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SUBMISSION TO QUEENSLAND SENTENCING ADVISORY COUNCIL
REVIEW OF COMMUNITY BASED SENTENCING ORDERS, IMPRISONMENT AND PAROLE OPTIONS
3 June 2019.

To: The Chair John Robertson, Queensland Sentencing Advisory Council

We are pleased to see this issue being examined. We thank you for the opportunity to make a submission to this enquiry.

We have answered the questions posed by the Queensland Sentencing Advisory Council with several principles guiding our thinking. These are listed below.

Our guiding principles

- Imprisonment is currently over-utilised as a response to crime;
- Imprisonment has deleterious effects on individuals and is the penalty most likely to precede recidivism;
- A sentence of imprisonment is always a sentence of last resort;
- That community based options should be available and well-resourced;
- That conditions imposed on individuals placed on community based sentencing orders should be limited to those that are necessary to fulfil the purposes of the order;
- That the circumstances surrounding offending are extremely varied and courts should maintain a high level of discretion in relation to sentencing so that they are able to respond appropriately to the circumstances of the individual;
- Sentencing provisions should be easy to understand and apply.

We make no particular comments about the options for reform presented in the Options Paper, except to note the following. We acknowledge that there are likely some administrative efficiencies to be gained by collapsing various different kinds of community-based/intermediate orders into one broad kind of penalty (a CCO). It appears to simplify sentencing, and allows for judicial discretion to be exercised in decisions about the conditions to attach to an order rather than with respect to choice between various penalty options.

However, we have some concerns regarding the creation of CCOs as a sentencing option. For example, we are concerned that this could, in practice, have a net-widening effect at this intermediate level of sentencing. Conditions should always be imposed in a parsimonious manner and with careful regard for the individual's specific circumstances. Unnecessary or onerous conditions can effectively 'set people up to fail'. Similarly, we are concerned that CCOs could provide an enhanced opportunity for the carceral state to 'risk-manage' an individual in ways that are unnecessarily intrusive and which can lead to further stigmatisation and criminalisation. We feel that CCOs may be too broad a penalty option to effectively safeguard against these risks.

For these reasons, we are of the view that it would be better to continue with a range of more specific penalty options at the intermediate level.

Question 1: Sentencing principles

What changes (if any) are required to existing sentencing principles under section 9 of the Penalties and Sentences Act 1992 (Qld) to allow for greater use of community based sentencing orders in appropriate cases (that is, where the safety of victims and other community members will not be compromised?

We recommend the third sub-section underlined below be added to s9(2) of *Penalties and Sentences Act 1992 (Qld):*

> (2) In sentencing an offender, a court must have regard to—
> (a) principles that—
> (i) a sentence of imprisonment should only be imposed as a last resort; and
> (ii) a sentence that allows the offender to stay in the community is preferable;
> (iii) a sentence that allows the offender to stay in the community must always be considered.

In light of this recommended change, we also recommend that all provisions that limit the application of these principles should be reviewed. This includes s 9(2A), which precludes application of these principles in sentencing for any case involving violence, or physical harm to another person.

It is, as previously noted, our view that the guiding principles that we outline at the beginning of this submission should underpin all decision-making about sentencing.

Questions 2: Mandatory sentencing provisions.

Are current Queensland mandatory sentencing provisions sufficiently clear so as to operate with certainty and consistency? If not, what provisions should be considered for review and how should they be reformed?

It is our view that all sentences should be discretionary. There is an enormous variety of circumstances in which offences can be committed and mandatory penalties may stymie the ability of courts to sentence appropriately. We are not aware of any research that suggests that mandatory sentences have a stronger specific or general deterrent effect. While maximum penalties are appropriate, provisions should be reviewed that include mandatory penalties.

Question 3: Legislative guidance on use of community correction orders (CCOs) and imprisonment

3.1 If introduced, what legislative guidance should be given to courts when considering imposing either a CCO or a term of imprisonment (including a suspended term of imprisonment)?
For example:

- *Should it be a requirement for a court to consider the availability of a CCO prior to considering imprisonment?*
- *Should there be legislative guidance that provides no more conditions are to be ordered than are necessary to meet the purposes of the order?*
- *In imposing a CCO and considering appropriate additional conditions, should a court be required to have regard to the vulnerabilities of the defendant in complying with that order, including for example, any geographical constraints in complying and/or limitations on service delivery in that region?*

See our response to Question 1 above.

In considering whether to impose a CCO, only conditions necessary to fulfil the purposes of the order should be imposed on the individual. Any conditions imposed on the individual should be practicable. In light of our previous comments, it is our view that a court should consider the availability of a CCO prior to considering imprisonment and that a court should be required to have regard to the vulnerabilities of the defendant and their capacity to comply with that order, including for example, any geographical constraints in complying and/or limitations on service delivery in that region.

The absence of appropriate services in a region, should not be a sentencing consideration justifying the imposition of a term of imprisonment.

3.2 Should additional legislative guidance be provided that makes clear that the fact a CCO has been imposed previously, including upon a breach, should not inhibit the further imposition of a CCO (taking into account the broad range of conditions that can be attached)?

Yes.

Question 4: Home detention

4.1 If a new community correction order is introduced in Queensland, should 'home detention' (an extended curfew with electronic monitoring) be excluded from being available as a condition of the order?

We think that a home address requirement, a curfew and electronic monitoring may be conditions of a CCO if necessary and practicable, taking into account the circumstances of the individual.

4.2 In the alternative, do you support home detention being introduced as a form of sentencing order? How might this be distinguished from court ordered parole with electronic monitoring and curfew conditions?

We recommend the introduction of 'Home Detention' as an alternative to an Intensive Correction order. In these circumstances, a period of imprisonment should be determined to be appropriate and the ICO or Home Detention Orders would be alternatives to imprisonment. We also recommend reintroducing periodic detention orders as a penalty option, as a further alternative to imprisonment.

4.3 If home detention was to be introduced as a sentencing order, what protections would need to be introduced to ensure it is used only in appropriate circumstances? For example, should the availability of home detention be restricted to circumstances where:

- *The person is convicted of an offence punishable by imprisonment.*
- *A conviction is recorded.*
- *The person consents to the order being made.*
- *The court would otherwise have imposed a sentence of immediate imprisonment and would not have ordered the sentence to be suspended or the person to be released at the date of sentence or shortly after this on court ordered parole.*
- *A suitability assessment has been undertaken which takes into account any impact the order is likely to have on any victim of the offence, any spouse or family member of the offender, and anyone living at the residence at which the person would live.*
- *Any co-resident has consented to the person living at the nominated address?*

We think that all of the circumstances listed above should be considered where a home detention order is being considered.

4.4 Should there be any restrictions on the types of offences, or circumstances, in which home detention is used (e.g. if there are safety concerns for victims or co-residents, or in the case of offences involving the use of violence, there is an unacceptable risk of the person committing a further violent offence)?

There should be no blanket exclusion from home detention in circumstances where an assessment determines that the person is suitable. We appreciate that in some cases a person who is convicted of offences involving violence may be deemed unsuitable for home detention, but it is our view that they should not be automatically excluded – it should depend on the circumstances. Part of the assessment for suitability should include assessment for risk of violence.

4.5 What should the maximum period of home detention be:

- *12 months (Northern Territory and New Zealand model)*
- *18 months (Tasmanian model)*
- *Two years (NSW mode)*

Two years.

4.6 What should be the maximum curfew period in a given day and/or week?

This issue should also be determined in light of the circumstances of the offender and any matters raised in the assessment, including any caring responsibilities and employment. In light of previous answers, we believe that restrictions should be imposed only as necessary to fulfil the purposes of the order.

Question 5: Suspended sentences

5.1 Are wholly suspended sentences operating as an effective alternative to actual imprisonment in Queensland?

Wholly suspended sentences should be retained. As noted in the background material over 50% of offenders placed on suspended sentences do not breach them.

5.2 Are there cases where suspended sentences could be used, but are not? If so what are the barriers to their use?

There may be cognitive biases at play (relating to race, class and previous offending history) that may create barriers to the use of suspended sentences. The offence and current circumstances of the offender should be taken into account in making a determination. Judicial education may be important. Better social supports to identified offenders may also assist.

5.3 Are there unique factors for offenders in remote and very remote areas of the State, including Aboriginal and Torres Strait Islander offenders, that:
- affect a court's decision to make a suspended sentence order; and
- if imposed, are likely to predispose such offenders breaching the order through commission of a new offence?

As we note above more than 50% of offenders do not breach suspended sentences, which means they are more successful in reducing recidivism than immediate imprisonment. Better social supports to identified offenders may also assist.

Question 6: Guidance on setting operational period

6.1 Is the current guidance under section 144(6) of the Penalties and Sentences Act 1992(Qld) about the setting of the operational period for a suspended sentence sufficient?

There should be further guidance, stating that all relevant information should be taken into account in setting the shortest operational period necessary to achieve the appropriate sentence.

6.2 If there is a need for additional guidance, what form should this take (e.g. legislative guidance, bench book, professional development sessions for lawyers and/or judicial officers, other)?

Further guidance may be given in the current Supreme Court Bench Books.

6.3 If legislative guidance is provided, should this specify a specific proportion between the term of imprisonment imposed and the operational period? For example, that the operational period set can be no more than two times the period of imprisonment imposed?

We do not think it is necessary to specify a specific proportion. Taking into account all relevant information, the shortest operational period necessary to achieve the appropriate sentence should be applied.

Question 7: Power of court dealing with offender on breach of a suspended sentencing (PSA, s 147)

7.1 Are the courts' powers on breach of a suspended sentence, as set out under section 147 of the Penalties and Sentences Act 1992(Qld), appropriate? For example:

- *should the requirement under section 147(2) that the court activate the whole of the sentence held in suspense unless of the opinion it is 'unjust to do so' be removed in order to promote greater judicial discretion in the sentencing process; and/or*
- *should the wording of section 147(3)(a) be amended to widen judicial discretion when dealing with a breach of a suspended sentence —for example, to remove the reference to whether the subsequent offence committed during the operational period of the order is 'trivial'?*

Yes: The requirement under section 147(2) that the court activate the whole of the sentence held in suspense unless of the opinion it is 'unjust to do so' should be removed in order to promote greater judicial discretion in the sentencing process.

Yes: the wording of section 147(3)(a) should be amended to widen judicial discretion when dealing with a breach of a suspended sentence — for example, to remove the reference to whether the subsequent offence committed during the operational period of the order is 'trivial'.

7.2 Are there any other changes that should be made to the current powers of a court on breach of a suspended sentence – for example, to introduce an additional power to:

- *impose a fine and make no other order (Western Australia and England and Wales); and/or*
- *make no order (Northern Territory and Tasmania).*

Yes, an additional power to impose a fine and make no other order should be available.

Yes, the court should be able to make no order.

Question 8: Breach powers

8.1 Should a court have a discretionary power to deal with a breach of a suspended sentence imposed by a higher court, if that court is dealing with an offence that breaches the higher court's order?

Yes.

8.2 If so, should there be guidance as to the use of the discretion and what form should this take?

There should be some guidance provided. The approach to this determination may be modelled on s552D Criminal Code Qld:

> 552D When magistrates court must abstain from jurisdiction
>
> (1) A Magistrates Court must abstain from dealing summarily with a charge... if 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.
>
> (2) A Magistrates Court must abstain from dealing summarily with a charge under *section 552BA* if satisfied, on an application made by the defence, that because of exceptional circumstances the charge should not be heard and decided summarily.

In a similar way, a lower court should have the power to deal with a breach of a suspended sentence imposed by a higher court if the lower court is satisfied that because of the seriousness of the offence or any other relevant consideration, it should deal with the matter.

Question 9: Combined suspended sentence/community based order

9.1 Should greater flexibility be introduced to allow a court:

- *to make a probation order in addition to a suspended sentence for a single offence, and/or*
- *to make a community service order in addition to a suspended sentence for a single offence; or*
- *as an alternative to point 1 and 2, to make a CCO in addition to a suspended sentence for a single offence?*

We cannot think of a situation in which it would be appropriate to make a probation order or a community service order in addition to a suspended sentence. If a court considers that an offender should be released subject to conditions, so that they can receive some support towards their rehabilitation, it is open to the court to grant court-ordered parole. It is our view that by making a probation order or community service order in addition to a suspended sentence for a single offence, offenders may be set up to fail, and the consequence of immediate imprisonment could be unduly harsh.

9.2 Under this form of order, should a failure to comply with the conditions of the community based order be dealt with under Part 7, Division 2 of the Penalties and Sentences Act 1992(Qld) (Contravention of community based orders) or an equivalent provision?

A failure to comply with such an order should be dealt with under an equivalent provision.

9.3 Should the maximum period the person is subject to conditions be limited in some way? For example, should the term of the probation order or CCO be required to be no longer than the operational period of the order, provided the operational period does not exceed 3 years?

The maximum period for which a person is subjected to conditions should be limited to the period necessary to carry out the aims of the sentence and at a maximum the operational period of the order.

Question 10: Setting of parole release date

How should the anomaly identified by the Court of Appeal in R v Sabine [2019] QCA 36 (18 February 2019) be addressed?

The anomaly should be corrected as recommended by Holmes CJ in *R v Sabine*. In this case Morrison JA at [53] made the following suggestion:

> ...the answer lies in specifying that a subsequent court which is sentencing an offender to a lesser period of imprisonment than an existing sentence, is not required to set a parole release date. Or maybe in permitting the subsequent court in that case to set a parole release date at the limit of the term it imposes, but on the basis that that date does not cancel the later date set by the previous court.

We prefer the first part of His Honour's suggestion.

Question 11: Court powers where offence committed while offender on parole (CSA, SS 209, 211, 215 and PSA, S 160B)

11.1 Do the provisions relating to the powers of a court where there is further offending while an offender is on court ordered parole, such as sections 209, 211, 215 of the Corrective Services Act 2006(Qld) and section 160B of the Penalties and Sentences Act 1992(Qld), require amendment? What changes would you suggest be considered?

A court-ordered parole order should not be automatically cancelled under s160B(2). The court should have discretion regarding whether a person should have court-ordered parole or an eligibility date.

11.2 Should section 209 of the Corrective Services Act 2006(Qld) be amended so that if a court ordered parole order would, on the current provisions, be cancelled automatically by a new sentence of imprisonment, the sentencing court has a discretion to again set a parole release date if it considers court ordered parole is still appropriate?

Yes, the sentencing court should have the discretion to set a parole release date if it considers court ordered parole to be appropriate.

Question 12: Sentence calculation

Are there any particular sections of the Penalties and Sentences Act 1992 (Qld) or Corrective Services Act 2006 (Qld) that make the sentencing calculation process in Queensland unnecessarily complex? If so, how would you recommend the current level of complexity be remedied?

In principle with respect to the technical administration of sentencing, provisions should be structured so they are easy to understand and apply, retain the court's discretion and prioritise community based

sentences. It is important that any conditions attached to orders are practicable having regard to the personal circumstances of the person.

When a person is subject to different sentences for different offences, this can result in complexities regarding what sentence they are serving for which offence, and what the consequences of applying for bail, or remaining in custody, are for the offender in terms of how much time they will ultimately serve in prison.

It is our view that a sentencing judge or magistrate should have the discretion to impose a single sentence on an offender for multiple offences, so that the sentence represents an appropriate response to the offending behaviour of the individual, and addresses their individual circumstances. Judges and magistrates should not be constrained in the sentencing process, otherwise the process becomes artificial and it is difficult for lawyers to advise their clients on matters related to bail and parole.

Question 13: Time in pre-sentence custody which is declarable

13.1 Should section 159A(1) of the Penalties and Sentences Act 1992(Qld) be amended to allow the court an ability to declare pre-sentence custody in circumstances where this is currently not permitted (e.g. by removing the words 'for no other reason')?

Yes. Doing so should give courts greater discretion to take into account situations where an offender is in custody for multiple offences or another reason. The magistrate/judge should have the discretion to backdate the start of a person's sentence to take into account any time served.

13.2 Should section 159A(4)(b) be similarly amended, or greater clarity provided as to its application? Are there risks regarding unintended consequences if such an amendment was made?

Yes. The only risk we are aware of is that the offender might receive mitigation in a sentence for that offence and for any other offence that came to the attention of authorities while on remand. We do not think the risk is significant.

Question 14: Availability of parole for short sentence of imprisonment

14.1 Should parole for short sentences of imprisonment of six months or less be abolished, meaning the sentence would need to be served in full, unless suspended in whole or in part?
Note: Under the Council's preferred option for reform of suspended sentences, courts would have an ability under the Penalties and Sentences Act 1992 (Qld) to combine a suspended sentence with a community based order when sentencing an offender for a single offence, in addition to their existing power to combine these orders when imposing sentence for two or more offences.

We do not believe parole for short sentences should be abolished. For some offenders, especially those for whom this was their first time in custody, parole may provide an important opportunity to support rehabilitation and reintegration.

14.2 If a court's ability to set a parole release or eligibility date for short sentences of six months or less is abolished, should there be any recognised exceptions. For example, should this apply:

- *to activation of a suspended term of imprisonment on breach by reoffending?*
- *if an offender has an existing parole date and reoffends while on parole?*

See our answer to 14.1 above.

14.3 What might some of the risks of the above reforms be?

If parole for short sentences is abolished many offenders will miss out on the support that should be provided with parole (access to housing, support with education, training and work and other reintegrative supports).

Question 15: Pre-sentence reports

15.1 Should pre-sentence reports or assessment reports be mandatory for some types of orders or conditions?

The value of a pre-sentence report is that it provides the sentencing judge or magistrate with the information they require to impose an appropriate sentence, having regard to personal circumstances of the offender.

Pre-sentence reports are an important aspect of the sentencing process, however they do not provide the only means by which this information can be put before the court. Irrespective of whether a pre-sentence report is ordered or not, judges and magistrates are required to inform themselves of certain matters before they impose certain sentences. For example:

- when deciding whether or not to record a conviction, a court is required to consider the offender's 'character and age', and the impact that the conviction would have on an offender's 'economic or social well-being, or chances of finding employment' (*Penalties and Sentences Act 1992* (Qld) s 12);
- when deciding whether or not to impose a fine, the court must consider the financial circumstances of the offender and the nature of the burden that payment of the fine would be on the offender (*Penalties and Sentences Act 1992* (Qld) s 48);
- when deciding whether or not to make a fine option order, a court must be satisfied that the person is unable to pay the fine (including because their only source of income is social security benefits), and they are a suitable person to perform community service (including consideration of any disability, sex and education level (*Penalties and Sentences Act 1992* (Qld) s 57).

It is important that sentencing judges and magistrates take the necessary steps to inform themselves of these and related matters before they formulate a sentence. This can be achieved by requesting further information from the offender's legal representative. Our research would suggest that ensuring that such information is before the court should be the legislative priority, regardless of how this is achieved.

15.2 If so, for what conditions or orders should such reports be mandatory, and why?

See answer to 15.1 above.

Question 16: Operation of ss 651 and 561Criminal Code (Qld) and s189 Penalties and Sentences Act 1992(Qld)

16.1Do you agree with the points raised about sections 651 and 561 of the Criminal Code (Qld) and section 189 of the Penalties and Sentences Act (Qld)?

Re: s651 QCC: While the offender's consent should be obtained, this could be done orally to the satisfaction of the Court rather than requiring the offender's signature. It should also not be necessary for the prosecution to consent. It should be for the higher court to determine (with the defendant's consent) whether it is in the interests of justice for the court to finalise the summary matter(s). The fourteen-day limit also appears to be unnecessarily restrictive.

Re: s561 QCC: We do not have any comment on the operation this provision.

Re: s189 PSA: We do not have any comment on the operation this provision.

16.2 What improvements could be made to any of these provisions and their associated systems?

In relation to the operation of s651 QCC see our comments in relation to 16.1 above.

Question 17: Sentencing disposition —convicted, not further punished

17.1 Should the sentencing disposition of convicting and not further punishing an offender for an offence be legislated?

Given this is a staple of sentencing in Queensland, it is appropriate that it is properly recognised.

17.2 What aspects of the order would need to be included in a definition?

We recommend the Victorian approach be taken allowing for conviction but unconditional discharge. Section 73 of the *Sentencing Act 1991* (Vic) provides that 'A court may discharge a person whom it has convicted of an offence'. (The question of whether a conviction should be recorded is a separate matter to be considered in the usual way.)

Question 18: Ability of higher courts to deal with breach of a magistrate's court community based order (CBO)

Should the Penalties and Sentences Act 1992(Qld) expressly permit the District Court and Supreme Court to deal with breach of a community based order imposed by a Magistrates Court?

Yes.

Question 19: Power of lower courts to deal with higher court CBO breach

19.1 Should Magistrates Courts and the District Court have a discretionary power to deal with breach of a CBO imposed by a higher court?

Yes.

19.2 If yes, should there be guidance as to the use of the discretion and what form should this take?

There should be some guidance provided. The approach to this determination may be modelled on s552D Criminal Code Qld:

> 552D When magistrates court must abstain from jurisdiction
>
> (1) A Magistrates Court must abstain from dealing summarily with a charge... if 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.
>
> (2) A Magistrates Court must abstain from dealing summarily with a charge under *section 552BA* if satisfied, on an application made by the defence, that because of exceptional circumstances the charge should not be heard and decided summarily.

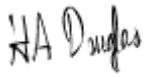
Question 20: Magistrates Courts' power to deal with breach of a CBO imposed by a Magistrates Court on own initiative

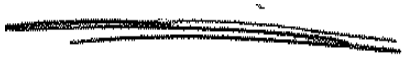
Should section 124 of the Penalties and Sentences Act 1992 (Qld) be amended to allow a Magistrates Court to deal with a breach, by reoffending, of a CBO imposed by a Magistrates Court, without proceedings first having to be instituted under section 123?

Yes. This would be more efficient and reduce delay.

We thank you for your consideration. Should you have any enquiries about this submission please feel free to contact us.

Yours sincerely,



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