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Former Judge John Robertson
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Dear Chair

QSAC Options Paper: Community based sentencing orders, imprisonment and parole

Thank you for the opportunity to provide comments on the Community based sentencing orders, imprisonment and parole options paper and the opportunity to participate in stakeholder roundtables on the topic. The Queensland Law Society (**QLS**) appreciates being consulted on this comprehensive reform project and the opportunity to participate in the stakeholder forums.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled by the QLS Criminal Law Committee, whose members have substantial expertise in this area. With respect to the options paper, we respond to the consultation questions as follows.

Question 1: Sentencing Principles

What changes (if any) are required to existing sentencing principles under section 9 of the Penalties and Sentences Act 1992 (Qld) to allow for the greater use of community based sentencing orders in appropriate cases (that is, where the safety of victims and other community members will not be compromised)?

There are often conflicting interests when it comes to sentencing offenders, with two main ones being the prospects of rehabilitation and the appropriate punishment of crimes that the community deems especially serious. The question as to whether anything needs to change to allow greater use of community based orders may mean a perceived "softening" of laws to help achieve this.

At the moment the start point under section 9 is that imprisonment is a last resort (section 9 (2)(a)(i)). This means that other penalties, including community based orders, are to be preferred. This is an appropriate position to maintain because society as a whole benefits from people being rehabilitated and supported to help ensure that they never find themselves in trouble again.

There are a large number of exceptions to the imprisonment as a last resort principle however, which include offences of violence and offences against children. This can mean that it is harder to argue for a community-based order for those particular types of offences.

If the suggestion is that there should be a greater emphasis on community based orders where it is safe to impose, perhaps the section could be amended to include in the "exceptions" that the Court could have regard to concerns about the safety of the victims and other community members when determining whether imprisonment should be imposed. The reality is, the case law contemplates the protection of the community as a consideration, but to frame it in such a way as an "exception" to an "exception" may encourage more community based orders, even for serious matters.

However, an overly prescriptive approach should be avoided to allow the Courts as much flexibility as possible. Nonetheless, a clear statement or emphasis of a preference for community based orders, even for the "exceptions", would almost certainly have an impact upon the numbers of such orders given.

Question 2: Mandatory sentencing provisions

Are current Queensland mandatory sentencing provisions sufficiently clear so as to operate with certainty and consistency? If not, what provisions should be considered for review and how should they be reformed?

The Society does not support mandatory sentencing because it neither deters nor reduces crime and creates anomalous and unjust outcomes. There is limited empirical support for mandatory sentencing as a crime reduction tool; rather the evidence suggests that it causes significant economic and social harm preserving judicial discretion and flexibility is the best means of achieving consistency and justice in the sentencing process.

We have set out a non-exhaustive list of the main mandatory sentencing legislative provisions currently operating in Queensland:

<u>*Penalties & Sentences Act 1992 (Qld)* (**PSA**) s9(4)(b)</u>

An offender convicted of a sexual offence against a child must serve an actual term of imprisonment unless there are exceptional circumstances;

- *s*160D *PSA*: a sentencing court may only order a suspended sentence or parole eligibility date for child sex offenders;
- s161E *PSA*: mandatory minimum sentences for repeat serious child sex offences;
- *s*161R *PSA*: mandatory cumulative imprisonment for 7 years or the maximum penalty for the offence (whichever is the lesser) for an offender convicted of an offence with a "serious organised crime" circumstance of aggravation;

- Part 9A *PSA*: Serious violent offences (SVO): Offender must serve 80% or 15 years of the sentence where the sentence imposed is 10+ years for a prescribed offence. There is also a discretion to make an SVO declaration if the sentence is less than 10 years;
- section 754 *Police Powers and Responsibilities Act 2000* (Qld): mandatory minimum penalty of 50 penalty units or 50 days' imprisonment for evasion offences;
- ss 108A-D and 120A *PSA*: graffiti removal orders and community service;
- s156A *PSA* – mandatory cumulative imprisonment where offender is convicted of a proscribed offence or whilst serving a term of imprisonment;
- *Weapons Act 1990* (Qld) ss 50(1)(d); 50(1)(e); 50B(1)(e); 65(1)(c): mandatory minimum periods of imprisonment for specified categories of offence; and
- Mandatory life imprisonment for murder.

As with all forms of mandatory sentencing, the above provisions do not achieve clarity, certainty or consistency in the sentencing process. Rather, they operate inflexibly and result in unjust or perverse outcomes because judges cannot properly distinguish between different cases. These issues are an inherent feature of mandatory provisions and are not the result of judicial reasoning or other factors.

<u>Sexual offences</u>

The requirement of actual custody unless there are exceptional circumstances has led to sentences being more punitive, and increased both time, cost and complexity in the sentencing process. As with most forms of mandatory sentence, the actual custody requirement risks having a disproportionate impact on vulnerable offenders, including Aboriginal and Torres Strait Islander offenders and offenders with a mental illness or intellectual impairment.

The courts' inability to order a parole release date for child sexual offences similarly creates unfair and impractical outcomes. It means that offenders may not be subject to community supervision once they are released from custody, whereas court-ordered parole may actually increase the prospect of offenders receiving treatment and community reintegration.

We recommend legislative change to enable judges to order parole for child sexual offences. More generally, we recommend that sections 160B & C of the *Penalties & Sentences Act 1992* (Qld) be amended to enable the Supreme and District Courts to order a parole eligibility or release regardless of the period of the head sentence.

<u>SVOs and mandatory cumulative imprisonment provisions</u>

The various provisions of the PSA which require mandatory cumulative imprisonment for prescribed offences, as well as the SVO regime, cause significant uncertainty and inconsistency in the sentencing process. There is no guidance within the PSA regarding the matters for a court to consider in exercising the discretion of make a SVO.

The Queensland Sentencing Advisory Council (**QSAC**) in its *Sentencing for Criminal Offences Arising from the Death of a Child: Final Report* raised concerns about the impact of the SVO scheme and mandatory cumulative provisions on sentencing practices for manslaughter of a child. The Council found that the cumulative and mandatory non-parole provisions distorted the head sentences, leading to head sentences being imposed which did not reflect the true gravamen of the offending.

This downward effect on sentencing tariffs would be overcome by the introduction of more flexibility to the sentencing process and enabling judges to consider pleas of guilty and other mitigating features. We also recommend a government review into the effectiveness of the SVO regime.

<u>Evasion offence</u>

There is now a significant body of District Court case law illustrating the sentencing difficulties created by s754 *Police Powers and Responsibilities Act 2000*: see, for example, *Commissioner of Police Service v Magistrate Spencer and Ors* [2013] QSC 202; *Doig v commissioner of Police*; *Forbes v Jingle* [2014] QDC 204; *Sbresni v Commissioner of Police* [2016] QDC 18; and *Skinner v The Commissioner of Police* [2016] QDC 138.

Despite clear judicial authority to the effect that the sentencing discretion is not constrained to exclude probation or other sentencing options, in practice there is still confusion about the operation of the provisions.

The imposition of a mandatory minimum penalty creates an upward effect on head sentences and sometimes causes unjust outcomes. It increases inconsistency and unpredictability because Magistrates cannot properly distinguish between more and less serious cases.

Where a fine is imposed, a court 'must' take into account the financial circumstances of the offender and the nature of the burden that the payment of the fine will be on the offender. The section 754 offence constrains this principle because it specifies a minimum amount.

<u>*Weapons Act 1990* – mandatory minimum provisions</u>

The imposition of a mandatory minimum penalty creates an upward effect on head sentences and sometimes causes unjust outcomes. It increases inconsistency and unpredictability because Magistrates cannot properly distinguish between more and less serious cases.

<u>Murder</u>

In respect of the mandatory life sentence for murder, Queensland and the Northern Territory are the only states in Australia with this penalty. It fails to recognise that there may be different levels of moral culpability (e.g. actual intention versus recklessness versus negligence) requiring different considerations at sentence.

QLS supports flexibility in sentencing and considers that judges and Magistrates should be supported to take into account all relevant circumstances so that the sentencing discretion can be exercised in a just and responsive manner. Inflexible mandatory sentencing provisions lead to unintended consequences and can create more problems.

Question 4: Home detention

4.1 If a new community correction order is introduced in Queensland, should 'home detention' (an extended curfew with electronic monitoring) be excluded from being available as a condition of the order?

The Society is in support of the introduction of varied sentencing options, and accordingly is in support of home detention as being available as a condition of a new community correction order.

The possible advantages of home detention existing as a condition of a community correction order as opposed to a separate form of sentencing order is that it may be easier to integrate the management of suitability and compliance with such an order with a separate department, such as the Department of Corrections, as opposed to through the order being facilitated through the Courts.

QSAC has already identified that intensive case management, using a mix of surveillance and rehabilitative strategies, appears to be important for successful completion of home detention. This may be easier to facilitate through a separate Department responsible for the implementation of the community order, such as the Department of Corrections.

4.2 In the alternative, do you support home detention being introduced as a form of sentencing order? How might this be distinguished from court ordered parole with electronic monitoring and curfew conditions?

Should appropriate measures be facilitated to incorporate the management and supervision for offenders subject to such an order, the Society alternatively supports home detention being introduced as a form of sentencing order.

This might be distinguished from court ordered parole with electronic monitoring and curfew conditions on the basis of the following:

Possible management of orders under a separate Department or authority than Queensland Corrective Services;

- Management and facilitation of orders through the Courts as opposed to the Parole Board;
- Breaches of home detention orders may be a separate offence, as opposed to breaches of parole which are not a separate offence;
- Different possible consequences for breaches and review of applications, as the order may not fall within the provisions of the *Corrective Services Act 2006* (Qld);
- Further conditions on such orders could be imposed in addition to parole orders, eg. electronic monitoring and curfew conditions entirely prohibiting departure from the residence save for being in the company of a corrective services officer;
- Courts may impose further or separate conditions on a home detention order as opposed to conditions and compliance being managed by Queensland Corrective Services; and
- An application process through the Courts may exist for variation and cancellation of home detention orders which are not present with respect to parole conditions and orders.

4.3 If home detention was to be introduced as a sentencing order, what protections would need to be introduced to ensure it is used only in appropriate circumstances? For example, should the availability of home detention be restricted to circumstances where:

(a) The person is convicted of an offence punishable by imprisonment

Given the costs on the government associated with management of home detention orders (e.g. electronic monitoring conditions) and significantly onerous compliance requirements on defendants and other residents at the proposed residence which would likely be associated with home detention orders, the Society would be in support of a provision requiring home detention orders to only be available to offences punishable by imprisonment. This is the case with home detention orders in the SA, Tasmanian, NT and NZ jurisdictions.

(b) A conviction is recorded

The requirement for the recording of a conviction should have limited bearing on whether or not a home detention order should be able to be made with respect to an offence.

However, should a home detention order be formulated to be available in Queensland as a sentence of imprisonment, then the requirement for the recording of a conviction would be in line with the relevant provisions of the *Penalties and Sentences Act 1992,* requiring convictions to be recorded in making other imprisonment-based orders.

(c) The person consents to the order being made.

Given the costs on the government associated with management of home detention orders and significantly onerous compliance requirements on defendants and other residents at the proposed residence which would likely be associated with home detention orders, the Society would be in support of a provision requiring a defendant to understand the onerous conditions associated with a home detention order and consent to the home detention order being made. This requirement would be similar to what is already required of defendants for other community based orders such as probation and community service orders. The consent of the offender being sentenced is already a requirement for home detention orders in the Tasmanian, NT and NZ jurisdictions.

(d) The court would otherwise have imposed a sentence of immediate imprisonment and would not have ordered the sentence to be suspended or the person to be released at the date of sentence or shortly after this on court ordered parole.

A requirement of this nature would effectively limit home detention as a possible option to Courts as an option only after a Court considers that the offending requires a punishment greater than a suspended sentence or an immediate parole release date. The Society is not in support of a restriction of this nature.

The Society agrees with the observations made by the QSAC that home detention may increase the sentencing options available to a court, but is likely to be an option suitable only for a very small group of offenders. Because of the limited potential suitability of a home detention order, the Courts should not be fettered by an additional requirement for it to consider that a sentence should be imposed greater than a suspended sentence or immediate parole, particularly given that parole orders already require defendants to be subject to strict monitoring and compliance requirements.

(e) A suitability assessment has been undertaken which takes into account any impact the order is likely to have on any victim of the offence, any spouse or family member of the offender, and anyone living at the residence at which the person would live.

The Society would be in support of a requirement for a suitability assessment being undertaken taking into account the impact such an order could have on the parties outlining above, and particularly with respect to the impact of such orders on persons living at the residence at which the person would live. The Society supports the imposition of requirements regulating when such suitability assessments must be undertaken or completed, bearing in mind the delays such an assessment may have to the criminal justice proceedings.

QLS is aware that a primary criticism of home detention orders is that an offender's family may be adversely affected by living in a home where an offender is under surveillance and subject to strict government oversight. Such orders may also make family members feel responsible for assisting the offender to meet the requirements of their order (effectively resulting in the family members indirectly also being punished for the offender's conduct).

QLS would also support the requirement for suitability assessments to be made taking into account the impact of home detention orders on the offenders themselves. In particular, the Society also notes concerns with respect to offenders who may be themselves subject to domestic and family violence within the home. Home detention orders would not be suitable for such offenders as they may increase their exposure to the threat of violence and potentially impact on their ability to escape a violent partner.

(f) Any co-resident has consented to the person living at the nominated address?

In order for a home detention order to be practicable, the Society considers that a requirement for the consent of co-residents of the nominated address to be a sensible one. However, such a requirement may create a situation where the offender could be subject to the mercy of their co-resident, and may create difficulties if the co-resident were to subsequently withdraw their consent. For this reason, provisions regarding the variation and cancellation of home detention orders would likely be necessary for these orders to be practicable in their implementation.

4.4 Should there be any restrictions on the types of offences, or circumstances, in which home detention is used (e.g. if there are safety concerns for victims or co-residents, or in the case of offences involving the use of violence, there is an unacceptable risk of the person committing a further violent offence)?

The Society is in support of the considerations outlined above being required to be made by the sentencing Court when deciding whether to impose a home detention order. The Society is in support of the discretion ultimately being left in the hands of the Court as opposed the suitability being mandated by the legislation. For this reason, the Society is not in support of the South Australian model which limits the availability of home detention orders to particular types of offences.

The Society considers that the legislation should mandate that a Court should not make a home detention order in certain circumstances. These circumstances could include:

- Where there are safety concerns for victims or co-residents;

- Where there are safety concerns for other vulnerable people;
- Where there are safety concerns for the offender;
- In circumstances regarding a violent or sexual offence, where the Court considers that there is an unacceptable risk that the offender would commit a further violent or sexual offence; and/or
- Where there are concerns regarding domestic violence in the proposed residence.

4.5 What should the maximum period of home detention be:

(a) 12 months (Northern Territory and New Zealand model)

(b) 18 months (Tasmanian model)

(c) 2 years (NSW model)?

Because of the limited circumstances regarding the potential suitability of home detention orders (as discussed in 4.3(d) above), the Society considers that the ability of the Courts to impose such a home detention order should not be fettered by further requirement limiting the maximum periods of such an order. The Society is in favour of these broader powers being afforded to sentencing courts and for this reason is in support of the NSW model where maximum durations are in the order of 2 years.

However, the Society also notes that the circumstances relating to offenders on home detention orders may change the longer the duration of the order. For this reason, the Society is of the view that provisions would be required allowing for the ability for a party (such as the offender or a corrective services officer) to apply to a court for the variation and cancellation of home detention orders in limited circumstances (such as where an offender must move, or is no longer suitable to be subject to a home detention order).

4.6 What should be the maximum curfew period in a given day and/or week?

Curfew conditions are discretionary conditions which exist in the current Victorian, Tasmanian, Victorian and NZ models for home detention.

The Society is of the view that the discretion as to maximum curfew periods should be exercised by the Courts, having regard to the particular circumstances of the defendant and the other information available to the Courts (for example the suitability assessment conducted prior to sentencing). However, given the onerous requirements of home detention orders on defendants and other residents of the proposed residents, the Society would not oppose a limitation being placed on discretionary curfews by Courts so that they do not exceed 12 hours per day, which is in line with the present Victorian and NSW models.

Question 5: Suspended sentences

5.1 Are wholly suspended sentences operating as an effective alternative to actual imprisonment in Queensland?

The Victorian Sentencing Advisory Council observed in its Final Report that:-

> *"[F]ew issues have divided the community as strongly as suspended sentences…This sentence polarises opinion and provokes high emotions… [t]he philosophical differences between those who accept that a suspended sentence is more severe than other non-custodial orders and who believe it to be an appropriate substitute for immediate prison time, and those who question the internal logic, position and continued need for such an order are fundamental and unlikely ever to be satisfactorily resolved"*

There is an obvious tension between the component parts of a suspended sentence; that is, the decision to imprison and the decision to suspend. To some extent, this is illustrative the ineluctable tension between the purposes of criminal punishment.

In this context, it is important to remember the reasons suspended sentences were first introduced. A suspended sentence has the dual advantage of allowing the Court to mark the seriousness of the offence and deter an offender from re-offending, whilst, at the same, avoid the possible negative effects of imprisonment and facilitate an offender's rehabilitation. In *Dinsdale v The Queen* (2000) 202 CLR 321, [76] Kirby J noted:

> *"Whatever the theoretical and practical objections, suspended imprisonment is both a popular and much used sentencing option in Australia. Courts may not ignore the provision of this option because of defects occasionally involved in its use."*

Ultimately, it is submitted that there is an important place for suspended sentences in the suite of sentencing options in Queensland. The important proviso is that Court's adhere to a proper process of reasoning in imposing them.

The rationale behind suspended sentences is well founded. They may provide a platform for adequate denunciation and deterrence whilst having proper regard to an offender's subjective circumstances. They contribute towards reducing the prison population. They allow offenders to avoid a first experience in custody by taking personal responsibility for their own rehabilitation. They have particular utility in sentencing people offenders with a low risk of reoffending, elderly offenders and for offences that have low rates of recidivism. They avoid short prison sentences, which can be refractory to ongoing rehabilitation. They may provide an incentive for offenders to plead guilty.

It is critical, however, that the proper two-step process for imposing a suspended sentence is not elided. Legitimate concerns exist regarding the identified tendency of sentencing Court's to erroneously employ suspended sentences against offenders who previously would have been sentenced to a less severe sentence than imprisonment, or to order a longer sentence of imprisonment than otherwise would have been imposed had the sentence of imprisonment not been suspended. Courts must be vigilant to avoid the use suspended sentences as an alternative to a non-custodial sentence.

5.2 Are there cases where suspended sentences could be used, but are not? If so what are the barriers to their use?

In Queensland suspended sentences are available for most offenders and offences.

It is submitted that there are two barriers to the appropriate use of suspended sentences. First, limitations relating to the power of Courts to set conditions as part of a suspended term of imprisonment. Second, the role of public opinion in judicial consideration of the sentencing option.

Suspended sentences in Queensland are non-conditional; that is, the sole condition is that the offender not commit an offence punishable by imprisonment. Courts can combine a wholly suspended sentence with probation, but only where the offender is being sentenced for a second, typically less serious, offence. And the consequence of breaching the probation component of a combination order (other than by further offending) does not place the offender at risk of having the suspended term activated. This may have led to a perception that offender's requiring supervision are better dealt with by way of a sentence of imprisonment with parole.

Meanwhile, other States and territories with suspended sentences allow for the making of a conditional suspended sentence.

The inability of Queensland courts to set conditions for supervision as part of a suspended sentence is a barrier to the use of the sentencing option. It is to be expected that the use of suspended sentences will increase (resulting in a reduction in offenders in prison) if this statutory limitation is remedied.

It is the view of the Committee that such a reform in in step with other, cognate jurisdictions and will not undesirably extend the ambit of suspended sentences.

It has been said that, *"… [t]he era when courts imposed sentence without any consideration of community views has long passed"*. Public opinion has a role in sentencing decisions. It may "inform" but not "constrain" sentencing.

It is widely acknowledged that a significant portion of the public and the media perceive suspended sentences as a 'let off', where the offender 'walks free' or 'gets off'. Research suggest that victims of crime consider that suspended sentences are, "…no punishment at all". The poor regard in which suspended sentences are held by the public acts as an indirect barrier to the use of the sentencing option. Increased public education and awareness are key to redressing this barrier.

5.3 Are there unique factors for offenders in remote and very remote areas of the State, including Aboriginal and Torres Strait Islander offenders, that:

(a) Affect a court's decision to make a suspended sentence order; and

(b) if imposed, are likely to predispose such offenders breaching the order through commission of a new offence?

It is generally acknowledged that suspended sentences favour offenders in the socio-economic middle to upper class.

The familial and social support available to an offender, their capacity to demonstrate positive efforts towards rehabilitation prior to sentence and their ability to independently avail themselves of rehabilitation during the operational period are all factors sentencing courts consider in determining whether the option is appropriate in a particular case.

Socially disadvantaged offenders with lesser means and/or turbulent circumstances are often practically disadvantaged in laying claim to a suspended sentence. These offenders are often located in regional or remote areas of the State, where access to social services is limited.

This disadvantage is reflected in the statistics. For example, Aboriginal offenders more commonly receive actual terms of imprisonment that the general run of offender's.

The disparity may be due to a number of factors. These include a perception that suspended sentences may set up the socially disadvantaged offender to fail. Put differently, a concern that suspended sentences are less apt to serve the interests of offenders with complex needs who have difficulty complying with sentencing orders.

A related issue is that suspended sentences are seen to cause net widening (ie. offenders being sentenced to imprisonment who would have otherwise received a non-custodial sentence) and sentence inflation (longer prison sentences being imposed than if the sentence had been ordered to be served immediately). Aboriginal and Torres Strait Islander offenders appear to be disproportionate recipients of suspended sentences.

There is, however, a real risk of negative impacts for Aboriginal people if suspended sentences are removed, absent improved access to community based sentences. Suspended sentences remain useful 'last chance' option.

Again, enabling courts to set conditions for supervision at the same time as a suspended sentence order may increase their use, effectiveness and community acceptance.

Question 6: Guidance on setting operational period

6.1 Is the current guidance under section 144(6) of the Penalties and Sentences Act 1992 (Qld) about the setting of the operational period for a suspended sentence sufficient?

No. There is a need for further guidance.

6.2 If there is a need for additional guidance, what form should this take (e.g. legislative guidance, bench book, professional development sessions for lawyers and/or judicial officers, other)?

The research presented by QSAC indicates that there does not appear to be any case law or other guidance that addresses the appropriate relationship between the head sentence and its accompanying operational period.

It has been identified by QSAC that the development of guidelines about the setting of operational periods to ensure that they are proportionate to the offending and term of imprisonment imposed would address the risk of setting people up to fail.

It appears to be suggested by QSAC in presenting its research that the appropriate way to address the concern is through legislating a method or model for imposing operational periods of suspended sentences. Such a method or model may include a mandatory ratio or calculation (for example, no more than twice the length of the sentence imposed).

The difficultly with legislating a ratio is that judicial discretion may be inhibited, for that reason it would be prudent to ensure that any guidance is subject to an "unless exceptional circumstances warrant a departure" provision.

6.3 If legislative guidance is provided, should this specify a specific proportion between the term of imprisonment imposed and the operational period? For example, that the operational period set can be no more than two times the period of imprisonment imposed?

Having regard to the response above it is suggested that the appropriate method if legislative guidance is provided would be in accordance with the suggested "no more than twice the length of the sentence imposed," with the ability for the court to depart from this guidance where exceptional circumstances warrant a departure.

Question 7: Power of Court Dealing with Offender on Breach of a Suspended Sentence

7.1: Are the courts' powers on breach of a suspended sentence, as set out under section 147 of the Penalties and Sentences Act 1992 (Qld), appropriate? For example:

(a) should the requirement under section 147(2) that the court activate the whole of the sentence held in suspense unless of the opinion it is 'unjust to do so' be removed in order to promote greater judicial discretion in the sentencing process; and/or

(b) should the wording of section 147(3)(a) be amended to widen judicial discretion when dealing with a breach of a suspended sentence — for example, to remove the reference to whether the subsequent offence committed during the operational period of the order is 'trivial'?

<u>Section 147(2)- "Unjust to Do So"</u>

The requirement for Courts to activate the whole of a suspended sentence unless it considers it "unjust to do so" essentially creates a presumption in favour of the Court's activation of the whole of a suspended sentence. This comprises a significant aspect of the punitive nature of the suspended sentence as a sentencing option. It is already the case that this presumption in favour of activation of the suspended sentence can be rebutted by a Court determining it unjust when considering a number of factors relating to the individual circumstances of the defendant and the case at hand. This is consistent with the approach already taken in the NT, Tasmanian, Western Australian, English and Wales jurisdictions.

Despite the presumption in favour of activation of the suspended sentence, the Court already has a broad discretion in determining whether or not the circumstances of the defendant and/or the case dictate that the activation of the suspended sentence would be unjust. For these reasons, the Society of the view that the requirement under section 147(2) that the court activate the whole of the sentence held in suspense unless of the opinion it is 'unjust to do so' is an appropriate one and should not necessarily be removed.

<u>Section 147(3)(a)- Triviality</u>

Section 147(3)(a) sets out seven factors that a Court must consider in deciding whether it would be unjust to order that the offender serve the whole of the suspended imprisonment. Notwithstanding the Society's position with respect to the onus in favour of activating a suspended sentence unless "unjust" outlined in s147(2), the Society is in support of broadening the discretion of the Courts with respect to the factors it must have regard to when considering whether or not it is "unjust" to activate a suspended sentence, as set out in section 147(3)(a).

In particular, the Society does have some concern that the use of the word ‘trivial’ in (3)(a) undermines the extent of the Court’s discretion when dealing with a breach of a suspended sentence. The requirement for an offence to be considered “trivial” before a Court can consider that it is unjust to activate the whole of a suspended sentence does not allow Court’s determination that a breach may otherwise be excusable in circumstances where the offence itself is not trivial but that there are otherwise proper reasons to excuse the breach, having regard to the individual circumstances of the defendant and/or the case.

The Society would be in support of a re-drafting of section 147 to reflect the Penalties & Sentences Act prior to its amendment in 1997. Pre-amendment, the court was required to order the offender to serve the suspended part of a partly suspended sentence, or the whole of a wholly suspended sentence, “unless it is of the opinion that it would be unjust to do so in view of all the circumstances that have arisen since the suspended imprisonment was imposed”.

7.2: Are there any other changes that should be made to the current powers of a court on breach of a suspended sentence – for example, to introduce an additional power to:

(a) impose a fine and make no other order (Western Australia and England and Wales); and/or

(b) make no order (Northern Territory and Tasmania).

The Society recognises that, on a case by case basis, individual circumstances of defendants and/or the case before the court would justify the Court in exercising additional discretions, for example to impose a fine and make no other order (as exists in the WA, England and Wales jurisdictions) or to make no order (as is the case in the NT and Tasmanian jurisdictions).

The Society is in support of further flexibility being given to the Courts with respect to its powers in respect to breaches of suspended sentences. This would allow the Courts, in the exercise of its sentencing discretion, to be able to more easily respond to offenders’ individual circumstances and to take into account the individual circumstances of each case.

For these reasons, the Society would be in support of an introduction of both of these individual powers to be available to Courts when dealing with breaches of suspended sentences.

Question 8: Breach Powers

8.1 Should a court have a discretionary power to deal with a breach of a suspended sentence imposed by a higher court, if that court is dealing with an offence that breaches the higher court’s order?

8.2 If so, should there be guidance as to the use of the discretion and what form should this take?

<u>The law</u>

A suspended sentence is to be regarded as a significant punishment[1] and is not merely an exercise in leniency[2]. In *Director of Public Prosecutions v Buhagiar and Heathcote*, Batt and Buchanan JJA of the Victoria Court of Appeal observed:

> *[T]here are cases where a judge may reach the view that suspension of a sentence is appropriate, not because it would be less unpleasant for the offender, but because it may be productive of reformation, which offers the greatest protection to society. A suspended sentence of imprisonment is not an unconditional release or a mere exercise in leniency. Rather it is an order made in the community's interest and generally designed to prevent re-offending.*
>
> *In deciding whether to suspend in whole or in part a term of imprisonment a judge is deciding whether, in all the circumstances, the offender should have the benefit of a special opportunity for reform, to rebuild his own life, or to make some recompense for the wrong done, or should have the benefit of the mercy … or for some other sufficient reason should have this particular avenue open to him, provided the conditions of the suspension are observed.*

A suspended sentence must only be made if the Court is satisfied it would be appropriate in the circumstances that the defendant be imprisoned for the term of imprisonment imposed[3]. As such, a defendant is ordinarily advised prior to a sentence hearing by his or her counsel that imprisonment for the offence is within the normal discretion of the sentencing Court, and it is open for the Court to fashion the sentence in a number of ways[4].

A suspended sentence, whether that is wholly suspended or partially suspended, does not carry the onerous conditions attached to a parole order or ICO. Counsel will often argue ad nauseam as to why a defendant ought be given the benefit of a suspended sentence as opposed to other forms of imprisonment orders. As is the normal case in a sentence hearing, submissions are made on behalf of the defendant outlining a myriad of mitigating factors unique to that defendant. These mitigating features are taken into account by the sentencing Court when deciding whether to opt for a suspended sentence.

The powers of a Court to deal with a defendant who has breached a suspended sentence are clearly outlined in the *Penalties and Sentences Act*[5]. The Court <u>must</u> order the defendant to serve the whole of the outstanding portion of the suspended sentence unless it finds it would be unjust to do so[6]. In coming to its decision as to whether to order the defendant serve the balance of the suspended sentence or otherwise, a Court must have regard to the following:

> *(a) whether the subsequent offence is trivial having regard to—*
>
> > *(i) the nature of the offence and the circumstances in which it was committed; and*

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1 *Elliott v Harris (No 2)* (1976) 13 SASR 516; *DPP (Cth) v Carter* [1998] 1 VR 601; *Sweeney v Corporate Security Group* (2003) 86 SASR 324.

2 *Reilly v The Queen* [2010] VSCA 278 (22 October 2010), [36]; *DPP (Cth) v Carter* [1998] 1 VR 601, 607–608; *DPP v Buhagiar and Heathcote* [1998] 4 VR 540, 547.

3 *Penalties and Sentences Act 1992* (Qld) s144(4).

4 Including partial or wholly suspended, immediate parole or parole after serving a period of actual custody etc.

5 *1992* (Qld) ss146-148.

6 *Penalties and Sentences Act 1992* (Qld) s147(2).

> *(ii) the proportion between the culpability of the offender for the subsequent offence and the consequence of activating the whole of the suspended imprisonment; and*
>
> *(iii) the antecedents and any criminal history of the offender; and*
>
> *(iv) the prevalence of the original and subsequent offences; and*
>
> *(v) anything that satisfies the court that the prisoner has made a genuine effort at rehabilitation since the original sentence was imposed, including, for example—*
>
> a. *the relative length of any period of good behaviour during the operational period; and*
> b. *community service performed; and*
> c. *fines, compensation or restitution paid; and*
> d. *anything mentioned in a pre-sentence report; and*
>
> *(vi) the degree to which the offender has reverted to criminal conduct of any kind; and*
>
> *(vii) the motivation for the subsequent offence; and*
>
> > *(a) the seriousness of the original offence, including any physical or emotional harm done to a victim and any damage, injury or loss caused by the offender; and*
> > *(b) any special circumstance arising since the original sentence was imposed that makes it unjust to impose the whole of the term of suspended imprisonment*[7]*.*

<u>Potential issues with lower Court dealing with suspended sentence ordered by Higher Court</u>

In order to properly come to its decision, a Court dealing with a breach of suspended sentence is often provided with the transcript of the original sentence in order to be availed of all of the factors placed before the original sentencing Court which led to the imposition of the suspended sentence. It is most uncommon for this material to be available at the time of the sentencing for the breaching offence. It would be dangerous to allow a lower Court to deal with a suspended sentence ordered by a higher Court without this material being available and may lead that Court into an appealable error.

Further, the Courts each have jurisdictional limits on what kinds of offences they can deal with. If a lower Court were allowed to deal with the breach of a suspended sentence ordered by a higher Court they would then be required to assess the seriousness of the original offence in circumstances where they are not ordinarily required to sentence that particular offence. Again, this may lead the lower Court into an appealable error.

<u>Circumstances where it would be beneficial to have lower Court dealing with suspended sentence ordered by Higher Court</u>

In circumstances where the breaching offence is so objectively trivial that it is accepted the higher Court would extend the operational period by a nominal amount then it may be beneficial to allow a lower Court to deal with the breach. One example may be where a

[7] *Penalties and Sentences Act 1992* (Qld) s147(3).

Magistrates Court is dealing with an offender for an evade fare charge[8] which breaches a District Court sentence for armed robbery. Providing the transcript of the proceedings in the higher Court is available, and the defendant consents, it would be cost and time effective to have the matter dealt with in the lower Court.

Recommendation

For the reasons outlined above it is recommended a lower Court only be given the discretionary power to deal with a suspended sentence of a higher Court in limited circumstances. Those circumstances would include:

- Where the transcript of proceedings for the higher Court was available;
- The breaching offence is accepted to be objectively trivial such that the likely outcome will be an extension of the operational period;
- The defendant elects to have the matter finalised in the lower Court; and
- If a Magistrate or Judge in the lower Court forms the view the likely penalty for the breach of suspended sentence will not be the extension of the operational period the matter is committed to the higher Court.

Question 9: Combined Suspended Sentence / Community Based Order

9.1 Should greater flexibility be introduced to allow a court:

(a)to make a probation order in addition to a suspended sentence for a single offence, and/or

(b) to make a community service order in addition to a suspended sentence for a single offence; or

(c) as an alternative to (a) and (b), to make a CCO in addition to a suspended sentence for a single offence?

The Society supports greater flexibility in sentencing options, and supports the principle that judicial officers should have a wide discretion to fashion sentences appropriate to the justice of each particular case. Accordingly, we would welcome reforms to allow a probation order to be made concurrently with a suspended sentence of imprisonment for a single offence. We would also welcome the possibility of combining a suspended sentence with an order for community service. That would provide for an additional level of immediate punishment, combined with the deterrent effect of a suspended sentence.

For the same reasons, if a CCO were introduced, we would support a discretion to combine it with a suspended sentence. Community based orders are intended to be an alternative to imprisonment. The cases which would call for these combinations might become rare or common in practice, but that is no reason to fetter the discretion to combine penalties in an appropriate case.

[8] *Transport Operations (Passenger Transport) Act* 1995 (Qld) s143AC

9.2 Under this form of order, should a failure to comply with the conditions of the community based order be dealt with under Part 7, Division 2 of the Penalties and Sentences Act 1992 (Qld) (Contravention of community based orders) or an equivalent provision?

Where combination orders have been imposed for a single offence, a breach of the community based order should continue to be dealt with under Part 7, Division 2 of the Act or an equivalent procedure. That is, a breach of the community based part of the order should not be a breach of the suspended sentence. It is a useful distinction to maintain, between what might be minor non-compliance, and a return to offending in a way that could incur imprisonment.

Maintaining this distinction will relieve the courts, and especially the District and Supreme Courts, of un-necessary work hearing allegations of minor non-compliance. That saving of work could be enhanced by an amendment to s.124(4) to say more explicitly that the Magistrates Court has a discretion not to commit a person to the higher court. In the case of major non-compliance with a community based order, the court can always re-sentence the offender, and one option available is to rescind the suspended sentence and impose a term of immediate imprisonment (s.125(4)(a) and s.126(4)).

9.3 Should the maximum period the person is subject to conditions be limited in some way? For example, should the term of the probation order or CCO be required to be no longer than the operational period of the order, provided the operational period does not exceed 3 years?

It should be a matter for the judge's discretion how long the term of the community based order should be. There is no reason in principle why it should not be longer than the operational period of the suspended sentence. There is no need to limit the maximum period the person may be subject to the conditions.

Question 10: Setting of Parole Release Date

How should the anomaly identified by the Court of Appeal in R v Sabine [2019] QCA 36 (18 February 2019) be addressed?

The difficulties identified in *R v Sabine* in relation to the anomaly between different Courts setting (in that case) the same parole release date, and how that impacts upon an appeal from one sentence but not the other, is a perplexing one.

As a matter of practicality, such a practice would occur on a daily basis; that is, the setting of the same parole release date in the Magistrates Court for sentences imposed with reference to sentences imposed in higher jurisdictions. Such an approach gives the defendant and corrective services certainty with respect of the sentence they are imposing.

The issue arises where a higher Court imposes a sentence with a parole release date, then a lower Court sentences on different charges and sets the same (or another) parole release date. Then, the sentence from the higher Court is appealed, but not the lower Court. It means that the appellate Court, which was the Court of Appeal in *Sabine*, would be constrained by virtue of the relevant sections of the *Penalties and Sentences Act* from setting an earlier parole release date should they feel it was otherwise warranted. A perplexing conundrum with no easy answer.

Paragraph 53 of the Judgement posits two potential solutions. The second solution it to permit the subsequent sentencing Court to set a parole release date at the limit of the term it imposes on the basis that date does not cancel the later date set by the previous Court. Such a solution would be problematic to legislate for, would be confusing, and would likely create many further issues.

The first solution is that a subsequent court sentencing an offender to a lesser period is not required to set a parole release date. That has some potential attractiveness but would need careful drafting so as not to constrain the subsequent Court.

For instance, to simply specify that the subsequent Court not be required to set a parole release date may constrain that Court from delaying the parole release date in circumstances where it would be appropriate to do so.

Instead, there could be a discretion as to whether to set a new parole release date. The legislation would need very, very careful wording, but one potential solution is to legislate that if a subsequent Court is of the view that the current parole release date should not be disturbed, then they are not required to set a new one. If the subsequent Court is of the view that a release on parole should be on a date after the current parole release date, then they must do so subject to the usual provisions regarding release dates.

Such a solution could be workable but also has the potential to be unwieldy and very complex.

Alternatively, the *PSA* could be amended to include that if a subsequent Court sentences an offender to a current parole release date that remains unchanged, then the initial parole release date given by the initial Court remains in force.

Neither solution is particularly simple and both would require very intricate drafting. It will almost certainly be a work in progress.

Question 11: Court Powers Where Offence Committed While Offender on Parole (CSA, ss209, 211, 215 and PSA, s160B)

11.1 Do the provisions relating to the powers of a court where there is further offending while an offender is on court ordered parole, such as sections 209, 211, 215 of the Corrective Services Act 2006 (Qld) and section 160B of the Penalties and Sentences Act 1992 (Qld), require amendment? What changes would you suggest be considered?

The *PSA* provisions regarding the Court's powers where an offender on parole commits further offences are confusing, occasionally contradictory and lack clarity.

QLS supports the very thorough analysis of these matters outlined in the QSAC Policy Issues Paper 5 – Court Ordered Parole.

QLS supports a broad and flexible approach to sentencing that preserves judicial discretion and considers that many of the issues will be addressed by enabling the courts to have a discretion to set a parole release date where the sentence is for more than three years' imprisonment, including for sexual offences.

11.2 Should section 209 of the Corrective Services Act 2006 (Qld) be amended so that if a court ordered parole order would, on the current provisions, be cancelled automatically by a new sentence of imprisonment, the sentencing court has a discretion to again set a parole release date if it considers court ordered parole is still appropriate?

Yes. This would enable a sentencing court to properly take into account a guilty plea whilst fashioning appropriate periods for the offending custody and under supervision. It would also enable more flexibility and accuracy in terms of giving effect to the totality principle.

Question 12: Sentence Calculation

Are there any particular sections of the Penalties and Sentences Act 1992 (Qld) or Corrective Services Act 2006 (Qld) that make the sentencing calculation process in Queensland unnecessarily complex? If so, how would you recommend the current level of complexity be remedied?

The Society submits that the determination of what pre-sentence custody is declarable can be unnecessarily complex. Questions 13.1 and 13.2 suggest options which may address the issue of complexity.

The Society would support a more simplified approach which could be based upon the regime which exists in the youth justice jurisdiction. The current youth justice approach (see s.218 of the Youth Justice Act) allows for any period of time for which a child was held in custody pending a proceeding for an offence to be counted as part of the period of detention that is served in a detention centre or corrective services facility. This calculation is determined administratively by youth justice without the need for a declaration. This option may be worth considering.

Question 13: Time in pre-sentence custody which is declarable

13.1 Should section 159A(1) of the Penalties and Sentences Act 1992 (Qld) be amended to allow the court an ability to declare pre-sentence custody in circumstances where this is currently not permitted (e.g. by removing the words 'for no other reason')?

The words 'for no other reason' imposes constraints upon courts in applying their sentencing discretion and is most often apparent where time is not declarable because of other outstanding offences or where an existing parole order is cancelled because of the commission of the offences.

In circumstances where time is not declarable because of outstanding offences, the restriction of 'for no other reason' can be addressed by a sentencing court taking in to account that time[9]. However, there is no obligation on the court to do so. When a court does take in to account non-declarable time it is then tasked with constructing a sentence that may not reflect the true intention of the court and has the potential to create artificiality in sentencing i.e. by reducing the head sentence that would have otherwise been imposed or by reducing the time required to be served. This also places an onus on the sentencing court to make clear how and to what

[9] *R v Fabre* [2008] QCA 386.

extent it has been considered. Adopting this course also has the potential to negatively impact upon the principle of general deterrence and public perception of sentences in circumstances where the public may only be aware of the end result and not the reasoning behind the sentence. Neither of these options are available in relation to offences for which mandatory sentencing applies.

Where the time served in pre-sentence custody is not declarable because of a cancellation of an existing parole order, it should also be taken in to account by the sentencing court[10] but again there is no requirement for this to occur. When it is taken in to account it is usually done so when formulating the global sentence, adding complexity to the sentencing process.

The removal of the words ‘for no other reason’ would allow sentencing courts the proper use of their sentencing discretion and result in less ambiguity in the exercise of that discretion.

Other Australian jurisdictions address the issue of non-declarable time by ‘backdating’ the start of the sentence. This is particularly pragmatic when mandatory sentencing applies however does not necessarily address the ambiguity of non-declarable time because of other outstanding offences.

Removal of the words ‘for no other reason’ would alleviate the above complexities and provide a transparent and consistent approach in sentences comprising otherwise non-declarable time.

13.2 Should section 159A(4)(b) be similarly amended, or greater clarity provided as to its application? Are there risks regarding unintended consequences if such an amendment was made?

The main risk of an unintended consequence in removing the words ‘for no other reason’ in *section 159A (4)* as opposed to *section 159A(1)* is that *section 159A(1)* prescribes that time in pre-sentence custody must be declared *unless the sentencing court otherwise orders* (emphasis added). *Section 159A(4)* does not contain the same sentencing discretion.

The practical implication of this is that if the words ‘for no other reason’ were removed from *section 159A(4)* as it is currently drafted and a person were in custody for a number of offences and, for instance, a parole sanction then the pre-sentence custody time must be declared for the offences and there is no discretion for the sentencing court not to declare that time and have it attributable to the parole sentence.

This can be rectified by the inclusion in *section 159A(4)* of the words ‘unless the sentencing court otherwise orders’ to reflect the same intention prescribed in *section 159A(1)*.

Question 14: Availability of Parole for Short Sentences of Imprisonment

The Society supports, as a general sentencing principle, that judicial officers should have the flexibility and discretion when sentencing a defendant in relation to a parole recommendation.

[10] *R v Leighton* [2014] QCA 169.

14.1 Should parole for short sentences of imprisonment of six months or less be abolished, meaning the sentence would need to be served in full, unless suspended in whole or in part?

It is acknowledged that there are currently significant issues in the administration of parole orders in short sentences. These issues include a lack of resources in terms of linking people quickly to supervision, and the availability of effective interventions given the short timeframes. The statistics (Parole Board of Queensland) suggest that parole orders in short sentences are not effective for many offenders as they are the subject of return to custody orders. In relation to parole eligibility orders, it appears that there is the issue of delay between when an individual applies for parole and when the application is finally considered by the Board.

It is noted that there is consideration for the introduction of a possibly more resource intensive, longer forms of community based orders. Such sentencing options have features which may be viewed positively, however, it is important that they are properly resourced. Court ordered parole, in particular with short sentences, may be over utilised at the expense of alternatives such as suspended sentences. Under a court ordered parole breach situation, the consequences for people who are breached are more immediate as compared with other orders which require a court to determine what should occur.

There is a concern that if parole for short sentences is abolished, this would reduce the sentencing options available for offenders who would ordinarily attract this type of sentence. Whilst the Courts would perhaps still be able to impose other community based supervision orders, or a structured CCO, each of these options requires resourcing. However, from an offenders perspective, a breach would not immediately result in a return to custody for non-compliance.

The Society supports the availability of a wide range of sentencing options for the Courts. It is submitted that short terms of imprisonment with parole is but another option open to the Courts discretion when imposing a sentence. The limitations with respect to imposing short periods of imprisonment with parole is not necessarily related to the legislation, but the limitations of resourcing and administering such orders. If the funding is not likely to improve the management of such orders, it is submitted that legislative amendment for further investigation of parole breaches in the form of a report or allowing further scope for cautions or warnings to be imposed may be of use rather than removing the option entirely.

14.2 If a court's ability to set a parole release or eligibility date for short sentences of six months or less is abolished, should there be any recognised exceptions. For example, should this apply:

(a) to activation of a suspended term of imprisonment on breach by reoffending?

No.

(b) if an offender has an existing parole date and reoffends while on parole?

No

14.3 What might some of the risks of the above reforms be?

By their very nature, breach of parole orders are not referred back to the original sentencing court for re-sentencing proceedings. It is submitted that abolishing parole for short term periods of imprisonment will leave the Courts with fewer alternative sentencing orders. In the event that parole for short term periods of imprisonment are abolished, the increased use of remaining sentencing options may well see a larger number of breach matters returned to the Court which are experiencing higher volumes of lodgements across all jurisdictions.

Those who would ordinarily be entitled to release on parole would otherwise be left to serve the entire period in custody and released at their full time date leaving more people in jail for longer and with no supervision upon release. Those on suspended sentences who might have warranted supervision through parole due to a combination of their criminal history and the nature of their offending, will have a rehabilitative sentencing option removed. It is submitted that the cost of properly administering these parole orders for short terms of imprisonment will be transferred to other agencies within the criminal justice system should they be abolished.

15. Pre-Sentence Reports

Comment is sought as to whether amendments ought to be made to the current legislative framework concerning the preparation of pre-sentence reports. Namely, should pre-sentence reports or assessment reports be mandatory for some types of orders or conditions and if so, for which conditions or orders?

<u>Current Position</u>

The current position in Queensland is that a court may order the chief executive to prepare a pre-sentence report for the court.[11] The report is taken to be evidence of the matters contained therein. Objection to the evidence contained in the report on the ground that it is hearsay is not permitted.[12]

There is currently no guidance contained within the legislative framework as to the purpose for which the pre-sentence report is prepared, or what information it should contain.[13] Reports are prepared over a short time frame and with reference to limited information.

Mandating the preparation of reports in certain circumstances raises many issues, some of which are beyond the scope of this review (such as ensuring sufficient funding for Queensland Corrective Services). To mandate the production of reports prior to imposing a particular order or condition may have unintended, and undesirable, consequences including:

- Restricting the availability and/or appeal of community based sentencing orders in regional or remote jurisdictions where reports are unavailable difficult to obtain;
- Placing further pressure on already heavily burdened Queensland Corrective Services staff, resulting in reports of varying levels of detail, usefulness and quality;
- Leading a court into error in exercising its judgment in relation to the appropriate sentencing order for a particular offender. For example, where reports contain limited

[11] Section 344, *Corrective Services Act* 2006 (Qld)
[12] *Ibid* s 344(10)
[13] Save for the reference to stating the person's criminal or traffic history contained in section 344(2) of the *Corrective Services Act* 2006.

or inaccurate information such that a court is not informed of all of the relevant circumstances of the offender; and

- Causing delays in the finalisation of court matters for both offenders and victims.

Pre-sentence reports should not be mandatory for any type of order or condition. The current framework provides sufficient mechanisms to ensure the court is appropriately informed when passing sentence, and community based orders can be appropriately tailored to an offender's individual circumstances.

The offender's legal representative is duty bound to assist the court in the administration of justice.[14] Compliance with this duty imposes a requirement on an offender's legal representative to elicit information about the offender's individual circumstances to assist the court in imposing the most appropriate sentence.

Once sentence is passed, Queensland Corrective Services can impose conditions upon offenders who are placed on community-based orders by a court.[15] Detailed information about the antecedents, needs and capacity of an offender should be obtained on their induction into a community-based order so that conditions are tailored to meet their individual needs over the course of the order.

Retaining the current position allows a court the discretion to order a pre-sentence report where, notwithstanding the assistance provided by the offender's representative, the court considers a report is appropriate to assist the court in imposing an appropriate sentence.

15.1 Should pre-sentence reports or assessment reports be mandatory for some types of orders or conditions?

No. The current system, as pointed out in the options paper, allows for the judicial officer in adult matters to consider if such a process is needed or a report required. If they are of the view that there is not sufficient information available to determine the appropriate course then the discretion is available to order such a report.

As discussed in the options paper, the creation of mandatory reports for some orders or conditions made create a necessary delay. There is also the costs issues and the potential to create conflict in situations where reports have already been provided but are opposite to any pre-sentence report provided.

There must be some responsibility placed on the profession to consider whether such a report is needed and either provide one to the Court or, if a benefit is to be gained, urge the judicial officer to obtain such a report. To simply make it mandatory makes it for a system that in some ways negates forensic consideration of the sentencing option by representatives and essentially hands control to report writers.

The judicial discretion to obtain a report should remain to enable the choice as to whether further information is needed or the Court can make a decision on what has been placed before it. The imposition of mandatory reports, unless some of quality control and objectivity

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[14] Rule 3, Australian Solicitors Conduct Rules 2012.

[15] For parole, section 200 of the *Corrective Services Act* 2006 (Qld). For probation, see sections 93 and 94 of the *Penalties and Sentences Act* (Qld). For community service orders, see section 103 of the *Penalties and Sentences Act* (Qld). For intensive correction orders, see section 114 of the *Penalties and Sentences Act* (Qld).

can be assured, may not provide and more than an opinion which may cause more dissent or delay in proceedings if parties seek to rebut that which is provided.

Even if the CCO option was to be embraced as a sentence, the option of obtaining a report is open to the Court in order to ensure assistance in reaching the appropriate sentence. This, in conjunction with the judicial officer's experience and the assistance of respective representation for the defendant and the Crown, would provide a forum in which a sentence reflective of the conduct and the community expectation could be fashioned.

The options paper highlights the importance of judicial officers, in a time poor system, ensuring that they are properly informed before passing sentence exists in Queensland. Mandating the creation of reports that may be derived from a further stretched resource in probation and parole officers, seems unlikely to ensure that the judicial officers are consistently better informed.

Rather than requiring the production of pre-sentence reports in particular circumstances, the focus should be on improving the quality of reports to ensure they achieve their purpose when required.

Clearly, reports containing the level of detail as those produced following an offender's participation in bail programs like Court Link and QMERIT would be ideal. However, such detailed reports present the obvious obstacle of practicality. It may be more beneficial to enhance the legislative framework by including what information is, or can be, included in a pre-sentence report.

Amending section 344 of the *Corrective Services* Act to include similar guidance as is contained within the *Victorian Sentencing Act* 1991[16] would serve to focus the attention of the report writer on gathering the information of most utility to a sentencing court. Such an amendment could have a three-pronged effect. It may:

- Go some way to addressing the issue of a 'two tiered system of reports' for defendants with limited means by ensuring the court is presented with the most relevant information;
- Serve to create some consistency in terms of the content and quality of pre-sentence reports by encouraging Queensland Corrective Services to adopt a uniform approach; and
- Ensure that the limited time and resources of Queensland Corrective Services staff are used most effectively and efficiently to produce the desired result.

While outside the topic of legislative reform, the extension of availability of dedicated court advisory services at a Magistrates Court level would be complimentary to the inclusion of guidance in the content of pre-sentence reports. Courts desirous of short, oral reports from Queensland Corrective Services may utilise such services to obtain specific information in a short time frame, thereby avoiding the cost and delay associated with written reports. Accessibility issues in regional courts may be overcome by utilising telephone and video link facilities to increase the availability of such services.

[16] Section 8B, *Victorian Sentencing Act* 1991 (Vic).

Question 16 Operation of Sections 651 and 561 Criminal Code (Qld) & Section 189 Penalties and Sentences Act 1992 (Qld)

16.1 Do you agree with the points raised about sections 651 and 561 of the Criminal Code (Qld) and section 189 Penalties and Sentences Act 1992 (Qld)?

Yes the current processes regarding s651 applications are unnecessarily complex. This is particularly so as this section is often utilised by persons in custody concerned about the Pre-sentence custody declaration being applicable to all matters.

Yes it is agreed that s561 of the Criminal Code and s189 of the Penalties and Sentences Act are now seldomly utilised given the implementation of the Registry Committal process and the limited scope for cross-examination at committal stage.

16.2 What improvements could be made to any of these provisions and their associated systems?

S651 provides the court with the power to deal with a summary offence in conjunction with an indictable offence. The court must not hear and decide the summary offence unless –

- The court considers it appropriate to do so; and
- The accused person is represented by a legal practitioner; and
- The Crown and the accused consent to the court so doing; and
- The accused person states his or her intention to enter a plea of guilty to the charge; and
- The bench charge sheet is before the court.

The restriction on self-represented persons having access to this process seems unreasonable although it is unlikely to be utilised by this group often. It is not clear why they are not able to rely on this section if they have successfully complied with the requirements in s652.

S652 deals with the proceedings to transmit a summary offence. This process involves the person making written application to the Magistrates Court to transmit the relevant bench charge sheet to the registrar of the District/Supreme Court. This application must be signed by the Applicant and a declaration by that person under the *Oaths Act 1867*. It must also outline details of the charge to be transmitted, the intention to plead guilty and confirmation that it is only being transferred to plead guilty.

The process for s651 applications would be far less laborious if there was not the requirement for a Justice of the Peace/Solicitor/Commissioner of Declarations to witness the Applicants signature to transfer the summary offences to the higher jurisdiction. This is not a condition for the Application for Consent that is required to be signed firstly by defence and then by the DPP in accordance with their guidelines. Removing the requirement for the Applicant to make a declaration would streamline the process significantly making it far easier for a person in custody (or even one on bail) as locating a JP/Solicitor to witness this document can be difficult.

Further, it is agreed that the practice of requiring Consent of the Crown to transfer these summary offences is unnecessary. All that should be required is for the solicitor to assess the matter and state in the application precisely how the summary matter is connected to the indictable matters. The process would then be very similar to the requirement for a Registry Committal application which is completed and signed by the solicitor only. This would in turn see a reduction on matters needing to be adjourned for non-compliance with the Practice Direction for the filing of this material which is 14 days prior to the sentence.

There was also concern by the stakeholders that Commonwealth offences and indictable matters under s552B (indictable matter that must be heard and decided summarily unless defendant elects for jury trial) could not be transferred. S651 seems to cover this situation as the section states, " *the court may hear and decide summarily any charge of a summary offence*". Commonwealth offences should be included in this process.

Question 17 Sentencing Disposition – Convicted, Not Further Punished

17.1 Should the sentencing disposition of convicting and not further punishing an offender for an offence be legislated?

17.2 What aspects of the order would need to be included in a definition?

We agree with what is said in the Options Paper (at p.286 p.12.2) that the sentencing order that an offender be 'convicted and not further punished' is a staple of Queensland sentencing options. It is particularly appropriate in cases where no punishment can be imposed – for example, where double punishment is prohibited by s.16 of the *Criminal Code 1899*, or where no additional penalty should be imposed by a later court for reasons of totality: *Mill v The Queen* (1988) 166 CLR 59.

The order is dissimilar to an order under section 19 of the *Penalties and Sentences Act 1992*. Not only is a Section 19 order limited to cases where the conviction is not recorded (s.16) but it is also arguable that an offender released under Section 19 has not been 'convicted' at all. Section 19(1)(b)(ii) for example, provides for the offender to be summoned to return to court to appear for both conviction and sentence.

We see no reason for a specific legislative provision to provide for the sentencing order that an offender can be convicted and not further punished. If it were to be expressly included in the *Penalties and Sentences Act* then such a provision ought to be drafted as widely as possible, so as not in any way to fetter a court's discretion to make the order. The provision ought to provide expressly that the order may be made whether or not the court records the conviction.

Question 18: Ability of higher courts to deal with breach of a magistrates court CBO

Should the Penalties and Sentences Act 1992 (Qld) expressly permit the District Court and Supreme Court to deal with breach of a community based order imposed by a Magistrates Court?

Yes. There are indeed many instances where an offender with a community based order imposed by a Magistrates Court is prejudiced in the finalisation of their matters because of an inability to declare pre-sentence custody where that person has been on remand both for a breach of that order as well as for further charges which have necessarily proceeded on indictment. Whilst Courts do make attempts to ameliorate the impact of this, by taking into account otherwise non-declarable pre-sentence custody or by structuring a sentence to attempt avoid this, such should not be necessary and the superior courts are obviously capable of adequately addressing such matters, and should do so in circumstances where totality of sentence would be in issue generally as well as because of the potential shared pre-sentence custody issue.

Whilst the practical effect of such a power being introduced would indeed require vigilance on the part of the parties to such a matter in ensuring the superior court had before it the relevant complaint as well as information detailing the nature of the breach and compliance generally, the order itself and the charges the subject of the initial order, such should not be problematic given the parties should otherwise be in possession of this information and, as they presently do, account for resolution of it in the course of dealing with the offender's matters generally.

Given the DPP are instructed to appear on behalf of Corrective Services in breaches of superior court orders presently, there should be minimal real impact on either of those entities by this being facilitated.

Question 19: Power of lower courts to deal with higher court CBO breach

19.1 Should Magistrates Courts and the District Court have a discretionary power to deal with breach of a CBO imposed by a higher court?

Yes. With parameters in place, see below, it is desirable that in appropriate cases the Magistrates Court and District Court be empowered to deal with breaches of CBO's imposed by higher courts.

In simple terms, it will generally result in a swifter resolution of a matter if the Magistrates Court, in particular, but also the District Court, is able to deal with a breach of a CBO from a higher court. Committal proceedings, even when expedited, do always occasion some further delay.

Whilst in many cases this will not be problematic, there are cases where it may be – where, for example, a person is unable to obtain bail, possibly due to a poor history of prior offending, and hence they are remanded awaiting the resolution of a matter which might otherwise not actually require a term of imprisonment. Similar issues may arise where an offender is subject to parole as well as a CBO, where their parole might be suspended pending resolution of the breach albeit one based on a relatively trivial fresh offence or some degree of non-compliance with the order.

The present system whereby the lower court can admonish and discharge on a higher court CBO, but take no other action itself, creates a difficulty for the lower court in addressing a minor but not completely trivial breach. The court may feel torn between wanting not to unnecessarily delay resolution of the matter, particularly in the above cases, but where they want to take some action beyond simply admonishing.

19.2 If yes, should there be guidance as to the use of the discretion and what form should this take?

Yes. The UK model whereby a superior Court can, on passing sentence and making a CBO, make a declaration as to whether or not in the event of a breach this could be dealt with by a lower court is a neat way of addressing this – in that the court with appropriate jurisdiction to hear the matter at the outset, makes an informed decision about whether a lesser Court could adequately address the matter in the event of a breach of the order.

One disadvantage of that model though may be that such may have a tendency to weaken confidence in the courts orders by both an offender and the community generally. If the court in imposing the order immediately makes provision for it to be breached, it doesn't send a particularly strong message about the importance of compliance with it.

The Council's preferred model, where such can be referred to the DPP for them to consent or otherwise would be workable, provided such involved guidelines for when such consent should be forthcoming – considerations such as the relative seriousness or triviality of the breaching conduct, the seriousness of the original offending, whether the breach was constituted by re-offending or by non-compliance and the likely outcome in resolution of the breach (ie. is the person at risk of imposition of a penalty on re-sentence which extends beyond the scope of the court proposing to deal with the matter).

A final option would be that either party can seek to have such a matter dealt with by the Magistrates Court or District Court, and that the court then has power to do so subject to a section similar to Section 552D of the *Criminal Code Act* 1899. That is, the court must abstain from dealing with the matter if it is satisfied 'because of the nature or seriousness of the offence or any other relevant consideration the defendant, if convicted, may not be adequately punished'.

Question 20: Magistrates Courts' power to deal with breach of a CBO imposed by a Magistrates Court on own initiative

Should section 124 of the Penalties and Sentences Act 1992 (Qld) be amended to allow a Magistrates Court to deal with a breach, by reoffending, of a CBO imposed by a Magistrates Court, without proceedings first having to be instituted under section 123?

Yes.

This is a sensible and practical measure to enable a Magistrates Court to deal with such and a breach of a CBO (from the same Court) by re-offending if it desirable to do so.

It is the case that totality of sentencing, if a breach is otherwise to be instituted, can complicate such breaches presently. But it is important that such a power be particularly confined.

The concern is that it should not be a situation where a person who is otherwise appropriately carrying on their order but for the re-offending (particularly re-offending of a different and perhaps trivial nature), should not inappropriately have to re-litigate the matter the subject of the CBO. The current protection of sorts for that is that such is only considered when Corrective Services assess both the breaching conduct and the person's conduct on the order and determine that such warrants breach action by a court, noting obviously that other lesser steps can also be taken – warnings, increase in reporting obligations, new referrals for supports and so on. A Magistrates Court obviously does not have such powers, if empowered to deal with the breach it's an all or nothing equation.

In that context it is important that such a power, if made, is discretionary in nature – not that the Magistrates Court must act on any such breach. Such should perhaps be only enlivened on application of either of the parties to ensure that this step is only in practice taken when it is appropriate to do so, and both parties should be able to be heard on that. Considerations of when it would be appropriate to do so would include, and should be provided legislatively:

Whether the breaching offence is of a like nature or otherwise;

- Whether the breaching offence is serious in nature or otherwise;
- What the offender's compliance with that order was;
- What, if any, further time remains on the CBO;
- Whether the defendant is legally represented – it would be particularly problematic if a defendant self-represented pleading to a minor charge only to then find themselves having to address these sorts of considerations.

There should be provision for the court to adjourn the proceedings, if necessary, to obtain further information concerning the offender's compliance with their order.

Extra questions

Intensive correction orders

Option 1: Retain ICOs in their current form 107

Option 2: Abolish ICOs as a sentencing option and replace with the CCO (Council preferred option as at options paper stage, connects to/read with the CCO option) 108

Option 3: Reform ICOs 109

QLS supports option 2.

Community correction orders

Option 1: Retain probation and community service orders with no or minor changes only 136

Option 2: Introduce a limited form of CCO, replacing probation and CSOs 136

Option 3: Introduce CCOs, replacing probation, community service orders and ICOs (Council preferred option as at options paper stage) 137

QLS supports option 3.

Court ordered parole (no preferred Council option as at options paper stage)

Option 1: No change to court ordered parole 239

Option 2: Reform court ordered parole to extend availability 240

Option 3: Reform court ordered parole to extend availability by removing cap 241

'Option 4': Dual discretion introduced under s 160B of the PSA that would allow courts to set either a parole release or parole eligibility date for sentences of three years or less, but retaining other criteria

QLS supports option 4.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy Manager, Binny De Saram by phone on (07) 3842 5895 or by email to b.desaram@qls.com.au.

Yours faithfully

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