QUEENSLAND COUNCIL FOR CIVIL LIBERTIES

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Watching Them While They're Watching You

Queensland Sentencing Advisory Council
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Dear Madam/Sir,

Please accept this submission in relation to the Council's review of intermediate sentencing options and parole. The Queensland Council for Civil Liberties (QCCL) has provided responses to selected consultation questions.

The aim of the QCCL is to promote the human rights and individual freedoms of Queenslanders. The right to liberty is self-evidently a basic human right. Individual liberty should only be interfered with when this is absolutely necessary to protect a competing right or interest.

In approaching the questions in the Options Paper, the QCCL would strongly advocate for an approach that favours community-based sentencing orders or parole options in preference to imprisonment, wherever possible. This idea is reflected in the principle under s 9(2)(a) of the *Penalties and Sentences Act 1992* (Qld) ('*PSA*'), which recognises imprisonment as being a last resort.

Australian sentencing has been said to suffer from two key defects: a lack of uniformity between jurisdictions, and an inability to attain sentencing objectives.[1] While uniformity across jurisdictions is not necessarily an end in itself, the current review and reform of Queensland sentencing laws should seek to be consistent with legislation in other Australian jurisdictions where that legislation has been shown to be effective in meeting fundamental sentencing objectives.

Question 1: Sentencing principles
In sentencing an offender, a court is currently required to have regard to the principles that imprisonment is a last resort, and that a sentence allowing the offender to stay in the community is preferable.[2] In combination with the requirement to consider the physical harm to community members if a non-custodial sentence is imposed for a violent offence,[3] these principles are broad enough to ensure that community-based sentencing orders are considered where appropriate.

[1] Mirko Bagaric, 'An argument for uniform Australian sentencing law' (2013) 37 *Australian Bar Review* 40.
[2] *Penalties and Sentences Act 1992* (Qld) s 9(2)(a) ('*PSA*').
[3] Ibid ss 9(2A), 9(3)(a) and (b).

Amendment to the principles under section 9 of the *PSA* is therefore not necessary to ensure that community-based sentencing orders are made in appropriate cases. If legislative amendment is to be done to allow for greater use of community-based sentencing orders, such amendment should instead be directed towards the substantive provisions of the *PSA* in order to provide more targeted guidance.

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

Legislative guidance is necessary to ensure consistency in the imposition of CCOs. The QCCL recognises that consistency does not require exact replication of sentences, given the need for judicial consideration of the surrounding circumstances of each offence.[4] Any proposed legislative guidance should thus have adequate regard to the importance of judicial discretion in sentencing while also promoting the principled application of that sentencing option.[5]

Consistent with the principle in section 9(2)(a), courts should therefore be required to consider CCO availability before considering either imprisonment or a suspended sentence. A legislative requirement to consider CCOs for specified offences will ensure that imprisonment remains a last resort for courts when sentencing offenders.

Option 3 for the introduction of CCOs in the Options Paper,[6] having the greatest flexibility and thus long-term benefit for Queensland's criminal justice system, is to be preferred. The benefit of this model relies on the ability of courts to impose such additional conditions as they consider appropriate, having regard to the purpose and principles underlying the CCO.

The QCCL therefore strongly favours a broad but principled discretion in attaching additional conditions. Flexibility by design will enable CCOs to meet the sentencing needs for both varied offenders and the communities within which the CCO will be carried out.

The imposition of additional conditions when making a CCO should be proportionate to achieving the purpose of the order. Further, conditions should be tailored to meet an individual offender's rehabilitation needs and ensure that appropriate interventions and programs are included in these conditions.[7] Should courts be required to attach at least one additional condition,[8] guidance would ideally prioritise a treatment and rehabilitation condition to promote offender reintegration into the community and reduce recidivism. Preserving individual liberty by encouraging community reintegration must be accorded due importance.

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[4] Queensland Sentencing Advisory Council, *Community based sentencing orders, imprisonment and parole: Options paper* (April 2019), 71-2.
[5] *Boulton v The Queen* (2014) 46 VR 308, [37] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA).
[6] Queensland Sentencing Advisory Council (n 4) 137-9.
[7] See Pierrette Mizzi, 'The sentencing reforms: Balancing the causes and consequences of offending with community safety' (2018) 30(8) *Judicial Officers Bulletin* 73, 80; Queensland Sentencing Advisory Council (n 4) 137.
[8] Queensland Sentencing Advisory Council (n 4) 137.

Given that breaches of community correction orders in other jurisdictions are significantly due to further offending,[9] the reduction of recidivism through rehabilitation programs should be a key purpose of the imposition of CCOs. To reiterate, this rehabilitative purpose should be reflected and promoted in the legislative guidance addressing the additional conditions of a CCO.

Question 5: Suspended sentences
The need for rehabilitation and reducing recidivism must again be emphasised in the context of suspended sentences. Introducing a power to attach additional program conditions to a suspended sentence for a single offence might be a consideration to ensure that offenders are supported to avoid reoffending and thus actual imprisonment. Attaching additional conditions should evidently only be done when appropriate to do so, having regard to the kind of offence and its seriousness.

The introduction of a comprehensive and flexible CCO model may reduce the need for suspended sentencing. Evidence on the long-term effect of the abolition of suspended sentences in NSW and VIC, and its phasing out in Tasmania, is required to accurately determine whether suspended sentences are any more effective than CCOs (in jurisdictions where the latter are provided for). Any change to suspended sentencing orders should thus be done only if necessary in light of the proposed Queensland CCO model.

Question 6: Guidance on setting operational period
As noted in the Options Paper, proportionality is a fundamental principle of sentencing.[10] The current lack of guidance on ensuring that the operational period for a suspended sentence is proportionate to the length of a head sentence is a concerning gap. The current provision under s 144(6) of the *PSA* insufficiently sets out the importance of proportionality in this matter.

Given that suspended sentencing orders currently involve an exercise of judicial discretion, guidance for operational periods that likewise preserves judicial discretion is to be preferred. Guidance would ideally take the form of a bench book, developed in consultation with judicial officers with extensive sentencing experience and based on empirical evidence as to the effectiveness and length of operational periods in minimising recidivism for specified offences and offenders.

Question 10: Setting of parole release date
The decision in *R v Sabine* [2019] QCA 36 ('*Sabine*') highlights the anomaly arising from the operation of section 160B(4) of the *PSA* when an offender is subsequently sentenced to a shorter imprisonment period than an existing sentence.

The simplest and most preferable means of reforming this issue is for the legislation to specify that no parole date is required to be set by a subsequent court when sentencing an offender to a lesser sentence than an existing sentence. This was suggested in *Sabine* (per Morrison JA, [53]). The previously set parole date would thus remain in force.

We trust that this paper has been of assistance in your deliberations and thank the Queensland Sentencing Advisory Council for the opportunity to comment on these issues. The QCCL would like to

[9] Karen Gelb, Nigel Stobbs and Russell Hogg, Queensland University of Technology, *Community-Based Sentencing Orders and Parole: A Review of Literature and Evaluations Across Jurisdictions* (April 2019), xi.
[10] Queensland Sentencing Advisory Council (n 4) 186.

strongly reiterate its suggestion for tailored community-based sentences (based on reintegration, rehabilitation and the preservation of individual liberty) over imprisonment where appropriate.

Yours faithfully

Michael Cope
President
For and on behalf of the
Queensland Council for Civil Liberties
3 June 2019