

17 December 2021

Queensland Sentencing Advisory Council
GPO Box 2360
Brisbane Qld 4001

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

Dear Sentencing Advisory Council

Review of the operation and efficacy of the serious violent offences scheme in the *Penalties and Sentences Act 1992* (Qld)

Thank you for the opportunity to provide feedback on the Queensland Sentencing Advisory Council (the **Council**) in respect of the review of the operation and efficacy of the serious violent offences scheme in the *Penalties and Sentences Act 1992* (the **Review**). Aged and Disability Advocacy Australia (**ADA**) appreciates being consulted on this framework.

About ADA Australia

ADA is a not for profit, independent, community-based advocacy and education service with nearly 30 years' experience in informing, supporting, representing and advocating in the interests of older people, and persons with disability in Queensland.

ADA also provides legal advocacy through ADA Law, a community legal centre and a division of ADA. ADA Law provides specialized legal advice to older people and people with disability, including those living with cognitive impairments or questioned capacity, on issues associated with human rights, elder abuse, and health and disability legal issues related to decision-making.

ADA has reviewed the issues paper and the terms of reference and provides the following for the Council's consideration.

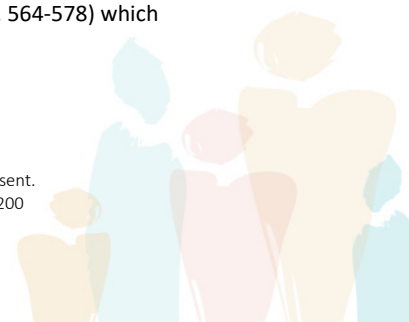
Do the principles adopted by the Council for the purposes of reviewing the operation and efficacy of the SVO scheme provide an appropriate framework for potential reform?

ADA generally supports the review principles set out under section 5 of the issues paper.

We note principle 6 with strong support. It is critical that any reforms appropriately consider the impacts to Aboriginal and Torres Strait Islander persons in the criminal justice system. Reforms should include policies and strategies that are designed to reduce the over-representation of Aboriginal and Torres Strait Islander people in the system, including those currently incarcerated.

The principle of judicial discretion is critically important and must be preserved, as identified in principle 7. The miscalculations of applying a 'one size fits all' approach under a mandatory sentencing scheme is well-evidenced.¹

¹ Multiple studies indicate that mandatory sentencing schemes are ineffective in reducing recidivism. ADA notes this has been covered by the *University of Melbourne Literature Review* (n 1), which refers to criticism of sentencing policy based on the notion of general and personal deterrence, which lacks empirical support. We also note the article, 'The common sense and complications of general deterrent sentencing' (Andrew Ashworth, *Criminal Law Journal*, 2019, 7, 564-578) which extensively discusses the limited deterrence value of mandatory sentencing.



This discretion is particularly critical in the context of persons with disability, persons with acquired brain injury, psychosocial disability, and those with other forms of cognitive disability or impairment, whether that impairment is permanent, temporary or episodic.

Persons with disability make up approximately 18% of the population, yet comprise nearly 50% of people in the criminal justice system in Australia.² This is a significant over-representation, and demonstrates multiple and overlapping systemic failures across the early childhood, health, education, legal and social sectors with respect to early detection of disability and to provide adequate supports which effectively deviate a person with disability away from the criminal justice system.

Whilst principle 7 recognises that the *'circumstances of each offender and offence are varied'*, and seeks to promote an individualised approach to justice that should be sufficiently capacious to recognise an offender's disability or impairment and consider the impacts of these in the context of the offence, this does not always transpire.

Given the sizeable number of persons with disability who become involved with the criminal justice system, we submit that the Council consider developing a standalone principle in relation to the impacts of any reforms on persons with disability. The principle should acknowledge the overrepresentation of persons with disability and cognitive impairment, as well as provide guidance with respect to the diversity of disabilities and spectrum of conditions relevant to the individual.

We also suggest that Council members undertake training from specialist disability organisations, to better understand the impacts of invisible disability and the effect on a person's actions and needs. It is important that all education programs are provided by an organisation with comprehensive experience and knowledge relevant to the *type* of invisible disability – for example, we suggest that the Council consider Synapse to provide training on brain injury, and to consult with the Queenslanders with Disability Network in relation to identifying appropriate training providers for intellectual disability and cognitive impairment.

Mandatory sentencing schemes

ADA provides support and legal and non-legal advocacy for older persons and persons with disability. Many clients have had experience with the criminal justice system, either as a complainant, an offender, or both.

ADA does not consider a mandatory sentencing scheme to be an appropriate or useful tool as it does not allow for proper consideration of a sentence that is just in the circumstances of the offence and the affected individuals.

Removing judicial discretion to consider the effect of mental health conditions, psychosocial disability or other impairment and its effect upon a person's actions when committing a crime:

- assumes that the person understood their actions and intended the outcome;
- disregards the role that other factors, persons and policies may contribute to the person with disability in the commission of a crime or breaching of an order – for example, a person with autism (which may be undiagnosed) who fails to follow the directions of a police officer;
- criminalises certain acts which may be related to presence of disability, mental health condition or cognitive impairment without exception;
- will inflate and pressurise an already overcrowded incarcerated population, increasing the percentage of persons with intellectual disability or acquired brain injury in prison, without

² Human Rights Watch, *I needed help, instead I was punished: Abuse and neglect of prisoners with disabilities in Australia*, 2018, 1 < https://www.hrw.org/sites/default/files/report_pdf/australia0218_web.pdf>.

sufficient support services available to provide rehabilitative programs, appropriate support and health care services, and adequate accommodation for persons with psychosocial disability or mental health conditions;

- these pressures could lead to a further over-reliance on solitary confinement, prisoner non-compliance and self-harm, decreased rehabilitation opportunity and increased recidivism, as well as increased challenges for corrective services staff.

Thank you again for the opportunity to comment. ADA would be pleased to further assist the Council with its inquiry. Should you wish to discuss this submission, please do not hesitate to contact

[REDACTED]

Yours faithfully

[REDACTED]

Geoff Rowe
Chief Executive Officer