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30th April 2024

The Hon. Ann Lyons
Chair
Queensland Sentencing Advisory Council
GPO Box 2360
Brisbane Qld 4001

By email: submissions@sentencingcouncil.qld.gov.au

Dear Chair,

Re: QSAC Review of sentencing for sexual assault and rape offences

Thank you for the opportunity to provide comments on the Queensland Sentencing Advisory Council (**QSAC**) review in relation to how sexual assault and rape offences are sentenced (**Consultation**). Sexual assault and rape are serious offences. In this submission we have sought to outline our position in relation to why the purposes of rehabilitation and community safety should be given priority in the context of sentencing over punishment and deterrence on the basis that rehabilitation addresses the causes for underlying offending behaviour and, if successful, should reduce the risk of reoffending. We have also asserted the importance of expanding culturally safe rehabilitation programs, noting the limited availability of the same, especially in remote areas where there are higher numbers of Aboriginal and Torres Strait Islander peoples in residence. We have also expressed our concerns relating to overincarceration and expressed that any analysis of sentencing practices in Queensland must simultaneously involve careful consideration of commitments under the National Agreement on Closing the Gap, such that any proposed amendments to the existing regime which might be considered as part of the Consultation do not inadvertently worsen progress towards targets to reduce incarceration rates of Aboriginal and Torres Strait Islander individuals and that, where possible and appropriate, opportunities are taken to improve the current regime to promote alternatives to incarceration.

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 25 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 submission is informed by over five decades of legal practise 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.

Introductory comments

Any analysis of sentencing practices in Queensland must simultaneously involve careful consideration of commitments under the National Agreement on Closing the Gap (**NACTG**), such that any proposed amendments to the existing regime do not inadvertently worsen progress towards targets to reduce incarceration rates of Aboriginal and Torres Strait Islander individuals and that, where possible and appropriate, opportunities are taken to improve the current regime to promote alternatives to incarceration.

As at the time of writing, overincarceration of Aboriginal and Torres Strait Islander individuals persists, despite the commitments contained in the NACTG.

The Closing the Gap Information Repository provides up-to-date data (sourced from the Australian Bureau of Statistics) in relation to how the nation, states and territories are tracking towards the priority reforms and targets in the NACTG.

With respect to Target 10 of the NACTG, which provides that by 2031, the rate of Aboriginal and Torres Strait Islander adults held in incarceration will be reduced by at least 15%, the Closing the Gap Information Repository provides that:

- at the National level, the target is, in fact, worsening and that as at 30 June 2023, the age-standardised rate of Aboriginal and Torres Strait Islander prisoners was 2,265.8 per 100,000 adult population, which is an increase from the previous year at 2,151.1 per 100,000 adult population in 2022; and
- at the Queensland level, the target is also worsening.[1]

With respect to Target 11 of the NACTG, which provides that by 2031, the rate of Aboriginal and Torres Strait Islander young people (10-17 years) in detention will be reduced by at least 30%, the Closing the Gap Information Repository provides that:

- at the National level, the trend for the target shows no change from the baseline; and
- at the Queensland level, the target is worsening.[2]

The causes for over-representation of Aboriginal and Torres Strait Islander individuals in the criminal justice system are complex and multi-faceted. Such was the subject of analysis and commentary in QSAC's 2021 Connecting the Dots Report, in which existing criminological literature relating to the causes of over-representation was discussed[3]. In particular, contextual factors to relevant offending were raised, including the impacts of unemployment and generational unemployment, lack of educational attainment, poverty, low socio-economic status, homelessness, complex health needs including mental health and physical and/or cognitive impairment, alcohol and substance abuse (including the impact of the same on individuals in utero) and intergenerational trauma. Also discussed was criminological literature that recognised differential treatment faced by Aboriginal and Torres Strait Islander individuals in interactions with the criminal justice system including over-policing resulting in higher incidences of arrest, conviction and imprisonment[4].

Appropriate consideration of such matters upon sentencing is consistent with the principles of individualised justice, proportionality in sentencing and substantive equality before the law.

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[1] Productivity Commission (Cth), *Closing the Gap Information Repository*, (2023), available at <https://www.pc.gov.au/closing-the-gap-data/dashboard/se/outcome-area10>.

[2] Note 1.

[3] Queensland Sentencing Advisory Council (Qld), *Connecting the dots: the sentencing of Aboriginal and Torres Strait Islander peoples in Queensland*, Sentencing Profile (March 2021) 4-10.

[4] Note 3.

In providing feedback in relation to this consultation, we have elected to respond to the questions that are within our particular sphere of practice and that are of particular importance to our client base.

Consultation Questions

1. *Sentencing purposes - What are the most important purposes in sentencing a person for sexual assault and rape, and why?*

We acknowledge that sexual assault and rape are crimes of a very serious nature. We also hold the view that in order to effectively address crime and reduce reoffending, the root causes of an individual's offending must be addressed.

Accordingly, in our view, the most important purposes in sentencing a person for sexual assault and rape are penalties commensurate with the specifics of the conduct in question (punitive); but cross-referenced with community safety and thus the rehabilitation of the offender. With respect to rehabilitation of the offender, (per section 9(1)(b) of the *Penalties and Sentences Act 1992* (**PS Act**)), which relates to providing conditions in the court's order that the court considers will help the offender to be rehabilitated, thorough consideration of this matter upon sentencing would involve holistic consideration of the individual in the context of relevant criminogenic factors, cultural context and the best evidence-based way for that individual to address the root causes of the offending, which might include, for example, addressing underlying trauma, such that the individual's risk of reoffending is reduced. Whilst punishment and deterrence (see sections 9(1)(a) and (c)) by way of incarceration and other punitive measures certainly have a place in certain contexts, these measures do not, in isolation, address the root causes of offending. Improving community safety necessitates an approach that also prioritises rehabilitation of the individual such that the individual is less likely to reoffend. In the context of Aboriginal and Torres Strait Islander individuals, to have the best chance of success, rehabilitation programs must be delivered by community-controlled organisations preferably within the local community that the individual belongs, to provide the cultural safety required to promote engagement by the individual. We are aware that there is a significant paucity of culturally safe rehabilitation/healing programs throughout the State, especially in rural and remote areas. We see this as an area were there needs to be additional funding to empower local community-controlled organisations to expand delivery of such programs.

7. *What cultural issues impact on Aboriginal and Torres Strait Islander persons that are particularly important in sentencing for rape and/or sexual assault?*

In our view, cultural issues that impact an Aboriginal and/or Torres Strait Islander individual that are particularly important in sentencing for rape and/or sexual assault include the following:

- the protective factors of the individual's connection to community, kin and culture including spiritual wellbeing;
- the protective factors of the individual participating in relevant programs run by local community-controlled organisations to address root causes for offending behaviour including, for example, programs that address underlying trauma via healing programs;
- the:
  - impacts of intergenerational trauma, child removal, dispossession from lands and systemic racism and the role of such in contributing marginalisation of at-risk individuals; and
  - social and economic disadvantage including in relation to housing, employment and education;
  - impacts of trauma that the individual has experienced in their life, for example, if they were the victim of sexual assault or rape prior to the offending including as a child;
  - impacts of physical health and mental health issues that might have been brought on or exacerbated by the aforementioned factors;
  - impacts of substance abuse/misuse that might have been brought on or exacerbated by the aforementioned factors,

  to identify underlying drivers of the individual's offending;
- the protective factors of diverting the individual into a community-led programs/initiatives as an alternative to incarceration; and
- the long-standing overincarceration of Aboriginal and Torres Strait Islander individual, including the high numbers of individuals on remand, and the commitments under the NACTG to drive down incarceration levels.

Additionally, we recommend consideration of legislating the principle expounded in the High Court case of *Bugmy v The Queen* [2013] HCA 27, namely that the effects upon an offender of profound deprivation do not diminish over time and should be given full weight when sentencing the offender. The impact of the Bugmy decision in the context of sentencing Aboriginal and Torres Strait Islander individuals was aptly described by Jackson L (2013) as follows:

> "*the effect of the decision is that Aboriginal offenders will be able to rely upon evidence of systemic social deprivation as a relevant factor in the determination*

of an appropriate sentence on an individual basis. What is particularly important about this decision is the recognition that the effects of a background of profound social deprivation do not diminish over time or with repeat offending. <u>If sentencing courts are to give full weight to the effects of social deprivation, this may affect the numbers of Aboriginal people entering the prison population and the over-representation of Aboriginal people in the prison system</u>."[5]

16. *Cultural reports for Aboriginal and Torres Strait Islander peoples and people from other cultural backgrounds - How well does section 9(2)(p) of the Penalties and Sentences Act 1992 (Qld) currently allow for courts to take community and cultural considerations into account in sentencing people who identify as being Aboriginal and Torres Strait Islander through submissions made by local community justice groups? Could any improvements be made to better inform courts in sentencing people who are Aboriginal and Torres Strait Islander or from another cultural background about relevant considerations?*

Cultural reports are an excellent means by which community and cultural considerations can be taken into account in the context of sentencing Aboriginal and Torres Strait Islander individuals, and those of other cultural backgrounds. In particular, we acknowledge the important role that cultural reports play in assisting judicial officers to consider the factors relating to an individual's connection to community, kin and culture, the participation of the individual in relevant cultural programs to address underlying causes for offending behaviour along with the impact of matters such as marginalisation, intergenerational trauma, and systemic disadvantage on the individual being sentenced and other relevant cultural considerations.

In the context of improvements that could be made to better inform courts in sentencing Aboriginal and Torres Strait Islander individuals, we raise the following points:

- we concur with the comments made on page 54 of the Consultation Paper that "pre-sentence reports should include cultural reports, culturally safe screening and assessment tools for people with cognitive disability and should consider the impact to the family of the offender if imprisonment were to be imposed"[6];
- the legislation could expressly extrapolate upon what can be included in a cultural report, for example, the matters outlined in our response to Question 7, to provide

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[5] L Jackson, 'Casenote: *Bugmy v R* (2013) 302 ALR 192' (2014) 8(10) *Indigenous Law Bulletin* 29.

[6] Queensland Sentencing Advisory Council, 'Sentencing of Sexual Assault and Rape: The Ripple Effect – Consultation Paper: Issues and Questions' (March 2024) 54.

further guidance to community justice groups in preparing such reports and to enhance the quality and content of the same; and

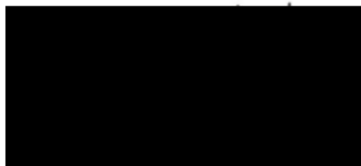
- expanding cultural capability training for judicial officers, including notably, cultural immersion programs on Country to enhance judicial officers' knowledge and understanding of Aboriginal and Torres Strait Islander culture, history and languages along with the ongoing impacts of colonisation and intergenerational trauma.

Other comments

The cost of psychological reports to provide expert opinion on past trauma/mental health of the individual being sentenced and potential causes/links to offending behaviour are a barrier to obtaining or giving information to a sentencing court. Given many of our clients experience financial constraints, we recommend that consideration be given to government subsidised psychologist reports (preferably delivered by community-controlled service providers).

We thank you for the opportunity to provide feedback on the Consultation Paper.

Yours faithfully,



Shane Duffy
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