Aboriginal & Torres Strait Islander
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Queensland Sentencing Advisory Council
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By email: Sentencingcouncil@qld.gov.au

28th March 2022

Dear Colleagues,

RE: Review of the Serious Violent Offenders (SVO) Scheme

We welcome and appreciate the opportunity to provide feedback on the issues paper concerning the serious violent offences scheme which provides for 80% (and that can be more) of a sentence to be served in jail and only 20% or less of the remaining sentence to be completed on parole. The scheme as it now stands raises a raft of issues which in turn raise a number of concerns including The fairness and efficacy of the sentences. It also raises issues about its compatibility with human rights standards.

Preliminary Consideration: Our background to comment

The Aboriginal and Torres Strait Islander Legal Service (Qld) Limited (ATSILS), is a community-based public benevolent organisation, established to provide professional and culturally competent legal services for Aboriginal and Torres Strait Islander peoples across Queensland. The founding organisation was established in 1973. We now have 24 offices strategically located across the State. Our Vision is to be the leader of innovative and professional legal services. Our Mission is to deliver quality legal assistance services, community legal education, and early intervention and prevention initiatives which uphold and advance the legal and human rights of Aboriginal and Torres Strait Islander peoples.

ATSILS provides legal services to Aboriginal and Torres Strait Islander peoples throughout Queensland. Whilst our primary role is to provide criminal, civil and family law representation,

we are also funded by the Commonwealth to perform a State-wide role in the key areas of Community Legal Education, and Early Intervention and Prevention initiatives (which include related law reform activities and monitoring Indigenous Australian deaths in custody). Our submissions are informed by nearly five decades of legal practice at the coalface of the justice arena and we therefore believe we are well placed to provide meaningful comment, not from a theoretical or purely academic perspective, but rather from a platform based upon actual experiences.

COMMENT

We have had the advantage of seeing the Queensland Law Society submission and are in strong agreement with most of their points. Similarly we have seen the Legal Aid Queensland submission and we broadly concur with their submissions. Because of that we will not seek to repeat the same or similar arguments which have already been well stated, instead we will focus on question nine and in doing so traverse many of the themes raised in earlier questions.

> Question 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?

We will confine our comments to the particular issues surrounding Aboriginal and Torres Strait Islander peoples in the criminal justice system but logically we would imagine very similar issues would arise for vulnerable and marginalised people who are also over represented in the criminal justice system.

There are already significant problems of overrepresentation of Aboriginal and Torres Strait Islander peoples in the corrective services system, a situation which has been rightly described as a national tragedy. The reasons for this are complex but without a doubt distortions or incongruities arising from sentencing proceedings will continue to contribute to this problem. The operation of the SVO scheme feeds into that problem of unfair, compounding or incongruous sentencing outcomes leading to overrepresentation issues.

As noted in the issues paper, Aboriginal and Torres Strait Islander peoples are over represented in the categories of offences which have attracted an SVO.

Despite only representing approximately 4% of the Queensland population, Aboriginal and Torres Strait Islanders peoples represent 20.1% of the 437 SVO cases that were identified in an eight year reporting period. The proportion of cases in which a mandatory SVO was imposed is 16.4%, the proportion of cases in which a discretionary SVO was imposed is 30.3%. Also identified in the issues paper is that because Aboriginal and Torres Strait Islanders peoples end up staying in prison for longer than the 80% non-parole period they therefore spend much

shorter, if any, time on parole. This therefore represents a double disadvantage.

The other more indirect outcome of the SVO scheme is the substantial weakening of post-prison parole supervision in the community, effectively cutting short the runway which parole programs would otherwise have. It is an opportunity cost when money is put into much longer prison time with little utility, reducing the time available to participate in programs, and reducing the money available that could otherwise be invested in the programs and parole officers and creating longer term public safety.

Properly done, the sentencing process takes into account the crime that has been charged, the circumstances of the offending and the individual circumstances of the offender. Empirically and logically sentencing is best done without artificial constraints to that process. In broad summary our concerns with the SVO scheme is that it focuses solely on the type of crime that has been charged for the application of the scheme. In our view it is impossible to achieve a fair and just outcome if the circumstances of the offending and the individual circumstances of the offender are not taken into account when deciding whether or not to make an SVO determination.

In our view whether or not to declare someone a serious violent offender must necessarily take into account the circumstances of the offending and the individual circumstances of the offender. It is for that reason we would say that whether or not it is appropriate to make an SVO determination is a question of fact that should fall for the sentencing judge to decide. Consequently the sorts of public policy concerns that the SVO scheme presently attempts to address should properly be included within the sentencing principles that the sentencing judge draws upon when formulating an appropriate sentence.

Even for serious offences ordinarily attracting sentences of 10 years or above, the particular risks of unfair or disproportionate sentences arising from an SVO scheme which fails to take personal circumstances or circumstances of offending into account are very real. One example is demonstrated in R v Collins [2000] 1 Qd R 45 where a compounding series of tragic and brutal circumstances was the context to a brutal assault, the circumstances themselves were extraordinarily awful. It would have been an artificial exercise if the extraordinary personal circumstances of the offender and the circumstances of offending had not been taken into account by the Court when deciding upon an appropriate sentence. The discussion by the High Court of Australia in R v Bugmy [2013] HCA 27 (2 October 2013) also shows why it is so important to take into account the individual circumstances of an offender when deciding upon penalty. It would create a statutory unfairness if a a mandatory rule did not allow a court to take those sorts of considerations properly into account for sentencing.

Compared with offences attracting jail sentences of ten years or more, offences attracting sentences of five years or more are accompanied by an even wider range of circumstances of offending and a mandatory rule that focusses on the charge only is likely to be more productive of unfair and disproportionate results. There is particular concern with respect to the inclusion

of the offences of choking, suffocation, and strangulation in the scheme,. ATSILS has argued elsewhere that the definitions for these offences should follow the medical definitions. Were that to happen the objective seriousness of the offence could be established more clearly and definitively by medical evidence, which in turn would give a sentencing court a more reliable basis on which to impose an appropriate sentence. Without those changes and that evidence base the SVO scheme should not apply to these charges.

Additionally for a sentence of the magnitude that an SVO determination carries, there should be a pre-sentence report prepared for the sentencing judge which outlines the sorts of programs realistically available to the prisoner while in the prison system as opposed to the programs and supervision that would be available on post-prison release so that decisions made about whether or not along a much longer term of imprisonment would serve the purposes of personal deterrence, denunciation or rehabilitation would be evidence based

CONCLUSION.

A mandatory statutory rule is inevitably going to lead to sentences which are not appropriate taking into account the circumstances of offending and the personal circumstances of the offender, and thus will result in sentences that are neither reasonable nor demonstrably justifiable. Coupled with the arbitrary impact that anomalous sentences will produce, the scheme, and especially an expanded scheme will almost inevitably be in breach of the human rights protected under the Human Rights Act2019 (Qld) and a number of international human rights instruments.

ATSILS submits that consideration of how best to address the purposes of sentencing of personal deterrence, denunciation or rehabilitation and a consequent decision to impose lengthier sentences in preference to supervision and programs should be evidence based and should take all the relevant circumstances into account. That would produce fairer-and better sentences which in turn would better address the needs of the community. Thank you.

Yours faithfully,

Shane Duffy

Chief Executive Officer