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Mr Kim Wood,  
Principal Commissioner,  
Queensland Productivity Commission  
PO Box 12112 George Street  
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By email: Matthew Clark <Matthew.Clark@qpc.qld.gov.au>

16<sup>th</sup> April 2019

**RE: COMMENT ON IMPRISONMENT AND RECIDIVISM DRAFT REPORT**

Dear Principal Commissioner,

We welcome and appreciate the opportunity to make further submissions in relation to the inquiry into imprisonment and recidivism. The *Draft Report on Imprisonment and Recidivism* brings a welcome fresh eye to the systemic issues that surround the runaway and unsustainable levels of incarceration and re-incarceration. As you have rightly noted, there are no easy solutions, however the answer to this enormous problem lies in identifying the underlying drivers or root causes which contribute to overincarceration. It is then that you can focus on broader service responses- both policy and legislative in health, education, housing, disability and so on. Then make changes that go deep enough to address the real problems. We note the successful outcomes of the Maranguka Justice Reinvestment Project in Bourke as an example of the sort of change that can be achieved.<sup>1</sup>

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<sup>1</sup> KPMG, *Maranguka Justice Reinvestment Project Impact Assessment*, 27 November 2018, available at <http://www.justreinvest.org.au/wp-content/uploads/2018/11/Maranguka-Justice-Reinvestment-Project-KPMG-Impact-Assessment-FINAL-REPORT.pdf>. Accompanying the significant turnaround in Bourke and social wellbeing was a gross economic impact of \$3.1 million in 2017. The report estimates that if just half of the results achieved in 2017 are sustained, justice reinvestment in Bourke could deliver an additional economic impact of \$7 million over the next five years.

## **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.

## **OVERVIEW**

As has been noted elsewhere and examined in detail in your draft report, that although the overall crime rate has been decreasing, the rates of imprisonment have been rising steeply. The statistics show that the people most likely to experience incarceration and re-incarceration are those who experience deep and persistent disadvantage. Back in 2008, one of the Judges sitting on a sentencing appeal<sup>2</sup> before the Queensland Court of Appeal commented on the wider impact of over-incarceration on families and communities<sup>3</sup>:

The study noted that the impact on Indigenous families was far greater partly because of the greater percentage of Indigenous people incarcerated. The Australian Bureau of Statistics (ABS) estimates that in 2006 Indigenous people were thirteen times more likely to have been incarcerated than non-Indigenous people. ... **Those statistics also show that almost one in five Indigenous people reported a family member being sent to jail/currently in jail (ABS 2004). Furthermore, Indigenous people in remote areas were one-and-a-half times more**

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<sup>2</sup> *R v Chong; ex parte A-G* (Qld) [2008] QCA 22, available at <https://archive.sclqld.org.au/qjudgment/2008/QCA08-022.pdf>

<sup>3</sup> *Ibid*, at para [38]

**likely than Indigenous people in non-remote areas to report that a family member had been sent to jail or was currently in jail (25 per cent compared to 17 per cent) (ABS 2004).** The figures are even more dramatic for Indigenous women. As at 30 June 2004, 27.8 per cent of female prisoners were Indigenous. (bolding added)

The ABS statistics referenced in *R v Chong* are from 2006 and 2004, the figures have worsened since then. 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. It is impossible to overstate the impact which over-incarceration now has on families and communities and the intergenerational impact that it is having. The over-representation of Aboriginal and Torres Strait Islander peoples in jail has been rightly called a national tragedy.

Over-incarceration is not just metaphorically an epidemic, recent studies suggest that it behaves as an epidemic. Those studies suggest that the negative effects of over-incarceration extend beyond those who have been imprisoned and their families to the broader community. For example in a study published in the American Journal of Public Health<sup>4</sup>, environmental health research was applied to the impact of incarceration on communities by treating incarceration as a toxin and investigating how higher than average exposure might impact community well-being. The study found that there were high levels of Generalised Anxiety Disorder and Major Depressive Disorders in neighbourhoods where there was a high rate of incarceration. The study looked at people who were living in the affected neighbourhoods but who otherwise had no personal contact with the criminal justice system and found that the effect of a neighbourhood level of incarceration on mental health is similar for individuals with or without a history of incarceration.

The positive news is that change that goes to the root causes of the problem can turn this situation around. The lessons from the Maranguka Justice Reinvestment Project is that sustainable outcomes and savings can be achieved by redirecting funding from crisis response, adult prison and youth detention towards preventative, diversionary and community development initiatives.<sup>5</sup>

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<sup>4</sup>The study was written up in Emily Van Hoffman, 'How Incarceration Infects a Community: Disease-based models help researchers understand how prison-admission rates are linked to the health of a neighbourhood', *The Atlantic*, 6 March 2015, available at <https://www.theatlantic.com/health/archive/2015/03/how-incarceration-infects-a-community/385967/>

<sup>5</sup> Maranguka Justice Reinvestment Project Impact Assessment, *ibid*, p 6.

## RESPONSE TO RECOMMENDATIONS

### Draft Recommendations 1,2 – Decrease the scope of criminal offences.

We are supportive of a review to reduce the scope of some criminal offences, to remove sentences of imprisonment as a penalty for some offences, and to create summary offences as alternatives to more serious offences in the Criminal Code especially for low level offending committed by youthful offenders. It would be ideal if a multi-disciplinary consultation group could examine potential offences to remove, downgrade or limit in their application.

We are also supportive of exploring alternative approaches to addressing low level offending that is interlinked with disadvantage or deprivation. For example, nuisance behaviour by the mentally unwell is better addressed by medical interventions. Dealing with addiction is another area that calls for better responses. We often see clients who experience both homelessness and addiction, mental illness and addiction, untreated trauma and addiction, chronic pain conditions and addiction. One problem cannot be addressed in isolation from the others. There are better, cheaper and more effective interventions that repeated contact with the criminal justice system. As someone put to us recently “You cannot arrest your way out of social problems.”

A few simple tweaks could also have a significant positive effect – particularly in the Indigenous sector. For example, by limiting the category of offences that trigger the breach of a suspended sentence of imprisonment. Public nuisance or minor obstruct police offences do carry the potential for a sentence of imprisonment - and thus, under the current legislation, can activate a suspended sentence of imprisonment. Breach of Bail offences – which commonly lead to cumulative sentences of imprisonment being imposed (or imprisonment being imposed, standing alone) – given that ‘contempt’ of a court order is treated very seriously – and yet, often, a Breach of Bail offence has nothing to do with an act of actual contempt, but rather a court date is missed due to confusion, oversight, mental health challenges or lack of financial means to travel. The Bail Act could be amended – incorporating a new Breach of Bail *simpliciter* offence – for those factual situations where actual contempt is not at play – and for which, a sentence of imprisonment is not a sentencing option. A Breach of Bail *aggravated* offence could still remain an option (for genuine contempt situations), where imprisonment remains a sentencing option.

### Draft Recommendation 3 – Provide Options for Victim Involvement

We are supportive of better restitution and restoration processes as an alternative to the bringing of criminal charges. Some matters, especially minor property matters, are inherently unsuitable for being dealt with in the criminal courts. Examples include: a tenant of twelve years charged with wilful damage for attempting to paint over yellowing of the walls; a child in a residential care facility charged

with wilful damage for smashing a coffee mug;<sup>6</sup> a child who was running along a shopping centre, jumping up and touching low hanging signs was charged with wilful damage when one of the signs disintegrated upon touch.

#### **Draft Recommendations 4,5 – Increase the Range of Non-Custodial Sanctions**

The choice of sentencing options is the single biggest influencer on incarceration rates,<sup>7</sup> and the imposition of short sentences imposed with court ordered parole is the biggest influencer on re-incarceration rates. We are supportive of the recommendations and note the current work of QSAC to identify improved alternatives to custodial sentences. We strongly support the establishment of a mechanism to allocate resources to the funding of alternative community based measures.

We note there are similar reviews in other jurisdictions including the review currently being done in England and Wales which envisages the ending of jail terms of six months or less. We note that the evidence is that short sentences of imprisonment simply are not working and there is a need to take a step back and ask fundamental questions as to whether the current approach to sentencing reduces crime; if prisons currently maximise the chance of rehabilitation; and if there are better alternatives to punish and rehabilitate offenders.<sup>8</sup>

In any suite of changes, we consider that the option of a Pre-Sentence Report should be introduced for adult sentences to remedy the over-incarceration crisis. To help ensure that sentences of imprisonment are truly sentences of last resort, we would suggest the introduction of an optional protocol for a presiding judicial officer to require a Pre-Sentence Report for an adult where a sentence of actual imprisonment is being contemplated. Unless the options of appropriate and actual referrals to services and support in the community to address the underlying or root causes of the offending behaviour have truly been reviewed and exhausted, then short jail sentences will continue to be imposed in large numbers. The benefits of such being ‘optional’ will also address those situations where whilst there might a reasonable basis to impose a sentence of imprisonment, the judicial officer in question is minded to impose a non-custodial sentence in any event. Further, the ‘optional’ aspect would also assist in avoiding unnecessarily long remand periods where due to say, a remote

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<sup>6</sup> A new protocol for residential care facilities has been concluded under the auspices of the Queensland Family and Child Commission.

<sup>7</sup> 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>

<sup>8</sup> See for example the comments made by the Justice Secretary David Gauke in the United Kingdom, *Ministers consider ending jail terms of six months or less*, available at <https://www.bbc.com/news/uk-46847162>; and comments on the need for a “smart” justice system instead of the false dichotomy of “soft” vs “hard” justice, Press Release *Justice Secretary David Gauke sets out long-term for justice*, available at <https://www.gov.uk/government/news/justice-secretary-david-gauke-sets-out-long-term-for-justice>.

geographical location, the availability of a report writer is a challenge – as might be the availability of support referral groups within the community in question.

### **Draft Recommendations 6,7,8 – Reduce the Use of Remand (in custody)**

We are supportive of reforms to reduce the use of remand. As highlighted in the request for information there are a number of factors which interact with each other.

The lack of alternatives to remand in custody leads to higher than necessary numbers sitting in remand. This was highlighted with respect to the number of women on remand 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, 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 the absence of alternative accommodation was a key contributor to the number of women remanded in custody;<sup>9</sup> the same observation would hold for some men charged with Domestic Violence offences<sup>10</sup>. 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.

Another cause of the high level of prisoners held on remand are unnecessarily stringent bail conditions. In the 2011 report, *Exploring Bail and Remand Experiences for Indigenous Queenslanders*,<sup>11</sup> 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.<sup>12</sup> It would be a worthwhile exercise to examine the effect of the practice of imposing short periods of imprisonment for failure to appear in court. There are some circumstances where that sort of sentence

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<sup>9</sup> 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](https://www.ombudsman.qld.gov.au/ArticleDocuments/467/Overcrowding_at_Brisbane_Womens_Correctional_Centre.pdf.aspx)

<sup>10</sup> It has been pointed out in other forums that having better options for the Respondent to go stay somewhere would then make it safer and easier for the Aggrieved and children to stay where they are.

<sup>11</sup> 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>

<sup>12</sup> Ibid, page 3.

may be entirely appropriate but we are also aware of a great number of instances where it was neither necessary nor proportionate. Along the lines of the epidemiological studies quoted elsewhere in this paper, those sorts of sentences may have an entirely counterproductive effect.

An example might suffice:

Quite a number of years ago, one of our practitioners appeared in a particular jurisdiction where the failure to appear rate for Aboriginal and Torres Strait Islander defendants was disproportionately high. The presiding magistrate's response was to always impose imprisonment for a breach of bail offence - and would do so with ever-increasing periods in custody. The rationale was to send a clear message to the community that not turning up to court would not be tolerated. However, this sentencing regime had the exact opposite effect of that which was intended. Failure to appear rates markedly increased. The magistrate continued to respond with ever-increasing sentences of imprisonment – with the failure to appear rate increasing still further. The reason for this became evident upon seeking instructions from clients and taking them through their criminal histories. Most of the clients did not associate their previous sentence of imprisonment (for a breach of bail offence) with “not attending court”, rather, the exact opposite – in their often confused thought processes, they equated attending court with going to prison - hence the downward spiral of poor court attendances.

#### **Draft Recommendations 9,10, 11,12 – Improve rehabilitation and reintegration**

We are supportive of improvements to rehabilitation and reintegration. Our Prisoner Throughcare program is an example of the valuable support that can be supplied to prisoners pre and post release so that they are not set up to fail once released. The proposal to ensure that all prisoners, at release, have up-to-date identity documents, including a Medicare card and birth certificate, a driver's licence and bank account where required, and information on social welfare and employment services is essential.

#### **Draft Recommendations 13,14, 15 – Address gaps in prevention and early intervention**

We are broadly supportive of these recommendations. We note the huge impact that the community based programs and service hubs had towards the successful outcomes of the Maranjuka Justice Reinvestment Project.

#### **Draft Recommendation 16 – Expanding diversionary options**

We strongly support the proposal to encourage greater use of police discretion, diversion and cautions and the accompanying structural changes to support that greater use. We consider this an essential component of any reforms to achieve lower incarceration rates.

We would suggest investigating alternative diversionary options for addressing a commit public nuisance offence. 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 outlined in Professor Walsh's paper,<sup>13</sup> it is an overused and misused charge. Our observation is that the charging and sentencing of persons with public nuisance offences leads to the overuse of short sentences of imprisonment with respect to repeat offenders who often have a mental illness or addiction issue that lead them into unwanted attention.<sup>14</sup> The other group that is frequently charged with repeat public nuisance offences are the homeless.

In our view mediation or community based methods would be a more appropriate way to protect a community interest in the use of public spaces. That one measure alone would have a dramatic impact on the incarceration rates.

Further, one of the challenges for a diversionary option to apply, is the condition precedent that there be an 'admission of guilt'. Consideration should be given to a system, such as that which applies in relation to a Domestic Violence Application – where a respondent can consent to an order (in this case, a diversion), without an actual admission. Admissions are more problematical in the youth sector, given the need (at least for indictable offences) for an independent support person to be present.

#### **Draft Recommendations 17 & 18 - Build a better decision-making architecture**

As each new piece of legislation is introduced into the Parliament, explanatory notes are prepared for that Bill which contain an assessment of how the provisions in the bill will achieve the policy objective, what alternative methods of achieving the policy objective are available, the estimated cost of government implementation and the consistency with fundamental legal principles. A justice reform office could bring in an additional skill sets for analysing the impacts of legislative changes both at the time of their introduction and also afterwards.

Two examples illustrate the benefit of that approach:

Tougher penalties are generally believed to improve compliance with the law and community safety, however the application of epidemiological approaches to the study of the causes and effects of over-incarceration has shown that tougher penalties can unintentionally lead to disproportionate results and hinder rather than improve progress towards decreasing crime and creating safer communities.

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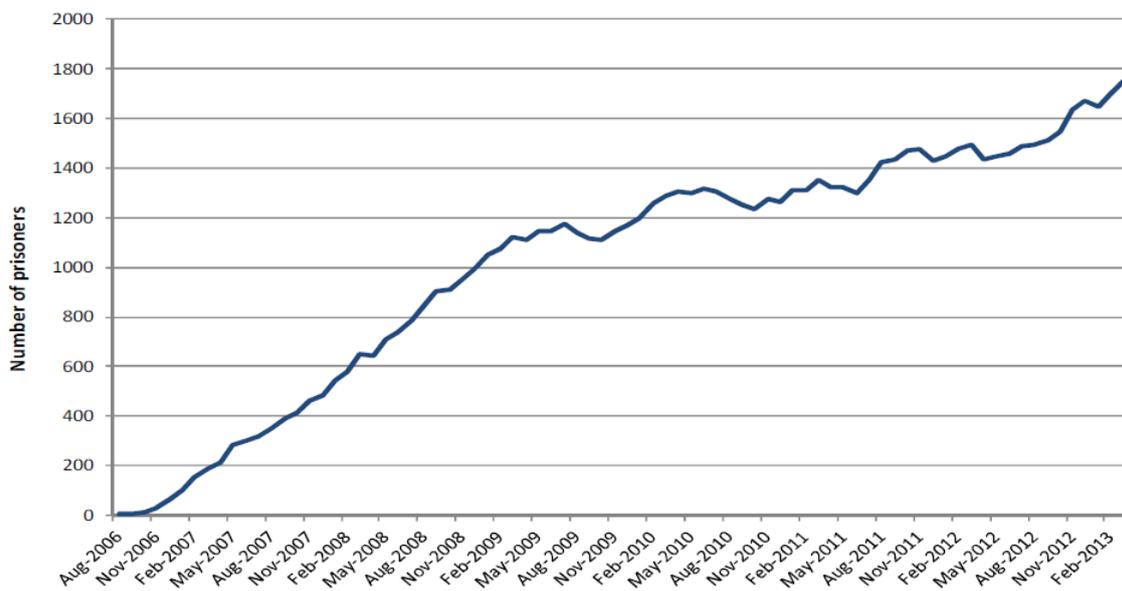
<sup>13</sup> Ibid.

<sup>14</sup> 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>.

One recent study has highlighted the counterproductive effect of an average sentence of 17 months compared to an average sentence of 14 months for drug possession.<sup>15</sup>

The Inquiry into the Queensland Parole System in 2017<sup>16</sup> highlighted the substantial increases in incarceration and re-incarceration figures that followed after changes to the *Corrective Services Act* (see graph below). The true impact of those legislative changes had not been contemplated at the time of their passage in Parliament in 2006.

The rapid rise in prisoners in custody due to suspensions and cancellations of court ordered parole<sup>17</sup>.



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

Yours faithfully,

Shane Duffy  
Chief Executive Officer

<sup>15</sup> See references to the work of Kristian Lum of the Virginia Bioinformatics Institute in <https://www.theatlantic.com/health/archive/2015/03/how-incarceration-inflicts-a-community/385967/>

<sup>16</sup> 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>

<sup>17</sup> Sofronoff Report, para 374.