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Queensland Sentencing Advisory Council
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By email: submissions@sentencingcouncil.qld.gov.au

Dear Chair

Assessing the impacts of domestic and family violence sentence reforms in Queensland

The Queensland Law Society (**the Society**) thanks the Queensland Sentencing Advisory Council (**Council**) for the opportunity to provide a submission in response to the Council's Consultation Paper – Assessing the impacts of domestic and family violence sentence reforms in Queensland. Our response to the questions posed in the consultation paper are set out below and have been prepared with the assistance of the Society's Criminal Law, Human Rights and Public Law and Domestic and Family Violence Committees.

We also take this opportunity to commend the Council for the significant work undertaken as part of this review and the way in which you have consulted with key stakeholders and the community. This thoughtful process as led to a comprehensive consultation paper.

Question 1 – Aggravating factor for domestic violence offences

(a) What has been the impact of current sentencing laws, which require a court in sentencing a person for a domestic violence offence to treat the fact that it is a domestic violence offence as aggravating, on court sentencing practices?
  (i) If you think the aggravating factor has changed court sentencing practices, in what specific ways have they changed?
  (ii) If you think it has not changed court sentencing practices, what are the potential reasons for this?
(b) What measures are important to assess the impact of this reform?
(c) What factors could be impacting the operation of this reform?
(d) Are there any other important considerations or research we should be aware of?

Legal practitioners have generally observed the aggravating factor being specifically raised in sentencing remarks in all court jurisdictions. In that respect, it is clear judicial officers are cognisant of the amendment and are specifically denouncing domestic violence offending. It is harder to assess, however, how the introduction of the aggravating factor has affected the severity of sentences imposed.

The Council have released research findings which indicate a general upward trend of imprisonment orders imposed in relation to contravention of domestic violence offences, but trends relating to domestic violence offending generally are yet to be released. It is important to consider the broader sentencing trends as specific contravention offences only capture a portion of domestic violence offences.

Whilst boarder statistics will be helpful in assessing the impacts of the amendments, limits will remain. Due to the balancing exercise inherent to every sentencing discretion and what is often described as an 'instinctive synthesis,' it is impossible to attribute with any certainty how each of the amendments might have contributed to any changes in trends. This is compounded by the aggravating factor being introduced alongside the increases of maximum penalties and other amendments relevant to the sentencing discretion.

It is worth noting that the common law in Queensland recognised domestic violence as an aggravating feature well before the 2016 amendments, such as in R v Fairbrother; ex Parte Attorney-General (Qld) [2005] QCA 105, which has been frequently referred to in sentencing remarks before and after the relevant amendments.

It is also worth noting that, even where it is not easily discernible that the domestic violence context of an offence increased the penalty, there is utility in that context being recorded in the person's criminal history as it aids the bench in identifying repeated domestic violence offending and sentence accordingly, in circumstances where the prosecutor may not be able to supply that history to the Court.

Question 2 – Increased penalties for contravention of a DVO

(a) What has been the impact of increased maximum penalties for contravention of a DVO on court sentencing practices?
  (i) If you think the increase to maximum penalties has changed court sentencing practices, in what specific ways have they changed?
  (ii) If you think the increase in maximum penalties has not changed court sentencing practices, what are the potential reasons for this?
(b) What measures are important to assess the impact of this reform?
(c) What factors could be impacting the operation of this reform?
(d) Are there any other important considerations or research we should be aware of?

The increase in the available maximum penalty and the application of the aggravating feature discussed above have operated together. Legal practitioners have generally observed an increase in the likelihood of a sentence of imprisonment being imposed for contravention offending where there is a history of similar or like offending. However, because the offence of contravention covers such a broad range of offending behaviour, it is difficult to discern trends as each case turns on its own merits.

In terms of assessing the impact of this reform, discerning those matters where a defendant has a history of contravention offending, identifying those matters where a defendant serves pre-sentence custody whether declared or not, identifying those matters where an election is made for the matter to be dealt with in the District Court and whether the contravention is elevated to the higher court because of associated offending would all be important features to assess the impact of this higher maximum penalty. In gathering data, it would be useful to understand the type of contravention the Court is sentencing for and in particular whether the contravention is said to amount to domestic violence; i.e. a contravention of a mandatory condition of a protection order or a behaviour that contravenes a specific condition for example, to not have particular

types of contact. If the contravention offence reflects behaviour involving actual violence, the operation of section 9(2A) of the PSA may impact the type of sentence the Court would otherwise impose.

Pre-sentence custody is raised in particular because of the impact of the show-cause position many defendants are placed in. A position which, given the test under the Bail Act, may not be able to be overcome for the purpose of a grant of bail. Pre-sentence custody has therefore played a number of different roles in sentence including to change the sentence one might otherwise receive because of the amount of time already served, the imposition of community-based orders where one might otherwise expect a sentence of imprisonment, or the imposition of shorter head sentences with longer operational periods to reflect that time on remand.

The exercise of sentencing involves balancing various features. In addition to the features identified above, where matters are dealt with by the Court and sentences attached to more serious, but otherwise not domestic violence, offending, may impact the true effect of this reform. This was acknowledged as a feature of the research brief prepared in May 2021. There are often matters where contraventions are dealt with along with other offences and global penalties are imposed which do not otherwise reflect what the Court might have imposed had that sentence stood by itself. This makes analysing the trends in this space a difficult task.

In respect of research to consider, it is noted that increases in maximum penalties for aggravated offending do not necessarily reflect the views of some victim-survivors who identify, particularly in the December 2024 report of the AIC, [1] the need for increased funding of education, behaviour change programs and counselling services. Rehabilitation programs specific to domestic violence are not available to remand prisoners. Time on remand, particularly given the change in the Bail Act, is a period of time which could result in intervention for repeated and violent DV offenders.

A further relevant issue observed by some members is that prosecutors are frequently not providing a notice to allege, as contemplated by s47(5) of the *Justices Act 1886*. In the absence of such a notice, the Court can take into account the offender's prior convictions for contravening domestic violence orders but those convictions cannot have the effect of increasing the applicable maximum penalty.

Question 3 – Aggravating factor and compatibility with human rights

Is the current aggravating factor – that says a court, when sentencing a person for a domestic violence offence, must treat the fact it is a domestic violence offence as aggravating (unless there are exceptional circumstances) – compatible with rights protected under the Human Rights Act 2019 (Qld) ('HRA') and relevant human rights instruments, such as the UN Convention on the Rights of Persons with Disabilities?

Specifically, is this requirement and other sentencing provisions in the PSA as these apply to the sentencing of domestic violence offences compatible with these rights?

If any part of how the aggravating factor works, or other sections of the PSA, is not compatible with human rights, what changes would improve compatibility?

The responsibility of States to protect people from domestic violence and recognise it as a human rights issue is well-documented. On the other hand, the provision as currently drafted makes it a presumption that the simple averment of the matter as a domestic violence offence

[1] https://www.aic.gov.au/sites/default/files/2024-12/crg_criminalisation_of_coercive_control_v9.pdf

is necessarily aggravating and effectively, places the onus on the defendant to displace that presumption by demonstrating "*exceptional circumstances*". Proportionality is a key principle in sentencing for compliance with human rights and there is an argument to be made that presumptions like that contained in s 9(10A) obfuscate this.

The key rights in respect of defendants here are recognition and equality before the law under s 15 of the HRA and right against arbitrary detention (ss 29(2)-(3) of the HRA). The relevant rights of victim-survivors set out on page 31 of the QSAC consultation paper.

An example of the issue with the presumption is in cases of misidentification of the "*true aggrieved*" or "*person most in need of protection*", resulting in criminal charges being laid against them. Even if they are guilty of the offence, the circumstances of the offending could constitute retaliation against their abusive partner/parent. Under the current provision, this person would then be required to displace the presumption under s 9(10A). Such a scenario may not fit within the concept of "*exceptional circumstances*" especially if the defendant has not necessarily experienced physical violence but rather coercive control and has not documented this through attending the police. They may not have access to adequate resources to provide their story/narrative.

Members of the Society's Human Rights and Public Law Committee suggest that the words "*it is not reasonable because of the exceptional circumstances of the case*" could be removed and replaced with either simply "*it is not reasonable in the circumstances of the case*" or "it *is unjust to do so*". This would centre the principle of proportionality in sentencing and recognise that an averment of an offence as a domestic violence offence in itself may not be an aggravating factor without the complete picture being presented. It would also still allow the court to recognise domestic violence as an aggravating factor where relevant.

Question 4 – Systematic disadvantage and cultural considerations

What key issues should the Council consider when reviewing changes in sentencing practices resulting from Queensland domestic violence sentencing reforms, particularly regarding their impact on:

(a) Aboriginal and Torres Strait Islander peoples;

(b) women and girls;

(c) people from other cultural backgrounds;

(d) people with disability or a mental illness

(e) LGBTQIA+ people; and

(f) people from other marginalised and vulnerable groups or communities?

There have been several amendments to s9 of the Penalties and Sentences Act 1992 (Qld) in light of the Hear Her Voice Reports and other advocacy regarding the experiences of Aboriginal and Torres Strait Islander peoples in the criminal justice system, which will have affected sentencing practices in Queensland for domestic violence offences.

For instance, section 9(2)(gb) and s9(2)(10B) were inserted in 2023. Section 9(2)(gb) requires the court to have regard to whether the offender is a victim of domestic violence and whether the commission of the offence is wholly or partly attributable to the domestic violence. S9(2)(10B) requires the court to treat as a mitigating factor the effect of domestic violence on the offender and the extent to which the commission of the offence is attributable to the effect

of violence (10B). In 2024, there were further amendments with the insertions of s9(2)(fa) and (fb), requiring the court to consider the hardship any sentence imposed would have on dependents and a child of the pregnancy, if pregnant. Section 9(2)(gb) was extended to include the offender's history of being abused or victimised. Relevant to Aboriginal and Torres Strait Islander peoples, section 9(2)(oa) was inserted to require the court to have regard to any cultural considerations, including the effect of systemic disadvantage and intergenerational trauma on the offender.

It would be difficult to assess at this point what impact, if any, those amendments have had on the sentencing practices in Queensland. It is hoped those amendments have highlighted to lawyers who practice in this area that they should obtain more fulsome antecedents and make specific submissions regarding those matters; however, it is very that is not the case, particularly for those appearing as duty lawyer or running busy legal aid practices with funding limitations. It can be difficult in the busy jurisdiction of the Magistrates Court to make submissions regarding traumatic events from an offender's background, particularly if they are having matters finalised in the callover court and are appearing for a relatively minor offence that will not result in a term of imprisonment. It would be the experience of most lawyers that offenders only disclose serious matters from their childhood or relationship when they are facing a significant sentence, or are already in custody, even when they have appeared before the court multiple times without disclosing those relevant factors to anyone

In contrast, it is also likely the public education around domestic violence and the public discourse in relation to high profile cases of domestic violence, have led to offenders considering their own experiences with domestic violence, whether they were the victims of it, or were exposed to it, and sharing that information with their lawyer so it can be raised in court. It would be fair to say there is a much more sophisticated understanding of domestic violence by a larger portion of the community now, than there was in 2016. Similarly to above, it would be very difficult to assess the impact this has had on sentencing practices, without reviewing the sentencing submissions and remarks made in each case.

It is unlikely a victim-survivor will gain any satisfaction from the sentencing process if the focus is on some of those factors outlined above and they may consider the offender is offering excuses for their behaviour, which is how it can be portrayed in the media at times. However, a person can be both a victim of domestic violence (directly or through exposure) and a preparator of it. These are important factors that cannot be overlooked, and it is for the sentencing court to balance those factors with the impact of the offending on the victim, to reach a sentence that is fair and just in the circumstances.

Question 5 – Anomalies and complexities

Are there any anomalies or complexities that affect the sentencing of domestic violence offences? If yes, what are some potential solutions?

Sentencing offenders for domestic violence offences requires the navigation of significant complexities and anomalies due to the unique dynamics of such cases, legislative constraints, and the diverse circumstances of the matters and the offenders.

Sentencing courts must balance potentially competing objectives such as punishment, rehabilitation, deterrence, denunciation and protection of the community, while also contending with challenges such as offenders who are themselves victims, the infinite variability of sentencing factual circumstances, and at times rigid statutory requirements. These issues

underscore the desirability of broad judicial discretion in the sentencing process to achieve just outcomes.

Offenders as victims of domestic violence

A significant difficulty arises when individuals charged with domestic violence offences are themselves victims of abuse. It is uncontroversial that a high proportion of those sentenced for domestic violences offences are themselves victims of similar offending, often leading to cycles of trauma-driven behaviour.

Domestic violence survivors may face criminal charges for acts committed in self-defence or under coercive control, such as retaliatory violence or breaching protection orders after being manipulated by a partner or former partner. Accordingly, courts should be empowered to holistically evaluate the context of family and intimate relationships, and interplay between victimisation and offending, in order to reach a sentence that is fair and just in the circumstances.

Infinite variability of circumstances

The offending conduct which precipitates the judicial sentencing process in infinitely broad. This is true for all facets of criminal law, including domestic and family violence offending. Such offending may involve psychological abuse, and/or severe physical violence, each requiring tailored sentencing responses. Common aggravating factors may include:

- Breaches of domestic violence orders, which courts (appropriately so) treat as undermining judicial authority and victim safety.
- Use of weapons or violence in the presence of children, which escalates harm and may justify heavier penalties.
- Patterns of coercive control, which may not align with traditional criminal charges but profoundly affect victims.

Conversely, mitigating factors such as remorse, rehabilitation efforts, or socioeconomic disadvantage (e.g., homelessness stemming from abuse) demand a nuanced approach. The absence of a one-size-fits-all approach necessitates judicial flexibility to weigh these factors with appropriate proportionally.

Unfortunately, in recent times the conversations, at times precipitated by sensationalist media reports regarding alleged offending, have resulted in enhanced politicisation of parliament's approach to criminal law and sentencing, rather than an informed and evidence-based approach.

Proposed solution: Broad sentencing discretion

Domestic violence sentencing is an incredibly complex process. The courts have recognised the need to avoid rigidity through the process of instinctive synthesis employed by sentencing courts. As criminal law and sentencing becomes more politicised however, society risks losing the strength of our sentencing regime – namely the flexibility generally vested in the sentencing judge or magistrate. In lieu, there is a trend towards a more rigid "tough on crime" approach, loaded with mandatory sentencing requirements.

The optimal approach to complexities and anomalies experienced in sentencing for domestic violence offending lies in empowering courts with broad discretion to evaluate all relevant factors. This permits, for example, a proper assessment and allowance of:

- Victim-offender dynamics: assessing whether the offender's actions stemmed from trauma, self-defence, or systemic disadvantage.
- Proportionality: balancing the seriousness of conduct (e.g., premeditated violence vs. impulsive retaliation) in assessing the offender's moral culpability.
- The prospects of rehabilitation: particularly to prioritise therapeutic interventions for offenders with mental health or substance abuse issues linked to their offending.

Vesting courts with broad discretion, guided by principles of proportionality, transparency, and trauma-informed practice, facilitates sentencing outcomes that are both just and contextually appropriate. By prioritising flexibility over uniformity, courts can better address the root causes of offending, promote rehabilitation, protect the community, and uphold public confidence in the justice system.

Question 6 – Other issues

Are there any other issues relevant to this review you would like to raise with us?

Risks of seeing 'victim satisfaction' with the sentencing process

The consultation paper reads as though there will be a heavy focus on whether the process is achieving 'victim satisfaction' with the sentencing process. The experience of victims in the criminal justice system is extraordinarily broad and depends upon a myriad of factors such as the crime they have been victim of, their relationship to the perpetrator, the manner in which police/prosecutors dealt with the victim, whether the defendant pleaded guilty or went to trial, and in the event of the latter, the rigour and extent of cross examination. There are only a handful of offences which can carry with them the level of complexity, emotion and acrimony that comes with a relationship breakdown. Against such a complex, emotionally charged backdrop, it must be assumed that victim satisfaction in the sentencing process would be low no matter what the penalty imposed, and extreme caution ought to be exercised when attempting to use victim satisfaction as a measure of effectiveness of the sentencing process.

The way victim satisfaction is measured may also skew the analysis, depending on how it is assessed. There are countless examples of victims listed as an aggrieved person in a protection order they neither sought nor supported. There are countless more examples of respondents to those orders being charged with contravening them because an aggrieved sought out or initiated contact with them. A victim in these scenarios may be incredibly dissatisfied with the sentencing process, not because the punishment was insufficient, but because the person was prosecuted at all.

There are well-established, long-standing principles which rightly demand that the sentencing process be objective, balanced and free from emotion. Relying upon victim satisfaction as a measure of effectiveness for sentencing ignores important sentencing considerations, such as rehabilitation and the requirement that punishment be just in all the circumstances.

Circumstances of making of domestic violence order

In recent years, there has been a significant increase in the number of protection order applications made both privately and brought by police. This has been coupled with a significant decrease in police autonomy of decision making, with the preference almost always being that the Courts determine the application or the breach, rather than have police withdraw an application or charge or consent to a variation of conditions, even where neither party is supportive of the order or its terms. There must be scope in the sentencing process for breaches

of orders, often made by consent without admission or in the absence of a respondent, to consider the circumstances in which an order was made when sentencing for a breach.

Risk of tying sentencing considerations and/or penalties to the fact that an offence is a Domestic Violence Offence rather than tailoring a sentence to the facts of each case

There is a real and significant risk of injustice arising if legislative change is invoked which ties the Court to a particular sentencing outcome solely because the offence is a 'domestic violence offence'. The intuitive synthesis of sentencing ought to be conducted based upon the facts of each individual case – it cannot be a label applied to all offences falling within a particular category.

This issue is particularly important because the application of the label 'domestic violence offence' is extraordinarily broad. It may apply to any offence, including even traffic offences, where the act done, or omission made which constitutes the offence is also domestic violence or associated domestic violence. It captures an immeasurable number of scenarios that demand flexibility in the sentencing process. Just a few examples include:

- Sentencing one party for a trivial breach or standalone offence in a matter where there are cross DV orders in place, during highly contentious and acrimonious family court proceedings and where both parties are equally combative and litigious;
- Sentencing a lifelong victim of DV who finally lashes out at their abuser;
- Sentencing a victim of DV who has been misidentified as a respondent in a protection order, which is subsequently breached;
- Sentencing vulnerable persons, with mental health issues, intellectual impairments or substance abuse issues who clash with family members attempting to enforce treatment or care or who threaten self harm.

In matters involving domestic violence, the demand for a sentencing Court to retain the utmost flexibility to fashion an appropriate sentence is stronger than ever.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

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Genevieve Dee
President