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Queensland Sentencing Advisory Council

By email:

8th February 2019

RE: QSAC CONSULTATION ON INTENSIVE CORRECTION ORDERS

Dear ,

We welcome and appreciate the opportunity to make a submission in relation to Intensive Correction Orders as part of the review of community based sentencing orders, imprisonment and parole options being conducted by QSAC.

The questions of whether Intensive Correction Orders still serve a useful purpose, whether they should be retained, and if so, what improvements could be made to increase their use, flexibility and effectiveness - need to be discussed against the backdrop of overincarceration rates in our prisons and the factors driving overincarceration.

Those factors include weakening of the principle of imprisonment as a sentence of last resort, the overuse of sentences of short terms of imprisonment with court-ordered parole, and the need for alternatives to incarceration; so our submission will discuss the purpose and use of Intensive Correction Orders as they interact with these factors.

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 people across Queensland. The founding organisation was established in 1973. We now have 26 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 people.

ATSILS provides legal services to Aboriginal and Torres Strait Islander peoples throughout the entirety of 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 four and a half 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.

THE BACKGROUND OF INCARCERATION AND REINCARCERATION RATES

In the four years between 2012 and 2016 the prison population increased by 41.6% with Aboriginal and Torres Strait Islander prisoners accounting for 31.3% of the prison population. For any growth measure, that is an extraordinary increase. It was not driven by crime rates as the figures indicated that crime rates were falling in most areas.¹ Most of the growth in Australian imprisonment since 2001 has been driven by other factors such as changes in policing policy, changes in court bail and sentencing decisions.

As noted by His Honour Judge Matthew Myers AM, the Commissioner for the Australian Law Reform Commission *Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islanders*, Aboriginal and Torres Strait Islander men are 14.7 times more likely to be imprisoned than non-Indigenous men and Aboriginal and Torres Strait Islander women are 21.2 times more likely to be imprisoned than non-Indigenous women.² The key factors leading to the overrepresentation of Aboriginal and Torres Strait Islanders in the prison system³ are well traversed, a situation which has been rightly called scandalous.⁴ Of those key factors, the three factors most relevant to this submission are: the weakening of the principle of imprisonment as a sentence of last resort, the overuse of sentences of short terms of imprisonment with court-ordered parole, and the need for alternatives to incarceration.

Current sentencing options and sentencing practices are a key driver contributing to the current rate of overincarceration. The overcrowding of the prisons is largely caused by large numbers of prisoners being sentenced to short terms of imprisonment with parole release or parole eligibility dates. Worse than the immediate effects of overcrowding and the churn of prisoners in the prison system, are the counterproductive effects caused by those short prison sentences. As noted in last year's review of the parole system, offenders who serve short periods of imprisonment or time on remand prior to sentence are not given the opportunity to attempt to address their offending behaviour before their

¹ D. Weatherburn, *Rack 'em, Pack 'em and Stack 'em, Decarceration in an Age of Zero Tolerance*, [2016] CICrimJust 21, 28(1) Current Issues in Criminal Justice (2016).

² ALRC Media Release on the Release of the Report, *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, available at <https://www.alrc.gov.au/news-media/media-release/pathways-justice-indigenous-incarceration>

³ In summary: 1) Charging and the failure to use diversions from the Criminal Justice System; 2) Increases in the refusals of bail and stringent policing of minor breaches; 3) The weakening of the principle of sentencing to jail as a sentence of last resort; 4) The overuse of sentences of short terms of imprisonment with court-ordered parole; 5) The need for alternatives to incarceration. See also Chief Justice Wayne Martin, *Indigenous Incarceration Rates: Strategies for Much Needed Reform* (2015) available at [https://www.supremecourt.wa.gov.au/files/Speeches/Indigenous Incarceration Rates.pdf](https://www.supremecourt.wa.gov.au/files/Speeches/Indigenous%20Incarceration%20Rates.pdf), and ALRC, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Final Report*.

⁴ *The Queensland Parole System Review (The Sofronoff Report)*, para 124.

release from custody.⁵ They are either ineligible or not referred for most rehabilitation programs inside prison. Prisoners who try to self-refer face long waiting lists and typically do not get access to programs. Not only do the short sentences fail to deliver positive benefits in the form of rehabilitation, they make it increasingly likely that an offender will return to prison.

Of those sentenced to imprisonment, **almost half the prisoners in the prison system are imprisoned for non-violent offences**. Unless there is a physical threat to the community, imprisonment is unlikely to achieve the objectives of sentencing. Instead, non-custodial sentences, including community service orders, are likely to be more appropriate, and far less costly to the taxpayer.

The Statistics Concerning Sentences of Short Terms of imprisonment with Court-ordered Parole and the Need for Alternatives to Incarceration.

Short custodial sentences with court ordered parole are primarily imposed in the Magistrates Court for periods of less than 12 months, with a significant number being for less than 6 months.

The Magistrates Court imposes the majority of sentences with court ordered parole. In 2015/16, the Magistrates Court made 16,717 orders for imprisonment with a parole release date; the District Court made 1,967 orders for imprisonment with a parole release date; the Supreme Court made 553 orders for imprisonment with a parole release date.⁶

The sentences are often for relatively short durations. 68.9 percent of court ordered parole orders that commenced in 2015/16 had an aggregated sentence length of 12 months or less. Sentences under six months make up 37.7 per cent of court ordered parole orders, and are a large proportion of all sentences delivered by the Magistrates' Court.⁷

Short sentences imposed with parole release dates are also the biggest influencer on re-incarceration rates. Offenders on court ordered parole are typically serving short sentences. As noted in the Sofronoff Report, of the offenders who complete a court ordered parole order (that is, did not have their parole order cancelled), approximately 50 per cent received at least one parole suspension and many received multiple suspensions.⁸ The end result was that of the 8,000 or so prisoners then incarcerated in the State, between 17 per cent and 20 per cent were there because their parole had been suspended.⁹

The counterproductive effect of short terms of imprisonment with court-ordered parole

The problems with short prison sentences has been expressed particularly well in two passages in the Sofronoff Report, the first problem detailing the lack of access to rehabilitation programs for short sentences of imprisonment:

'There may be an assumption that a prisoner released on parole will have begun a process of rehabilitation while in prison, by attending appropriate training or therapy and by a growth in self-discipline. However, prisoners on sentences under 12 months and those assessed as low risk do not engage in rehabilitation programs in Queensland prisons. They are either ineligible or not referred for most rehabilitation programs inside prison. While a few prisoners may be

⁵ Sofronoff Report, para 431

⁶ Sofronoff Report, para 366-368.

⁷ Sofronoff, para 367-8.

⁸ Sofronoff Report, para 383

⁹ Sofronoff Report, para 9.

able to access low intensity programs with self-referral, this does not typically occur due to long waiting lists. In addition, programs are not delivered in Queensland for prisoners who continue to deny guilt or responsibility for their offences or for prisoners who are on remand and have not been convicted of the offences for which they have been charged. This means that offenders who serve short periods of imprisonment or time on remand prior to sentence are not given the opportunity to attempt to address their offending behaviour before their release from custody.’¹⁰

The time served in custody by offenders on parole suspensions has a significant effect, often destroying the advances that were made on parole.

‘It is long enough to isolate an offender from family and friends providing them with support, services and any rehabilitation providers. It is likely the offender would lose her or his job and any private rental accommodation. It would detrimentally affect the offender’s position on a waitlist for any application for public housing or for rehabilitation services like residential rehab centres. Bearing in mind that the purpose of parole is a means to reintegrate an offender into the community, suspensions appear counter-productive to that cause. Suspending parole removes the offender from the community and puts at jeopardy important factors that militate against reoffending, the so-called “protective factors”, such as housing and employment, hindering reintegration and adversely impacting community safety and the correctional system.’¹¹

Our experience from practice accords with these observations.

The author of the Parole System Review then goes on to query, not unreasonably, that given that there is little or no rehabilitative benefit from short sentences with short periods on parole, what is the value in allocating precious resources in the provision of community supervision with the danger of further imprisonment but not the benefit?¹² We would echo that question. It is in that context that the availability of the Intensive Corrective Order as an effective sentencing option arises.

INTENSIVE CORRECTION ORDERS AS A VIABLE ALTERNATIVE

Sentencing Alternatives to Short Terms of Imprisonment on Parole

In our view viable sentencing alternatives to short periods of imprisonment accompanied by parole eligibility or release dates are essential to address the current overincarceration crisis.

Judicial officers, when exercising their sentencing discretion are guided by legislation, the existing precedents and the available alternatives. As set out in the *Penalties and Sentences Act 1992*, sentences are to be imposed on an offender by the Court to punish, rehabilitate, deter the offender and others, denounce the conduct, and protect the community, or for any combination of these factors. There are a variety of different orders that the Court may impose to achieve these purposes

¹⁰ Sofronoff Report, Ibid, paras 429-431. And see as an example of a self-represented prisoner trying to escape from the no programs no parole conundrum: *R v Hood* [2005] QCA 159 at paras [24]-[25], <https://www.sclqld.org.au/caselaw/QCA/2005/159>

¹¹ Sofronoff Report, paras 388-389

¹² Sofronoff Report, paras Para 440

when sentencing an offender, including non-custodial sentences, custodial sentences, and special orders.¹³

However, the Courts have been concerned at the limitations contained in the legislation and legal precedent that significantly restrict the sentencing judicial officer from combining different orders to best address the circumstances of the offender. *R v Hood* [2005] QCA 159¹⁴ arose from an appeal against sentence by an unrepresented prisoner. He was seeking that his sentence be converted to a prison sentence of 27 months suspended after nine months to be followed by an intensive correctional order for a period of 18 months. That is not possible under the *Penalties and Sentences Act*, nor were the orders that the court wished to make in the particular circumstances of that offender.¹⁵ There is a long and thoughtful judgement by His Honour Justice Jerrard on the variety of sentencing orders which are permitted and prohibited, constrained by earlier decisions and provisions in the *Penalties and Sentences Act 1992* and the subsequent constraints on framing appropriate orders which is difficult to justify.¹⁶

To put the matters beyond doubt, we would support legislative reform aimed at a far more flexible sentencing regime. As noted in the Sofronoff Report, it is a difficult task for sentencing judges to impose a sentence that is fair and appropriate for the offender, the victim and the public and within the established sentencing regime. Courts should have the greatest possible range of sentencing options available to carry out this task. It is possible that the reason so many offenders are sentenced to imprisonment with court ordered parole is due to the lack of flexibility available to the Court when sentencing.¹⁷

Changes to the Existing Intensive Correction Order

In our experience, Intensive Correction Orders are ordered only rarely by the Courts and only in very limited circumstances. The often counterproductive effects of short prison sentences with court ordered parole is a key reason as to why those sentences should be replaced with alternatives. In circumstances where a short sentence of imprisonment is envisaged by the sentencing court, more effective outcomes can generally be achieved through those sentences being served in the community through Intensive Correction Orders rather than in correctional facilities.

However, the provisions for Intensive Correction Orders are too restrictive as they now stand – particularly for what is often a highly disadvantaged cohort. We would urge consideration of the expansion of the current Intensive Correction Order to encompass the following changes:

- (a) An Intensive Correction Order should be able to be ordered if the sentencing court is considering imposing a term of imprisonment with a head sentence of up to three years;
- (b) A short Intensive Correction Order should be able to be ordered in conjunction with a longer Probation Order;
- (c) The Intensive Correction Orders should be expanded to include more trauma-informed and culturally safe programs for Aboriginal and Torres Strait Islander offenders;
- (d) Consideration should be given to using halfway houses for community-based sentences to increase access to Intensive Correction Orders for offenders with unstable accommodation.

¹³ Sofronoff Report, para 331

¹⁴ *R v Hood* [2005] QCA 159, [2005] 2 Qd R 54.

¹⁵ *R v Hood* [2005] QCA 159 at paras [26]-[27].

¹⁶ *Ibid*, at paras [27]-[41]. See particularly paragraphs [40]-[41].

¹⁷ Sofronoff Report, para 469.

(a) An Intensive Correction Order should be able to be ordered if the sentencing court is considering imposing a jail sentence with a head sentence of three years

Currently an Intensive Correction Order can only be ordered if the sentencing court is considering imposing a jail sentence of one year or less.¹⁸ The one-year restriction is unnecessarily limited. As Magistrates can impose sentences of up to three years, it should be possible for an Intensive Correction Order to be imposed where head sentences of up to three years are under consideration.

(b) A short Intensive Correction Order should be able to be ordered in conjunction with a longer Probation Order

By similar logic applied to orders of actual imprisonment, an Intensive Correction Order cannot be ordered in conjunction with a concurrent community service order unless in accordance with s 92 of the *Penalties and Sentences Act* 1991; that is, that a maximum of twelve months' imprisonment may be imposed along with a probation order. That limitation should be removed so that an Intensive Correction Order of up to three years can be ordered in conjunction with a Community Service Order.

(c) The Intensive Correction Orders should be expanded to include more trauma-informed and culturally safe programs for Aboriginal and Torres Strait Islander offenders

As noted in the Sofronoff report, offenders who serve short periods of imprisonment or time on remand prior to sentence are not given the opportunity to attempt to address their offending behaviour before their release from custody.¹⁹ They are either ineligible or not referred for most rehabilitation programs inside prison. Prisoners who try to self-refer face long waiting lists and typically do not get access to programs.

For the limited programs that offenders can get access to, there are nowhere near enough trauma-informed or culturally safe programs to address offending behaviour and re-integration into the community. The need for appropriate programs for offenders jailed for breaches of Domestic Violence Orders, repeat driving offences and Public Nuisance offences is vital to rehabilitate those offenders and to protect the community. Those programs can be better delivered in the community and are likely to be more effective for offenders serving an Intensive Correction Order.

(d) Consideration should be given to using halfway houses for community-based sentences to increase access to Intensive Correction Order sentences for offenders with unstable accommodation

If an offender is homeless or cannot sustain stable accommodation while fulfilling the requirements of the order, has transport difficulties, has physical or mental health issues, these are all restrictions which militate against the imposition of an Intensive Correction Order. That offender may then be sentenced to actual imprisonment for reasons to do with disadvantage or disability rather than any perceived advantage arising from actual custody. Both the community and the offender would be better served by improving access to participation in the Intensive Correction Order programs through halfway houses for community-based sentences.²⁰ Low security residential 'detention' facilities

¹⁸ *Penalties and Sentences Act* 1992 (Qld), s112.

¹⁹ Sofronoff Report, para 431.

²⁰ Similarly, we have observed that unstable accommodation is often the root cause for the triggering of suspension or cancellation of parole for our clients.

supervised and run by corrections departments are a far less costly option than the projected cost of additional jail cells.²¹

Returning the focus to the Principles of Rehabilitation and Prison as a Sentence of Last Resort and Pres-Sentence Reports for Adult Offenders

A general sentencing principle, explicitly provided for in the *Penalties and Sentences Act 1992*, is that, subject to certain exceptions, a Sentencing Court must have regard to the principles that a sentence allowing the offender to stay in the community is preferable and a sentence of imprisonment should be imposed as a last resort.²²

Although the principle of prison as a sentence of last resort ought to constrain the ready resort to prison sentences, the incarceration rates from the Magistrates Courts sentencing statistics would suggest that at times imprisonment is not used as a sentence of last resort. It is perhaps informative that presently almost half the prisoners in the prison system are imprisoned for non-violent offences.

When discussing the principles of sentencing, the High Court discussed the difficulties that arise when crafting a sentence:

“sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. ... The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.”²³

Rehabilitation should as a general rule, be very much viewed as the dominant guide post in sentencing for the sorts of offences that currently attract short terms of imprisonment. Too often persons with mental health issues and behavioural disorders are repeatedly incarcerated for their inability to regulate low level anti-social behaviour.

Prison works effectively as sentence of containment where that is needed to protect the community; it is also used for more extreme offending situations to punish and denounce more egregious crimes. However, with respect to non-violent crime, imprisonment should be seen as a sentencing option of last resort and reserved for extreme examples of recidivism. All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders with

²¹ The cost of suspensions of court ordered parole being spent in prison is significant as is the number of suspensions. An average night in custody costs the State \$177.86 per offender, however, the marginal rate of a day in custody for ‘double-ups’ as a result of the overcrowding in prisons is \$111. With 3,887 offenders suspended in the last year for an average of 95 days, periods of suspensions of court ordered parole cost the State approximately \$40 million in the last financial year alone: *Sofronoff Report*, para 392. Further it was noted in the same report that, in the case of Woodford Correctional Centre, removal of the group of prisoners on suspended parole, or even a substantial proportion of that group from the prison would *instantly* eliminate overcrowding: *Sofronoff Report*, para 9.

²² *Penalties and Sentences Act 1992 (Qld)*, s9(2). Those principles do not apply to some categories of offences, including offences involving violence or physical harm to another person and child sex offences. Additionally, the legislature has provided for mandatory sentences of jail for some offences including murder and driving under the influence where the offender has two prior driving convictions in the last five years.

²³ *Veen v The Queen (No 2)* (1988) 164 CLR 465, at 476. The High Court was describing the difficulties of sentencing at common law, however the description is equally apt for sentencing under the Queensland legislation.

particular attention to the circumstances of individual offenders.²⁴ Or to borrow an expression that puts it more pithily, prisons should be full of the people we are afraid of, not the people we are irritated with.

A New Zealand practice worth considering is the preparation of **Pre-Sentence Reports** for adult offenders, similar to the Pre-Sentence Reports prepared for youthful offenders in our youth justice system. As we understand it, a New Zealand Judge²⁵ cannot sentence an offender to imprisonment without a Pre-Sentence Report first being prepared which identifies the personal circumstances of the offender, the risk factors surrounding their offending and the availability of appropriate programs for that offender. Thus making it far more likely that an offender will only receive a sentence to actual custody where such is the only appropriate course to take.

That said, in the interests of flexibility, cost and expediency (and indeed, in avoiding defendants potentially being remanded in custody pre-sentencing, in situations where ultimately a non-custodial sentence is imposed), that the following exceptions be applied to any such a legislative reform; namely, that a Pre-Sentence Report not be required where:

- Either the sentencing judicial officer is minded to impose a **wholly suspended** term of imprisonment; or
- Where a term of actual imprisonment is to be imposed – but where the defendant would be **released on the sentencing date due to a declaration of time already served** in custody whilst on remand.

Conclusion

Until the system is brought back into balance, the current rates of incarceration will continue to be driven by a number of factors unrelated to serious offending. The prison system will continue to be stretched far beyond what it was designed to do and beyond its capabilities, and the strain on correctional centres will divert funding away from alternatives that would address offending in a far more effective manner for the community.²⁶

The damage of overincarceration on Aboriginal and Torres Strait Islander communities is profound and inter-generational. As noted in 2008 by the Queensland Court of Appeal in *R v Chong; ex parte Attorney-General (Qld)*.²⁷

‘Those statistics also show that almost one in five Indigenous people reported a family member being sent to jail/currently in jail. Furthermore, Indigenous people in remote areas were one-and-a-half times more likely than Indigenous people in non-remote areas to report that a family member had been sent to jail or was currently in jail ... the figures are even

²⁴ Stephen Norrish QC, *Sentencing Aboriginal Offenders – Striving for Equality before the Law* (2017), available at <https://criminalcpd.net.au/wp-content/uploads/2018/02/Sentencing-Aboriginal-Offenders-Judge-Norrish.pdf>

²⁵ In New Zealand, sentencing at the equivalent level of the Queensland Magistrates Court is done by District Court Judges.

²⁶ In contrast the report by KPMG on the impacts of the Maranguka Justice Reinvestment Project in Bourke, NSW identified a net benefit of \$3.1 million in 2017 with a projected additional economic impact of \$7 million over the next five years. See <https://justicereinvestmentnow.us9.list-manage.com/track/click?u=8e35b5fd275f03352fa4118f4&id=3e15a17a76&e=045a0560d4>.

²⁷ *R v Chong; ex parte A-G (Qld)* [2008] QCA 22 available at <https://archive.sclqld.org.au/qjudgment/2008/QCA08-022.pdf>.

more dramatic for Indigenous women. As at 30 June 2004, 27.8 per cent of female prisoners were Indigenous.....

The Standing Committee on Law and Justice (1999) identified that incarceration of one generation impacts on later generations through the “continued breakdown of family structures.” ...This is particularly so in remote locations because of the difficulty of an imprisoned person maintaining contact with their family during their incarceration.’²⁸

Lack of viable sentencing alternatives to imprisonment in custodial facilities is driving the incarceration rates up. To make matters worse, as noted by a lead author in this area²⁹, each increase in the reach of prison to offenders who would not previously have gone to prison lays the foundation of the next round of prison growth. Thus, the most insidious feature of rising imprisonment rates is that they are “autocatalytic” or self-perpetuating. So while our prisons are currently operating at 118.8% capacity and holding 1,153 more prisoners than our correctional system was designed for, these numbers will only continue to climb until the contributory factors are addressed and the system brought back into balance.

For these reasons we think the question of revitalising the Intensive Correction Order is not just an important issue but a vital measure as part of the necessary set of measures to bring the incarceration figures back under control and to properly address rehabilitation of offenders.

We thank you for the opportunity to provide input at this initial stage and thank you for your careful consideration of these submissions.

Yours faithfully,

Mr. Shane Duffy
Chief Executive Officer
ATSILS (Qld) Ltd.

²⁸ Ibid at paras [38] –[40], references omitted.

²⁹ D. Weatherburn. *Rack ‘em, Pack ‘em and Stack ‘em, Decarceration in an Age of Zero Tolerance*, [2016] CJCrimJust 21, 28(1) Current Issues in Criminal Justice (2016).