of the sentence and the parole eligibility date, is negatively impacted. With a mandatory scheme where judges are sometimes forced to strategically navigate the enlivening of an SVO declaration, perpetrators of child sexual abuse may receive a shorter overall sentence and non-parole period. This increases instances where survivors may feel the sentencing decisions do not reflect the seriousness of the offending or the enduring impacts of the abuse.
2. The purpose of the SVO scheme — to ensure sentencing reflects the "true facts and serious nature of the violence and harm in any given case"[8] — is not being realised. As above, the mandatory nature of the SVO scheme means that judges, to avoid enlivening an SVO declaration, may be forced to reduce a head sentence that may have been more reflective of the offending. This therefore creates a dissonance between the intention of the SVO scheme and the realities of its application. Additionally, the SVO scheme interferes with judicial officers' instinctive synthesis

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6 Queensland Sentencing Advisory Council, *Issues Paper: The '80 Per Cent Rule': The Serious Violent Offences Scheme in the Penalties and Sentences Act 1992 (Qld)*, November 2021, Brisbane, p. 46, <www.sentencingcouncil.qld.gov.au/__data/assets/pdf_file/0003/699240/QSAC-Issues-Paper-The-80-per-cent-rule.pdf>.

7 Ibid p. 45; *R v Sprott; Ex parte Attorney-General (Qld)* [2019] QCA 116.

8 Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 1997, 597 (Denver Beanland, Attorney-General and Minister for Justice), cited in Queensland Sentencing Advisory Council, *Issues Paper: The '80 Per Cent Rule'*, p. 6.

approach to sentencing and therefore means that sentencing may not reflect the "true facts and serious nature" of cases.

Rather than a mandatory sentencing approach, knowmore recommends a model where there is a presumption that perpetrators of child sexual abuse are sentenced to serve a significant amount of prison time and a significant non-parole period as a proportion of their sentence. Such a model would better reflect survivor and community attitudes and expectations about the sentencing of perpetrators of child sexual abuse, while eliminating unintended consequences of a mandatory scheme.

A presumptive model ensures the sentencing discretion of the court remains, allowing a judge to adjust the head sentence and non-parole period for appropriate circumstances. The Royal Commission commented on the importance of judicial discretion, stating "preserving discretion for sentencing courts is the most appropriate course to recognise the many and various circumstances that arise in sentencing".[9] Therefore, knowmore is of the view that a model of this kind is better positioned to achieve the intended aims of the SVO scheme, and balance these with survivor satisfaction with sentencing practices.

9 Royal Commission, *Criminal Justice Report: Parts VII–X and Appendices*, p. 307.

Automatic operation of the SVO scheme and parole eligibility

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

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

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

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

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

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

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

    b) a higher non-parole period; and

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

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

The Issues Paper notes that it is regarded as a 'rule of thumb' in Queensland that "where an offender pleads guilty and there are other mitigating features, such as a lack of prior criminal history or a commitment by the offender to their rehabilitation, the court will set a parole eligibility date at the one-third mark of the head sentence".[10] The Issues Paper further notes that "the parole eligibility dates for both maintaining a sexual relationship with a child and rape (without an SVO declaration) tend to be clustered around one third and half of the head sentence, with the majority being set at or below 50 per cent".[11]

knowmore submits that for perpetrators of child sexual abuse, a parole eligibility date of one-third to one-half of the head sentence is inappropriate and does not meet survivor expectations. Such low non-parole periods can be distressing to survivors as they do not reflect the seriousness of the offence, the abuse they have experienced, or the lifelong impact of the abuse. Survivors have also shared with us the feelings of fear they experience about perpetrators reoffending upon release.

10 Queensland Sentencing Advisory Council, *Issues Paper: The '80 Per Cent Rule'*, p. 10.

11 Ibid p. 37.

We submit that perpetrators of sexual offences against children should serve a significant non-parole period. However, this needs to be balanced with considerations of supervision and community safety upon release. This is an area where the SVO scheme falls short, because the 80 per cent rule means that the time an offender is actively supervised in the community is limited.[12] This could potentially result in an increased risk of reoffending, rather than a reduction.

For this reason, knowmore recommends the presumptive sentencing model outlined above for perpetrators of child sexual abuse, allowing for judicial discretion to consider the correct balancing of all considerations and circumstances that arise when sentencing.

Mandatory sentencing practices and human rights considerations

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

knowmore's main human rights concerns with the SVO scheme relate to its mandatory nature.[13] In particular, knowmore is concerned by the lack of evidence supporting the effectiveness of mandatory sentencing policy in achieving the SVO scheme's stated objectives. This in turn calls into question the extent to which the limitations on human rights arising from the mandatory sentencing measures within the scheme are reasonably and demonstrably justifiable.

We make the point that the scheme does not have to be mandatory to achieve its intended aims and objectives. We therefore submit that increasing judicial discretion and removing the mandatory nature of the scheme would result in demonstrably fairer and justifiable sentencing outcomes.

Concerns about the effectiveness and fairness of mandatory sentencing

The Royal Commission expressed concerns with mandatory sentencing policy, warning that it "…imposes a significant or complete constraint on judicial discretion…" and noting consequent problems with respect to its effectiveness and fairness. According to the Royal Commission:

> *The criminological evidence is that mandatory sentences are not as effective as deterrents, do not reduce crime rates and generally operate in such a way that discriminates against certain minority groups. In terms of consistency, rather than leniency of sentences, mandatory sentencing has the effect of treating*

12 Ibid p. 27.

13 We note that the making of a declaration is not mandatory if the sentence is less than 10 years.

> *unlike cases as like, creating a form of unfairness analogous to the situation where there is too much discretion and where like cases are treated differently.*[14]

This view is shared by a number of key stakeholders, including the Australian Law Reform Commission, which recommended against imposing mandatory sentences for federal offences,[15] and the Law Council of Australia, which states the following in its position paper on mandatory sentencing:

> *The community is rightly concerned that law and order policies are effective in reducing crime and recidivism. However, there is a lack of any persuasive evidence that mandatory sentencing leads to these outcomes. Rather the evidence points to the significant financial and social cost of mandatory sentencing to individuals and to the community without a corresponding benefit in crime reduction.*[16]

As indicated above, there is a considerable risk that the lack of judicial flexibility and discretion inherent in mandatory sentencing will result in injustices in individual cases, and may have a disproportionate impact on already vulnerable groups.[17] This particularly includes Aboriginal and/or Torres Strait Islander peoples, and victims and survivors of child sexual abuse.

With regards to Aboriginal and/or Torres Strait Islander peoples, we note the Council's finding that, except for trafficking in dangerous drugs, Aboriginal and/or Torres Strait Islander offenders are overrepresented across all offence categories commonly attracting an SVO.[18] Background Paper 4 further highlights that of the 437 SVO declarations between 2011–12 and 2018–19, 20.1 per cent were made for Aboriginal and/or Torres Strait Islander offenders.[19] This is despite the 2016 Census reporting that only 4.0% of Queensland residents identified as being Aboriginal and/or Torres Strait Islander.[20] This mirrors the

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14 A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts*, July 2015, Sydney, p. 189, <www.childabuseroyalcommission.gov.au/sites/default/files/file-list/Research%20Report%20-%20Sentencing%20for%20Child%20Sexual%20Abuse%20in%20Institutional%20Context%20-%20Government%20responses.pdf>.

15 Australian Law Reform Commission, *Pathways to Justice — An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Final Report No 133, 2017, Sydney, <www.alrc.gov.au/wp-content/uploads/2019/08/final_report_133_amended1.pdf>.

16 Law Council of Australia, *Mandatory Sentencing Policy*, May 2014, Canberra, <www.lawcouncil.asn.au/publicassets/2c6c7bd7-e1d6-e611-80d2-005056be66b1/1405-Policy-Statement-Mandatory-Sentencing-Policy-Position.pdf>.

17 According to the Law Council of Australia, "mandatory sentencing regimes create especially unjust outcomes for… indigenous peoples, juveniles, persons with mental illness or cognitive impairment, and the impoverished". See Law Council of Australia, *Mandatory Sentencing Policy*.

18 Queensland Sentencing Advisory Council, *Issues Paper: The '80 Per Cent Rule'*, p. 23.

19 Queensland Sentencing Advisory Council, *Background Paper 4: Analysis of Sentencing and Parole Outcomes: The Who, What and How Long of Serious Violent Offences*, October 2021, Brisbane, p. 18, <www.sentencingcouncil.qld.gov.au/__data/assets/pdf_file/0008/698939/svo-scheme-review-background-paper-4.pdf>.

20 Queensland Government Statistician's Office, *Aboriginal and Torres Strait Islander Peoples in Queensland, Census 2016*, 2017, Brisbane, <www.qgso.qld.gov.au/issues/2796/aboriginal-

overrepresentation and incarceration of Aboriginal and/or Torres Strait Islander peoples in Queensland's criminal justice system generally,[21] which is of grave concern. Clearly, the SVO scheme has a disproportionate impact on Aboriginal and/or Torres Strait Islander peoples.

With regards to survivors of child sexual abuse, we emphasise that this group is significantly overrepresented in adult detention facilities in Queensland.[22] In addition, our experience working with this client group has provided us with many accounts and significant insight into the risks of further harm that the detention environment can pose for these survivors. The Royal Commission addressed these issues at length in Volume 5 of its Final Report,[23] but some of the prevalent issues include:

- Barriers within the prison environment to making disclosures about child sexual abuse (including concerns about the perceived futility of reporting to correctional services authorities or police), which in turn impact on survivors' wellbeing and recovery.
- The lack of supports available — either internally or from visiting external providers of therapeutic treatment and support — to promote wellbeing and help survivors manage the impacts of complex trauma and heal. This is a particular issue for many prisoners who have reported to us that prison has provided an environment where they are able to become substance free and have the mindset and time to work on their behaviours and their trauma, if only suitable professional support was available.
- A lack of trauma-informed practice and knowledge of the impacts of child sexual abuse within the prison environment, which in turn can lead to traumatisation during routine practices such as strip-searching and urine testing of survivors, and the co-location of prisoners (i.e. locating survivors with child sex offenders, which is unfortunately particularly common in these environments).
- A lack of cultural awareness regarding the experiences of Aboriginal and/or Torres Strait Islander survivors and the importance of culturally appropriate supports in the prison environment.
- A lack of access to appropriate supports for pre- and post-release planning to help survivors manage outside the prison environment, recognising the particular difficulty of this for survivors who have often experienced long term institutionalisation.

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torres-strait-islander-peoples-qld-census-2016.pdf>.

21 In Queensland, as at 30 June 2020, Aboriginal and Torres Strait Islander peoples were 12 times more likely than non-Aboriginal and Torres Strait Islander people to be in prison. See Queensland Government Statistician's Office, *Prisoners in Queensland, 2020*, 2020, Brisbane, <www.qgso.qld.gov.au/issues/2951/prisoners-qld-2020.pdf>.

22 Royal Commission, *Final Report: Volume 5, Private Sessions*, 2017, Chapter 8 and Appendix S, <www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_volume_5_private_sessions.pdf>.

23 Ibid.

- The prison environment presenting problems for prisoners in being able to obtain and confidentially store records relating to their time in institutions as children and experiences of child sexual abuse.
- Legal barriers and practical difficulties in being able to pursue justice-seeking options, such as civil cases or redress, while incarcerated.[24]

Consideration of reforms

We encourage the Council to closely consider both the International Covenant on Civil and Political Rights (the ICCPR)[25] and Queensland's *Human Rights Act 2019* (the HRA) when contemplating abolishing or reforming the SVO scheme. In particular:

- We note the Law Council of Australia's concerns that "mandatory sentencing may breach Article 9 of the ICCPR and amount to arbitrary detention because the sentence imposed can result in disproportionate sentences".[26] knowmore is of the view that sentencing reforms should be evidence based, and any substantial departures from accepted sentencing principles and standards must be necessary and proportionate.
- We note that under section 13 of the HRA, "human rights limitations must be justified as a proportionate way of achieving the purpose of legislation, provided there is evidence that it is the least restrictive option".[27] We also note, as stated in the Issues Paper, that "the SVO scheme was introduced prior to the operation of the HRA" and so "specific consideration was not given to whether any limitations the scheme placed on human rights were reasonable and justified".[28] Despite the SVO scheme's earlier inception, we submit that the scheme should adhere to these overarching human rights principles.

We reiterate the point that a scheme does not have to be mandatory to achieve its intended aims and objectives. We submit that knowmore's recommended presumptive model, in allowing for judicial discretion, is more compatible with human rights considerations and better meets the test of being 'reasonably and demonstrably justifiable', while still being able to achieve the original objectives of the SVO scheme.

If the SVO scheme is retained, knowmore recommends that additional monitoring and research be conducted to determine the rate at which other vulnerable groups (including, if

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24 For example, the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth) restricts the eligibility of a person currently in prison, or who has ever been sentenced to a term of imprisonment of five years or more, to make a claim for redress to the Scheme. We discuss this further on pages 14 and 15.

25 United Nations General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, <treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>.

26 Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing*, May 2014, Canberra, p. 22, <www.lawcouncil.asn.au/publicassets/f370dcfc-bdd6-e611-80d2-005056be66b1/1405-Discussion-Paper-Mandatory-Sentencing-Discussion-Paper.pdf>.

27 Queensland Sentencing Advisory Council, *Issues Paper: The '80 Per Cent Rule'*, p. 31.

28 Queensland Sentencing Advisory Council, *Issues Paper: The '80 Per Cent Rule'*, p. 31.

possible, survivors of child sexual abuse) receive SVO declarations. A further review of this data should be conducted to assess the appropriateness of continuing the SVO scheme.

Other issues not addressed — consequences for survivors of child sexual abuse convicted of serious violent offences

29. Is there any other issue in relation to the SVO scheme or sentencing responses for serious violent offences that have not been addressed in the questions, that you would like to raise with the Council?

As noted earlier, survivors of childhood sexual abuse are significantly overrepresented in adult prisons. The Royal Commission noted the possible link between experiences of child sexual abuse and subsequent criminal offending,[29] citing a study that found child sexual abuse survivors were almost five times more likely to be charged with an offence than their peers from the general population.[30] Relevant findings from the Royal Commission were also referenced in the Second Year Review of the NRS:

> *The Royal Commission documented the higher proportion of prisoners who had been victims of child sexual abuse compared with the general population and acknowledged the growing body of research on the relationship between abuse as a child and criminal offending.*[31]

Support services further highlighted in their submissions to the Second Year Review that:

> *…some applicants [to the NRS] have additional complex needs, including significant mental health issues, drug and alcohol addictions, homelessness; and are experiencing personal safety concerns. Some are in gaol. These are circumstances that correlate directly with their childhood abuse and subsequent trauma.*[32]

This reality means that some survivors of child sexual abuse will during their life go on to commit offences subject to the SVO scheme. The SVO scheme can therefore have consequences for these survivors, in terms of both the impact of an SVO declaration on

29 Royal Commission, *Final Report: Volume 14, Contemporary Detention Environments*, 2017, p. 100, <www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_volume_15_contemporary_detention_environments.pdf>.

30 Ibid; MC Cutajar, JR Ogloff and P Mullen, *Child Sexual Abuse and Subsequent Offending and Victimisation: A 45-year Follow-up Study*, Report to the Criminology Research Council, May 2011, pp. 36 and 47–48, <www.aic.gov.au/sites/default/files/2020-05/0910-13.pdf>.

31 R Kruk AO, *Final Report: Second Year Review of the National Redress Scheme*, 2021, p. 67, <www.nationalredress.gov.au/sites/default/files/documents/2021-06/d21-508932-final-report-second-year-review-national-redress-scheme.pdf>.

32 Ibid p. 208.

their eligibility for redress under the NRS, and the extent to which their experience of childhood sexual abuse is considered during their sentencing.

SVO declarations and NRS eligibility

knowmore has engaged extensively in relation to proposed reforms to the design and operation of the NRS and has addressed many barriers to survivors obtaining justice through this Scheme.[33] The following comments relate to the specific circumstances where we assist survivors of child sexual abuse who have themselves been convicted of serious criminal offences, which may prevent them from being eligible to make an application to the NRS. knowmore is concerned that survivors of child sexual abuse subject to an SVO declaration may experience increased difficulty accessing the NRS and may receive outcomes of ineligibility.

NRS eligibility of survivors with serious criminal convictions

Under the NRS, survivors of institutional child sexual abuse who have been sentenced to a term of imprisonment of five years or longer for any offence are not automatically entitled to redress. Rather, they are asked to complete a Serious Criminal Convictions Additional Information Form.[34] The Operator of the Scheme must then make a determination that providing redress to the person would not bring the Scheme into disrepute, or adversely affect public confidence in, or support for, the Scheme.[35]

In making this determination, the Operator must:

- Provide written notice to specified advisors requesting advice about whether the Operator should make a determination that the person is not prevented from being entitled to redress.[36] The specified advisors are generally the Attorney-General of the jurisdiction where the abuse occurred and the Attorney-General of the jurisdiction where the person was convicted.[37]
- Consider any advice given by a specified advisor, the nature of the offence, the length of the sentence, the length of time since the person committed the offence, any rehabilitation of the person, and any other matter that the Operator considers is relevant.[38]

33 See for example, knowmore's submissions to the Second Year Review of the NRS and the Joint Select Committee on Implementation of the NRS (available at <knowmore.org.au/leading-change/improving-the-nrs/>).

34 NRS, *Serious Criminal Convictions Additional Information Form*, <http://www.nationalredress.gov.au/sites/default/files/documents/2021-03/nrs0042103_0.pdf>.

35 *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth) s 63(5).

36 Ibid s 63(4).

37 Ibid s 63(3).

38 Ibid s 63(6).

Impact of SVO declarations on NRS eligibility

As noted above, a person's rehabilitation is one factor given weight in determining whether someone with a serious criminal conviction is entitled to redress under the NRS. Question 10 of the NRS Serious Criminal Convictions Additional Information Form asks, "Can you describe how you have rehabilitated since your offence?" This question considers whether the applicant has completed any rehabilitation programs, undertaken education or training courses, or held jobs since the offending.

A consequence of the SVO scheme is that offenders subject to an SVO declaration have a mandatory non-parole period of 80 per cent of their head sentence. The 80 per cent non-parole period can negatively impact an offender's chances of successful rehabilitation. This is because the date of parole eligibility is very close to the expiry of their full head sentence and may disincentivise some prisoners from participating in programs linked with early release or prospects of parole.

Moreover, a key purpose of parole is to allow for an offender's reintegration into the community to promote rehabilitation and subsequently reduce recidivism. The University of Melbourne's literature review concluded that "more and not less time on parole would allow time to engage in rehabilitative programs" to reduce the risk of reoffending, build strengths and take steps towards desistance.[39]

Rehabilitation can therefore be evidenced by how an offender reintegrates into the community upon release from prison and whether or not they reoffend. This is difficult to assess in a mandatory scheme that restricts supervised release and disincentivises people from participating in programs linked with early release and rehabilitation.

If survivors are or were subject to an SVO declaration and apply to the NRS, they may be unable to demonstrate their progress towards rehabilitation and reintegration, thereby potentially impacting their NRS eligibility. Furthermore, in circumstances where a survivor has received an SVO declaration, a specified advisor, by virtue of the declaration being made, may recommend that the survivor be prevented from receiving redress.

On this point, knowmore has advocated for the removal of the current restrictions on eligibility for prisoners and people with serious criminal convictions.[40] The Second Year Review of the NRS made a recommendation to the Federal Government consistent with

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39 A Day, S Ross and K 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*, Report prepared for the Queensland Sentencing Advisory Council, August 2021, pp. 13–14 and 23, <www.sentencingcouncil.qld.gov.au/__data/assets/pdf_file/0005/698621/svo-scheme-review-literature-review.pdf>.

40 knowmore, *Submission to the Senate Committee for Community Affairs: The Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 and Related Bill*, 2 February 2018, pp. 8–20; knowmore, *Submission to the Joint Select Committee: Inquiry into the Implementation of the Redress Related Recommendations of the Royal Commission*, August 2018, pp. 7–8; knowmore, *Submission to the Joint Select Committee on Implementation of the National Redress Scheme*, 28 April 2020, pp. 23–24. Available at <knowmore.org.au/leading-change/submissions/>.

this.[41] If this Second Year Review recommendation is adopted by the Federal Government, it would not alter knowmore's position with regard to the introduction of a presumptive model rather than a mandatory model for the SVO scheme.

Sentencing of survivors

Where it is known that a person is a survivor of child sexual abuse, the connection between their experience of abuse and later criminal offending should be an important consideration in sentencing.

During our work supporting survivors in prison to engage with the Royal Commission, we assisted large numbers of prisoners in Queensland. Many of these survivors reported suffering sexual abuse, and usually related serious physical and emotional abuse, as children in youth detention settings — particularly in Westbrook (under all of its iterations as a Training Centre, Youth Centre and Youth Detention Centre) and the Sir Leslie Wilson Youth Detention Centre at Windsor.

The prevalence of child abuse in these notorious institutions was of a level that impacted large numbers of children who were placed in those centres. Many of our clients have reported that their experience of abuse in these youth detention settings has impacted adversely and seriously upon them throughout their lives, with such experiences being a factor contributing to their adult offending (which often involved serious violent crimes) and imprisonment.

Queensland's sad history of serious sexual abuse being perpetrated against so many children in detention means that a sentencing model that allows for judicial discretion is essential. A survivor's experience of child sexual abuse and the impact of that experience, where it is known to the court, should in our submission be a relevant factor in sentencing. The sentencing model we recommend would allow the link between experiences of child sexual abuse and subsequent offending to be appropriately acknowledged.

We also note the complex circumstances where a survivor of child sexual abuse has been convicted of a child sexual abuse offence. Here, we again reiterate the importance of unfettered judicial discretion.

41 R Kruk AO, *Second Year Review of the NRS*, Recommendation 3.2, p. 75.

Conclusion

Significant sentences (including significant non-parole periods) for perpetrators of child sexual abuse are necessary to accurately reflect the seriousness of these offences and their enduring, devastating impacts on survivors, their families and the broader community.

The SVO scheme presents a number of issues due to its mandatory nature and the inherent and subsequent fettering of judicial discretion. This is particularly evident where offences straddle the 10-year mark and judges are navigating the possible enlivening of an SVO declaration. This can impact on the appropriateness of the sentence handed down thereby negatively affecting victim-survivors' satisfaction with sentencing decisions. This also means that the original objective of the SVO scheme, to ensure sentencing reflects the "true facts and serious nature of the violence and harm in any given case", is not being realised.

Rather than a mandatory sentencing approach, knowmore recommends a model where there is a presumption that perpetrators of child sexual abuse serve a significant amount of time in prison, and a significant amount of their sentence is a non-parole period. A presumptive model ensures the sentencing discretion of the court remains, allowing for a judge to adjust the head sentence and non-parole period for appropriate circumstances. knowmore submits that this model would be better positioned to achieve and balance the intended aims of the SVO scheme and ensure that perpetrators of child sexual abuse serve prison time reflective of the seriousness of their offending and the impacts of the abuse.

Additionally, such a model would eliminate the human rights concerns regarding mandatory sentencing; redress the unintended consequences of the SVO scheme's operation; potentially improve NRS outcomes for survivors who are themselves subject to an SVO declaration; and ensure that survivors have their experience of abuse given appropriate consideration during sentencing for serious offences.