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By email:

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20th April 2020

RE: THE CORRECTIVE SERVICES AND OTHER LEGISLATION AMENDMENT BILL 2020

We welcome and appreciate the opportunity to make a submission in relation to The Corrective Services and Other Legislation Amendment Bill which *inter alia* responds to recommendations made by the Crime and Corruption Commission in the *Taskforce Flaxton: An Examination of Corruption Risks and Corruption in Queensland Prisons*.

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.

OVERVIEW

We welcome the support for the 33 recommendations arising out of Taskforce Flaxton and note the comment from the foreword of the Taskforce Flaxton Report that as Taskforce Flaxton progressed, the QCS had already begun responding to the issues being raised in the public hearings and demonstrated its willingness to deal with these issues with priority. But the 33 recommendations are only the start of what is a significant program of reform that is needed for QCS to become a top-tier public safety agency.

THE PROPOSED CHANGES

New Offence to Prohibit Sexual Conduct or Intimate Relations between Staff and Prisoners:

We note that Section 348 of the *Criminal Code* (Queensland) already provides with respect to the offences of rape and sexual assault that:

348 Meaning of consent

(1) In this chapter, consent means consent freely and voluntarily given by a person with the cognitive capacity to give the consent.

(2) Without limiting subsection (1), a person's consent to an act is not freely and voluntarily given if it is obtained— (a) by force; or (b) by threat or intimidation; or (c) by fear of bodily harm; or **(d) by exercise of authority¹**; or (e) by false and fraudulent representations about the nature or purpose of the act; or (f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.

¹And the express legislative language in section 348(2)(d) of the Criminal Code is echoed in International Criminal Law where it was held, in certain circumstances, that the fact of captivity forms part of the circumstances which can negate the possibility that consent occurred of the captive's own free will. *Prosecutor v Kunarac, Kovac and Vukovic*, Case No.IT-96-23, Judgment, para 464 (22 February 2001), affirmed *Prosecutor v Kunarac, Kovac and Vukovic*, Case No. IT-96-23/1-A, Appeal Judgment, para 132 (12 June 2002).

If a lesser offence is to be introduced, in our view it is one of those rare situations where the onus of proof ought to be reversed. Given the coercive nature of custodial settings and the power imbalance between a corrective service officer and an inmate, it should not be for the Prosecution to prove the elements of the offence beyond reasonable doubt but for the onus to fall on the Defendant.

The proposed offence only defines a relationship as inappropriate if it is one that would cause a risk or potential risk to the safety and security or good order of the correctional centre or compromises the proper administration of a sentence or community based order. This in our view is completely inadequate and fails to protect prisoners from abuses which such an offence should also properly do.

The harm identified in the Flaxton Report is the manipulation, intimidation, threats, coercion and cooperation obtained through inappropriate relationships. As noted by the Crime and Corruption Commission in the Flaxton Report:

“There is a general consensus that inappropriate relationships are at the core of corruption in prisons, and that they both leverage and generate a culture of secrecy. Inappropriate relationships are cultivated by prisoners, outside associates of prisoners and prison staff ... through manipulation, intimidation, threats, coercion and cooperation. Motivations for forming and maintaining inappropriate relationships are typically economic, sexual or emotional in nature.”²

Abuses are visited upon prisoners in the forms of misuse of authority by corrective services officers for a variety of motivations for gratification (such as withholding access to medical care, turning their backs and failing to call a code yellow when a prisoner is being bashed, and reprisals for complaints). A prisoner should not have to buy safety from those abuses by engaging in sexual acts with corrective services officers.

One seemingly inappropriate relationship not identified at the Operation Flaxton hearings but subsequently brought to our attention is that of Custodial Officers in Far North Queensland who hold custody or guardianship under Child Safety Orders of Aboriginal or Torres Strait Islander children who are family members of inmates that the custodial officers are employed to guard. In our view, that is a source of inappropriate relationship due to the potential for such to provide leverage via manipulation, intimidation, threats, coercion and cooperation and should be prohibited as well.

In our view the scope of the offence should be widened to define a relationship which is inappropriate as one which would cause a risk or potential risk to the safety and security or good order of the

² Crime and Corruption Commission, *Taskforce Flaxton An Examination of Corruption Risks and Corruption in Queensland Prisons* (“The Taskforce Flaxton Report”) page 11.

correctional centre or compromises the proper administration of a sentence or community based order or would lead to manipulation, intimidation, or coercion. Furthermore the lesser charge should not be brought in circumstances when Rape is the more appropriate charge.

Amendments to sections 266, 283-284:

We welcome broader legislative language that provides that the Chief Executive must establish or facilitate programs or services to facilitate programs or services to support the health and wellbeing of prisoners. Such language recognises that while the responsibility remains with the Chief Executive, the delivery of prisoner health services is carried out by Queensland Health in all publicly operated corrective health facilities.

As noted in some inquests concerning recent deaths in custody:

The issues surrounding the coordination for offender health are not inconsiderable, and there are complex policy and service delivery issues surrounding offender health.³

There are significant efforts being undertaken to improve services in relation to suicide, alcohol dependency and mental illness in the context of Connecting Care to Recovery 2016–2021: a plan for Queensland’s State funded mental health, alcohol and other drug services and Shifting Minds the Queensland Mental Health, Alcohol and Other Drugs Strategic Plan 2018-2023;⁴

We also note that there was support by the QCS at the inquests of Appleton and Malone for a recommendation by the State Coroner that the collaborative and multidisciplinary approach to intake, health assessment and mental health assessment presently undertaken at the Brisbane watch house be trialled by the QCS in the correctional facilities. and we note recommendation 6 made at both inquests by the State Coroner that:

I recommend that the Queensland Government consider a trial program for “Front End Services” of intake, health assessment and mental health assessment at the Brisbane City watch house that involves collaboration between relevant stakeholders, including Queensland

³ *Inquest into the death of Franky Houdini, (unreported, Queensland Coroner’s Court, 16 May 2018)*, available at https://www.courts.qld.gov.au/__data/assets/pdf_file/0009/566442/cif-houdini-f-20180516.pdf.

⁴ *Inquest into the death of Terrence Michael Malone, (unreported, Queensland Coroner’s Court, 8 May 2019)*, available at https://www.courts.qld.gov.au/__data/assets/pdf_file/0003/612534/cif-malone-tm-20190508.pdf, para 217.

*Corrective Services, Queensland Health, the Queensland Police Service and the Prison Mental Health Service.*⁵

And we note the broader observations by the State Coroner in the Appleton inquest that systemic issues arise when there is failure to take a person centred approach, when inmates are treated in a silo fashion and there is a lack of integration of health services, especially with respect to mental health. We are hopeful that the proposed amendments will support a person centred approach.

The proposed powers for section 311

There is significant impact on the health and wellbeing of prisoners being able to access funds to make telephone calls or to buy toiletries. We note that there must be an appropriate balance between the desire to protect the security of the corrective services facility and the safety of prisoners and the protection of prisoners from unfair decisions which impact their wellbeing. In our view the approval or disapproval of donors of money should be done in a transparent and fair fashion and the exercise of a power to deny payments into prisoner trust fund accounts should be subject to a merits review.

The need for a properly independent system of prison inspections

We note that there was support from the 2016 Queensland Parole System Review (*The Sofronoff Review*) that the QCS retain an internal review and investigation function to support the QCS Commissioner, and we welcome the proposed strengthening of QCS Ethical standards.

The Sofronoff Review also recommended that the retained QCS internal review and investigation function should be in addition to an independent inspectorate. Along similar lines, the CCC noted that the inherently closed nature of prisons can facilitate and perpetuate corruption and that greater investment in surveillance technology, improved public reporting and an enhanced independent inspection function would facilitate transparency and accountability.⁶

We echo Recommendation 33 of the Taskforce Flaxton Report, that there needs to be:

- (a) the establishment of a properly resourced Independent Inspectorate of Prisons,

⁵ Recommendation 6 in *Inquest into the death of Terrence Michael Malone*, (unreported, Queensland Coroner's Court, 8 May 2019), available at https://www.courts.qld.gov.au/_data/assets/pdf_file/0003/612534/cif-malone-tm-20190508.pdf; Recommendation 6 in *Inquest into the death of Garry Ronald Appleton*, (unreported, Queensland Coroner's Court, 8 May 2019) available at https://www.courts.qld.gov.au/_data/assets/pdf_file/0004/612535/cif-appleton-gr-20190508.pdf

⁶ The Taskforce Flaxton Report, page x.

- (b) the development of nationally consistent inspection standards, cycles, methods and reporting templates,
- (c) inspection reports be made publicly available.

As genuine as the present efforts are to strengthen the current system, at the end of the day The current QCS prison inspectorate model does not meet recognised international standards of independence. We echo the recommendations of the 2016 Queensland Parole System Review (*The Sofronoff Review*) which recommended that the Queensland Government establish an Independent Inspectorate of Correctional Services where the appointed Chief inspector would report to Parliament and work collaboratively with the Office of the Queensland Ombudsman.

We thank you for the opportunity to provide feedback on the proposed legislation. I also take this opportunity to acknowledge with thanks, the input of Ms Kate Greenwood regarding the initial draft of this submission.

Yours faithfully,

Shane duffy

Chief Executive Officer