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Queensland Productivity Commission
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By email: Matthew.Clark@qpc.qld.gov.au

1ST November 2018

RE: INQUIRY INTO IMPRISONMENT AND RECIDIVISM

Dear Principal Commissioner,

We welcome and appreciate the opportunity to make a submission in relation to the inquiry into imprisonment and recidivism. For reasons outlined below we will use the term “return to prison rate” which encompasses recidivism but also captures the broader issue of cancellation and loss of parole. We note the concern about the imprisonment rates and agree it is a serious and growing public policy concern for Queensland.

BACKGROUND

We welcome the concern about the imprisonment and re-imprisonment rates that are at the heart of this inquiry. In our view the problem requires a systems analysis to investigate the root causes of the problem and to identify how best to restructure the existing system, including the reallocation of resources.

We would submit the current rates of incarceration are driven by a number of factors that are not driven by serious offending; that the prison system is being stretched far beyond what it is designed to do and is being stretched beyond its capabilities; and that the strain is diverting funding away from alternatives that would address offending in a far more effective manner for the community.

Preliminary Consideration: Our Background for Meaningful 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.

Background to Incarceration and Re-Incarceration Numbers

While there are factors unique to Queensland which require addressing, the overall picture Australia-wide is very similar, our prison population is booming, costing us nearly four billion dollars a year, almost half the prisoners in the prison system are imprisoned for non-violent offences. Prisons do not stop re-offending, 59% of prisoners have been in prison before, and in fact prison is strongly correlated with repeat and escalating offending.¹

Incarceration rates are at their highest since World War II and have been climbing steeply since the 1980s although the rate of serious crimes is actually declining.² Contributing to the problem of over-incarceration is the over-representation of Aboriginal and Torres Strait Islanders in the custodial system. 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.³

The imprisonment rate of women in Queensland is the third highest in Australia and the female prisoner population is rising faster than that of males.⁴ The number of Aboriginal and Torres Strait Islander women in prison has risen by 20 per cent since 2011, compared with a rise of three per cent for non-Indigenous women.⁵ While the problems leading to the over-representation of Aboriginal and Torres Strait Islander peoples in prisons are complex, they can be solved.⁶

¹ Senate Standing Committee on Economics, Chapter 4 *Sentencing, Deterrence and Custodial Sentences*, in *Lifting the Fear and Suppressing the Greed: Penalties for White-Collar Crime and Corporate and Financial Misconduct in Australia*, available at

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/WhiteCollarCrime45th/Report/c04

² These issues were recently discussed at a symposium at the University of Queensland TC Beirne School of Law conducted by Professor Bruce Western Columbia University discussing recent research in the United States and Australia.

³ 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>

⁴ Queensland Ombudsman, *Overcrowding in the Women's Prison* (2016), *ibid*, para 7.1

⁵ ABS statistics cited in H. Douglas and R. Fitzgerald, *The Domestic Violence Protection Order System as Entry to the Criminal Justice System for Aboriginal and Torres Strait Islander People*, IJC&SD Vol 7, 41(2018) available at <https://www.crimejusticejournal.com/article/view/915/678>

⁶ 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>

Factors contributing to the over-incarceration of Aboriginal and Torres Strait Islander peoples were explained by the Honourable Wayne Martin AC, Chief Justice of Western Australia:

Over-representation amongst those who commit crime is, however, plainly not the entire cause of over-representation of Aboriginal people. The system itself must take part of the blame. Aboriginal people are much more likely to be questioned by police than non-Aboriginal people. When questioned they are more likely to be arrested than proceeded against by summons. If they are arrested, Aboriginal people are much more likely to be remanded in custody than given bail. Aboriginal people are much more likely to plead guilty than go to trial, and if they go to trial, they are much more likely to be convicted. If Aboriginal people are convicted, they are much more likely to be imprisoned than non-Aboriginal people, and at the end of their term of imprisonment they are much less likely to get parole than non-Aboriginal people.⁷

Aside from the key underlying socio-economic factors, the sector-factors we identify as contributing to the current crisis in over incarceration and re-incarceration are as follows:

- a) Charging and the failure to use diversions from the Criminal Justice System;
- b) Increases in the refusals of bail and stringent policing of minor breaches;
- c) The weakening of the principle of sentencing to jail as a sentence of last resort;
- d) The overuse of sentences of short terms of imprisonment with court-ordered parole;
- e) The need for alternatives to incarceration.

CHARGING AND THE FAILURE TO USE DIVERSIONS FROM THE CRIMINAL JUSTICE SYSTEM

The Australian Law Reform Commission in its Report: *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, has made a series of recommendations addressing these issues.⁸ In particular, deep examination is needed for Recommendation 14–1 that *Commonwealth, state and territory governments should review police procedures and practices so that the law is enforced fairly, equally and without discrimination with respect to Aboriginal and Torres Strait Islander peoples.*⁹

Our observation is that the charging and sentencing of persons with public nuisance offences lead to the overuse of short sentences of imprisonment with respect to repeat offenders who inevitably have a mental illness or addiction issues that lead them into unwanted attention.¹⁰ The other group that is frequently charged with repeat public nuisance offences are the homeless. Other situations that lead to public nuisance charges are exemplified below:

Example: Bill was assaulted in a mall area by his girlfriend’s cousin Fred. He pushed Fred away and returned a blow in response to sustaining repeated blows from Fred. He pushed Fred away a final time. Because Bill was in a public space, he was charged with public nuisance.

Example: Alice is a teenage girl who was out with her friends near the CBD. Two junior police officers stopped Alice and her friends because they believed a bicycle had been stolen. Alice was protesting at

⁷ 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

⁸ ALRC, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Final Report p 455.

⁹ ALRC, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Final Report p 455.

¹⁰ See T.Walsh, *No Offence: the Enforcement of Offensive Language and Offensive Behaviour Offences in Queensland*, available at <https://espace.library.uq.edu.au/view/UQ:398628>.

being stopped and searched for no cause. A more senior police officer came and advised that there was no complainant and not to proceed on the charges to do with the bicycle. The junior police officer continued to question Alice, she started swearing at him and was arrested for commit public nuisance (for swearing at the police officer), she struggled during the arrest and tried to run away and was also charged with obstruct police.

Example: C and D were at a Brisbane train station – both held a valid ticket. Police were called to the vicinity apparently due to a disturbance caused by others. Police in effect interrogated C and D – who indicated dissatisfaction with same – further indicating that they felt they were being targeted simply for being Aboriginal. D used a swear word in communicating his dissatisfaction with being unfairly targeted – and was arrested for public nuisance. C was arrested for both a public nuisance and obstruct police when he sought to protest the arrest of his friend. The entire sorry episode (including inappropriate use of police force, prior, during and after the arrest) was caught on an officer’s vest-cam. Presumably as a result of this footage, the charges (which had been listed for a summary hearing) were subsequently discontinued (October 2018).

The purpose of the offence of commit public nuisance is to protect community interests in the peaceful use and passage through public spaces. For the reasons noted in Professor Walsh’s paper,¹¹ it is an overused and misused charge. We would suggest investigating community-based methods for addressing a commit public nuisance. It is after all a community interest in the use of public spaces that is sought to be protected. To that end, it is an offence that could more appropriately be dealt with by way of court-ordered mediation to address the underlying concerns. That one measure alone would have a dramatic impact on the incarceration rates.

In the alternative, we would urge that a public nuisance offence re restricted either solely to a ‘ticketing’ offence (a fine) or, if the matter is before the court (e.g. because the issuing of a ticket was inappropriate due to e.g. intoxication, or because a ticket was issued but is to be challenged), that ‘imprisonment’ be removed as a sentencing option. An added beneficial effect of such would mean that a public nuisance would no longer constitute **an offence which triggers a suspended sentence** (s146 *Penalties and Sentences Act 1992*).

REFUSAL OF BAIL

In the 2011 report, *Exploring Bail and Remand Experiences for Indigenous Queenslanders*,¹² it was observed that compliance with ‘standard’ conditions (curfews, resident restrictions, reporting requirements and alcohol bans) was difficult for some Aboriginal and Torres Strait Islander people. The report concluded that failure to comply with these conditions along with the stringent policing of minor breaches in some locations increased the risk of custodial remand for Indigenous defendants, with court delays then contributing to the length of time defendants remained in remand.¹³

As noted in the Queensland Ombudsman’s Report *Overcrowding at Brisbane Women’s Correctional Centre* (2016) 7.2.3

That although the ability to otherwise influence the number of female prisoners being remanded by the courts is limited. there are other strategies identified by the Commissioner,

¹¹ Ibid.

¹² Sanderson, Mazerolle and Anderson-Bond, *Exploring Bail and Remand Experiences for Indigenous Queenslanders* available at <https://www.premiers.qld.gov.au/publications/categories/reports/assets/exploring-bail-and-remand-experiences.pdf>

¹³ Ibid, page 3.

including diversionary programs, that could be implemented to arrest the growth in remand prisoners and, consequently, its contribution to the overcrowding at BWCC.

It was noted in that report that ‘in the absence of an alternative to remand in custody, they end up sitting in custody’¹⁴. Obviously, keeping accused remanded in custody in preference to anywhere else is the most expensive option. Immediate relief to the overcrowding in prisons could be created by more suitable alternatives for remand, such as bail hostels.

SENTENCING, PRISON AS A SENTENCE OF LAST RESORT AND MANDATORY SENTENCES

Sentencing is an exercise of discretion by a judicial officer, guided by legislation, the existing precedents and the available alternatives. The choice of sentencing options is the single biggest influencer on incarceration rates,¹⁵ and with respect to short sentences imposed with parole release dates, the biggest influencer on re-incarceration rates.

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 when sentencing an offender, including non-custodial sentences, custodial sentences, and special orders.¹⁶

Both as a sentencing principle and as explicitly provided in the *Penalties and Sentences Act 1992*, 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.¹⁷ 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 ‘major’ driving convictions in the last five years.

Although the principle of prison as a sentence of last resort ought to constrain the ready resort to prison sentences, as can be seen from the incarceration rates from the Magistrates Courts sentencing, imprisonment is seeming not used as a sentence of last resort on many occasions.

Prison works effectively as sentence of containment where that is needed to protect the community; it is also used for extreme circumstances to punish and denounce really 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. Too often persons with mental health issues and behavioural disorders are repeatedly incarcerated for their inability to regulate low level anti-social behaviour.

Quote from Sentencing Magistrate:

*“Mr X, the last twenty three entries on your record are for public nuisance. For most of those you have been sentenced to short terms of imprisonment. Clearly jail hasn’t had any effect on you and your offending behaviour.
I have no option but to sentence you to a short term of imprisonment.”*

¹⁴ Queensland Ombudsman, *Overcrowding at Brisbane Women’s Correctional Centre* (2016), para 7.2.1, available at https://www.ombudsman.qld.gov.au/ArticleDocuments/467/Overcrowding_at_Brisbane_Womens_Correctional_Centre.pdf.aspx

¹⁵ W. Sofronoff QC, *Queensland Parole System Review Final Report*, para 447, (“Sofronoff Report”) available at <https://parolereview.premiers.qld.gov.au/assets/queensland-parole-system-review-final-report.pdf>

¹⁶ Sofronoff Report, para 331

¹⁷ *Penalties and Sentences Act 1992 (Qld)*, s9(2).

As outlined in the section below on the imposition of short sentences with parole, unless there is a physical threat to the community, imprisonment is unlikely to achieve the objectives of sentencing. Alternative, non-custodial sentences, including community service orders, are likely to be more appropriate, and far less costly to the taxpayer.

With respect to the question of mandatory terms of jail, there are too many provisions which mandate jail. With respect to non-violent offenders, we question whether imprisonment is a proportionate or cost-effective response to the offending in most instances, and question whether stronger custodial penalties have a meaningful deterrent effect. Again, non-custodial sentences, including community service orders, are likely to be more appropriate, and far less costly to the taxpayer. Non-custodial sentences can be used in conjunction with fines and compensation orders to enhance deterrence.

With respect to mandatory non-parole periods, the following comment was made in the Sofronoff Report:

*In my view there is little doubt that mandatory non-parole periods is a flawed approach. It produces a regime without regard to important discretionary matters that may arise in a given case and which, in the interests of the safety of the community, ought be taken into account. The very essence of the exercise of judicial discretion requires a consideration of all the available sentencing options to decide upon the sentence that will achieve the purpose for which it is imposed – community safety being the paramount concern.*¹⁸

And further:¹⁹

Good laws are expressed to apply generally; the judges are entrusted to apply them to particular circumstances for the public good. Laws that restrict the consideration of relevant circumstances and require instead that relevant facts be ignored invariably create unintended and unforeseeable anomalies that tend against the public good in many surprising ways.

We would support the implementation of Recommendation No. 7 from the Sofronoff report that *“where a sentence is to be imposed for an offence that presently carries a mandatory non-parole period, the sentencing judge should have the discretion to depart from that mandatory period.”*²⁰

In our view that would avoid unnecessary and ineffective terms of imprisonment being imposed because it would assist Judges and Magistrates to take into account particular circumstances that call for different sentencing and to avoid the anomalies that would otherwise arise in these sentences. As noted by the Queensland Law Society in a different context, mandatory sentencing restricts 'a court's ability to address issues specific to the offender and can result in harsh and unjustifiable sentences.'²¹

THE OVERUSE OF SHORT CUSTODIAL SENTENCES WITH COURT ORDERED PAROLE

The imposition of short custodial sentences with court ordered parole is a significant contributor to incarceration and re-incarceration rates. Since its introduction in 2006, court ordered parole has been frequently used by the Courts. 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

¹⁸ Sofronoff Report, para 519

¹⁹ Sofronoff Report, para 522

²⁰ Sofronoff Report, page 23

²¹ Quoted in Senate Standing Committee on Economics, Chapter 4 Sentencing, Deterrence and Custodial Sentences, in *Lifting the Fear and Suppressing the Greed: Penalties for White-Collar Crime and Corporate and Financial Misconduct in Australia*, available at

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/WhiteCollarCrime45th/Report/c04

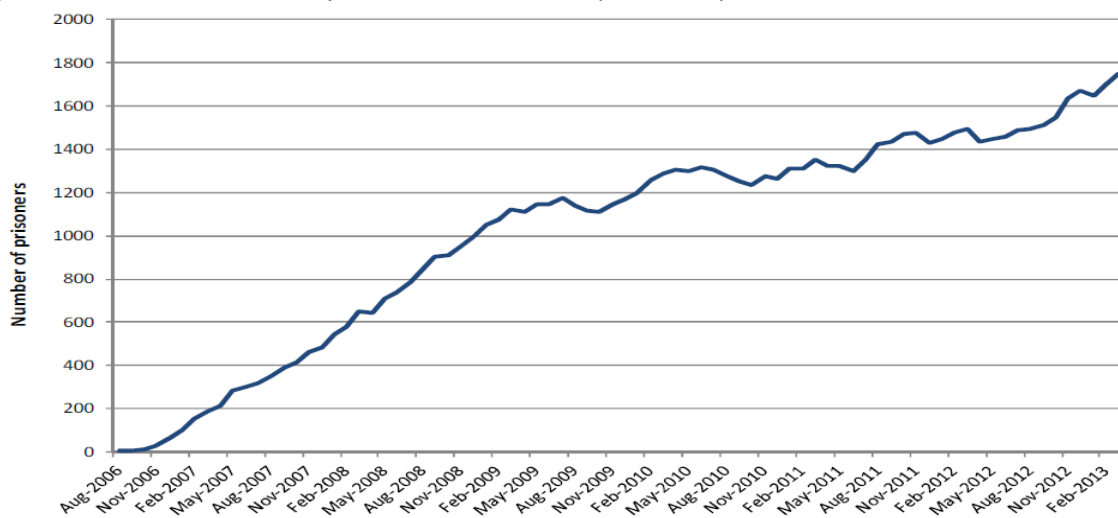
release date; the District Court made 1,967 orders for imprisonment with a parole release date; the Supreme Court made 553 orders for imprisonment with a parole release date.²²

As noted in the Sofronoff Report, offenders on court ordered parole are typically serving short sentences; 68.9 percent of court ordered parole orders that commenced in 2015/16 had an aggregated sentence length of 12 months or less.²³ Sentences under six months make up 37.7 per cent of court ordered parole orders and are a large proportion of sentences delivered by the Magistrates' Court.²⁴

The introduction of the Probation and Parole service and court ordered parole coincided with an increase in suspensions of parole orders.²⁵ In 2015-16, there were 3,887 suspensions of court ordered parole ordered, while only 639 parole orders made by the Parole Board were suspended.²⁶ Of the offenders who complete a court ordered parole order (that is, did not have their parole order cancelled), approximately 50 per cent receive at least one parole suspension and many receive multiple suspensions.²⁷ The end result is that of the 8,000 or so prisoners currently incarcerated in the State, between 17 per cent and 20 per cent are there because their parole has been suspended.²⁸

The rapid rise in prisoners in custody due to suspensions and cancellations of court ordered parole is illustrate in the graph below²⁹.

Figure 4.5: Prisoners in custody due to court ordered parole suspension or cancellation



The impact of the number of suspensions of court ordered parole is significant, in the case of Woodford Correctional Centre, elimination of this group, or even a substantial proportion of it, would *instantly* eliminate overcrowding.³⁰ The other impact of so many suspensions of parole is that it creates significant churn through the prisons. The constant relocation of prisoners in the prison system also impacts the prison's capacity to manage its prison populations.

²² Sofronoff Report, para 366-368.
²³ Sofronoff, para 367-8.
²⁴ Sofronoff Report.
²⁵ Sofronoff, para 374
²⁶ Sofronoff Report, para 380
²⁷ Sofronoff Report, para 383
²⁸ Sofronoff Report, para 9.
²⁹ Sofronoff Report, para 374.
³⁰ Sofronoff Report, para 9.

As noted in the Sofronoff Report the cost is significant. 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.³¹

The process is also counter-productive:

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 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.³²

The author of the Report 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?³³ We would echo that question.

THE NEED FOR ALTERNATIVES TO SUSPENSION OF PAROLE

In our view there needs to be a better alternative to suspension of parole for real and perceived risk. As noted in the Sofronoff report, the time served in custody by offenders on parole suspensions has a significant effect,

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.³⁴

Given the reliance upon external services by Probation and Parole³⁵ and the shortage of available external service providers which already impacts on the ability to address an offender's immediate needs and risks in a timely manner, it appears even more counter-productive.

³¹ Sofronoff Report, para 392

³² Sofronoff Report, Ibid, paras 429-431

³³ Sofronoff Report, paras Para 440

³⁴ Sofronoff Report, paras 388-389

³⁵ The report noted that Probation and Parole make on average in excess of 17,000 service requests per year. Sofronoff Report para 676

Further, there are particular challenges in relation to those on community-based orders in general – and in this instance, with parole in particular – namely, when it comes to **remote (and outer-regional) communities**. Typically, in such instances Probation and Parole are confined to a fly-in-fly-out service model – which accentuates the challenges.

In addition, it is very apparent (based upon our first-hand observations), that it is not uncommon for Probation and Parole staff to prefer an outcome which sees a ‘client’ returned to custody – for no other reason than easing their extensive workload. Such is not a criticism – more an observation that untenable workloads will lead to preferences aimed at reducing same. So, their better resourcing is a key. Further, on this point: because Probation and Parole has seemingly morphed over the years from a ‘support and compliance’ model, towards what amounts to a ‘compliance’ model – added resources aimed at putting departmental staff on the ground with a focus upon support and mentoring, would be a distinct improvement. Less reoffending, less incarceration.

DELAYS IN THE APPLICATIONS TO REGAIN PAROLE AND INCREASED RETENTION OF PRISONERS

The Recommendation in the Sofronoff report was in favour of keeping parole applications, because “[it] attaches an element of significance to that step and underscores in the mind of the offender that parole must be earned and justified. It serves to emphasise to the applicant that parole is a matter that will require preparation and forethought.”³⁶ However the issue we come across is that the whole parole process is so opaque and so bewildering to inmates, they may not entirely understand what they did (or didn’t) do to lose parole and they may not entirely understand why it has been revoked or what they have to do to get it back.

If a parole order is cancelled, then the offender must apply to the Parole Board for release on parole. In those circumstances the Parole Board may impose additional requirements that weren’t initially envisaged by the sentencing Judge, such as finding suitable accommodation.³⁷

In our experience the approval of accommodation as suitable is a constant stumbling block for prisoners trying to regain parole; the concern about accommodation may arise from the Parole Board itself, or from opposition to the accommodation arrangements by Probation and Parole. It is often difficult for an inarticulate and often illiterate inmate to explain why accommodation would be suitable. From information relayed back to us, the greatest source of confusion and angst for inmates comes from trying to anticipate what would satisfy Probation and Parole and also the Parole Board with respect to accommodation requirements.

Again, from a cost viewpoint, there would be much cheaper accommodation options for housing prisoners in temporary accommodation while they wait for approvals to reside in new accommodation rather than sustain the cost of their waiting in jail cells. Such a measure would also ease the congestion caused by this particular category of inmates.

As noted in the Sofronoff report, there is no active case management of prisoner applications or effort directed towards assisting prisoners through the application process. The resources are limited to fact sheets, manuals, forms and checklists. These are of limited assistance to prisoners particularly those from diverse cultural backgrounds, those with a significant disability or limited literacy. The QCS submission notes that the chief inspector has concerns that many prisoners, particularly some Aboriginal and Torres Strait Islander prisoners, have a general lack of understanding of the parole process.³⁸ In any event, substantial improvements and savings would be achieved by at the very least

³⁶ Sofronoff Report, para 837.

³⁷ Sofronoff Report, para 382.

³⁸ Sofronoff Report, para 616

providing active case management and assistance for prisoners to regain parole or alternatively using a better process than suspension of parole to manage risk.

ALTERNATIVES TO INCARCERATION

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 range. 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.³⁹

Further, courts can only impose meaningful community-based conditions where: 1) appropriately funded support service providers actually exist in the locality in question; and 2) the court is actually aware of their existence (and e.g. of any qualifying criteria).

Specific departmental staff (with the Premier's Department taking the lead – coupled with DATSIP in terms of Indigenous affairs), need to be established with the specific role of identifying and clarifying the various community programs that are funded. That is, maintain a list of all service providers (locations, specific services, qualifying criteria etc), which are funded across all Departments - such that the courts (and related stakeholders) can glean relevant information so as to feed into community-based sentencing options (or bail options). Ideally, such a position (or positions) should also be set up at a federally (perhaps co-ordinated through PM&C) – playing a similar role at a federal level, and importantly, with state and federal staff cooperating between themselves so that a full picture of what is, and indeed, what is not, available, is clearly evident – and accessible by the court system.

The Queensland Sentencing Advisory Council is currently analysing current Queensland sentencing trends by offence type to understand the current use of intermediate sentencing orders (community service, probation, imprisonment with probation, intensive correction orders, partially suspended sentences, wholly suspended sentences, imprisonment with court ordered parole, imprisonment with board ordered parole) and how use of these orders has changed over time. It is researching and evaluating interstate and international sentencing options it is due to report its findings in April 2019.

BELIEFS PERPETUATING THE RESORT TO CUSTODIAL SENTENCES - THE MYTH OF DETERRENCE

As outlined below there is a misguided belief that greater use of custodial sentences promotes deterrence and increased maximums of custodial sentences promotes deterrence. Both anecdotally and from quantitative studies, the evidence is against both of those propositions.

Although there are a number of clearly identifiable factors which have already been well researched and well recorded, some persistent beliefs about the criminal justice system block meaningful reform. The primary belief is the theory of the role of deterrence both when increasing penalties for offences and when sentencing offenders. Evidence about the role of deterrence has been given in the following terms:

Professor Bagaric dismissed the theory of general deterrence as an 'absolute myth'. He argued that while it might seem counterintuitive, the severity of penalties had little effect on the thinking of offenders, unlike the risk of detection (a matter covered in the previous chapter): Ninety-three per cent of criminologists around the world know that there is no correlation between the severity of the penalty and a reduction in crime. Common sense tells us that there is. We all think that people act rationally and prudently when they are considering what actions

³⁹ Sofronoff Report

to do next. We make the assumption that when people are about to commit a crime, whether it is an assault or a white-collar crime, that they sit back and reflect, 'If I do this, what is going to happen to me?' and that if the consequence is really bad—it could be jail for 10 years—they will not do it. It does not work. The empirical evidence shows that it does not work.

Clarifying his argument, Professor Bagaric suggested that deterrence worked in an absolute sense, but not in a marginal sense. Absolute deterrence, he explained: ...contends that, in order for the risk of detection to be effective, people need to understand that if they are caught there needs to be a hardship and unpleasantness that is going to be associated with that. But the unpleasantness does not have to be [jail] ... The unpleasantness can be a community-based order. That would be sufficient. The unpleasantness can be stripping of their assets. That would be sufficient. The unpleasantness just needs to be something that the person would seek to avoid. It does not have to be grotesquely over the top compared to the level of harm of their crime. Deterrence does work in an absolute sense but not in a marginal sense.⁴⁰

SUMMARY

To echo a comment often made in forums on de-incarceration, prisons should be full of the people we are afraid of, not the people we are irritated with.⁴¹ Because prisons are not effective in rehabilitating criminals, incarceration is likely to be entirely counterproductive (at least in the longer term), when it comes to mechanisms aimed at protecting the community from future offending. Further, although stronger custodial penalties are often represented as having a meaningful deterrent effect, there is little evidence to suggest that is true and substantial research to show that it isn't. There is repeated failure in the system to show recognition that custodial sentences are not working. We agree the current description of the high rate of imprisonment is properly described as a crisis and it needs urgent attention for the sake of this generation and the next.

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.

⁴⁰ Evidence given by Professor Bagaric, referred to in the Senate Standing Committee on Economics, *'Lifting the fear and suppressing the greed': Penalties for white-collar crime and corporate and financial misconduct in Australia* (2017), paras 4.17-4.18 available at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/WhiteCollarCrime45th/Report

⁴¹ See also <https://www.theguardian.com/society/2013/oct/29/vicky-pryce-prison-does-not-work-prisonomics-economist>