

QSAC Reference: 611274/1; 7328383

15 May 2025

The Honourable Justice Ann Lyons AM
Chair
Queensland Sentencing Advisory Council
GPO Box 2360
BRISBANE QLD 4001

Via email: submissions@sentencingcouncil.qld.gov.au

Dear Justice Lyons

Thank you for the opportunity to provide a submission to the Queensland Sentencing Advisory Council (QSAC) consultation paper, *Assessing the impacts of domestic and family violence sentencing reforms in Queensland*, as part of the review of sentencing for domestic and family violence (DFV) offences.

Relevant to the review, the Office of the Public Guardian (OPG) is an independent statutory office performing functions under the *Public Guardian Act 2014* and *Guardianship and Administration Act 2000* to promote and protect the rights and interests of adults with impaired decision-making capacity through the provision of decision-making services. The Public Guardian may be appointed by the Queensland Civil and Administrative Tribunal (QCAT) or the Supreme Court as a last resort to make substitute decisions in relation to an adult's personal matters, which includes legal matters not relating to finance or property. An adult with decision-making capacity may also appoint the Public Guardian as their attorney for personal matters under an enduring power of attorney.

OPG performs a crucial yet distinct role to that of our clients' legal representatives. OPG guardians help clients to understand legal procedures, ensure they have access to justice, and make decisions to instruct legal representatives about the client's legal matters. This ensures that our clients' legal representatives and others in the court process fully understand each client's impairment and its potential impact on their ability to participate in legal processes.

OPG would like to share the following feedback on the impacts of sentencing outcomes under the DFV legislative framework for our clients with impaired decision-making capacity.

OPG provides decision-making services to adults with impaired decision-making capacity who may be either the aggrieved or the respondent in a DFV matter. Division 9 of the *Domestic and Family Violence Protection Act 2012* (DFVP Act) provides that during DFV proceedings and when making a Domestic Violence Order (DVO), the court must ensure the aggrieved and the respondent understand the DVO, and that the order contains a written explanation of the DVO. OPG holds concerns about how the court satisfies itself of the Division 9 requirements when dealing with people who have had decision-making capacity for a matter rebutted by a court or tribunal. This is also relevant to any proceedings for breach of such orders and subsequent sentencing. OPG is concerned

that the court may not adequately adjust or turn its mind to the adult's communication needs, impairments and diagnosis, and the benchbook used by the judiciary does not provide for tailored approaches, rather a standardised script that is read to the parties.

OPG also holds concerns about the legal and technical language used in DVOs and associated conditions and subsequently, the accessibility of these documents for adults with impaired decision-making capacity. OPG guardians actively advocate with legal representatives to negotiate and submit to the court that DVOs and conditions need to be in simple English or tailored to the adult's communication needs, impairment and understanding. These barriers are also relevant to any breaches of an order and subsequent sentencing in the criminal courts.

OPG clients have experienced mixed outcomes when applications are made to have their breach charge(s) summarily dismissed in the Magistrates Court (for example, under section 172 of the *Mental Health Act 2016*). If the court dismisses the breach charge on the basis that the respondent was or appeared to be of unsound mind when the offence was committed, it is arguable that the respondent could not understand the DVO at the time it was made by the DFV Court. If so, the court may not have fulfilled its responsibility to ensure the respondent understood the DVO under section 84 of the DFVP Act. In these circumstances, there is no clear pathway or power for the criminal court to consider whether the DVO should be revisited and reconsidered or referred back to the DFV Court. To enable a smoother process between the two courts, OPG suggests the following two Practice Directions be reviewed and aligned:

- Magistrates Courts Practice Direction No. 1 of 2025: Summary proceedings for domestic violence offence – Brisbane Magistrates Court (noting it only applies to the Brisbane Magistrates Court, which causes inconsistencies across the registries)
- Magistrates Courts Practice Direction No. 4 of 2022: Domestic and Family Violence.

An additional barrier for OPG clients is the lack of an immediate right to a grant of legal aid to appeal a DVO or make an application to amend, in circumstances where the breach charge is not dismissed but there are concerns about the making of a DVO. For example, the Legal Aid Queensland Grants Handbook indicates:

- Where the respondent to a DVO is applying for aid to appeal the order, they must provide details as to why they wish to appeal the order and why they consider that they will be successful in their appeal.
- Where the aggrieved to a DVO is applying for aid to respond to an appeal of that order, Legal Aid Queensland considers that the applicant for aid meets the merits test.
- Aid may be granted to vary a DVO if the applicant meets the merits test, specifically the reasonable prospects of success test and the appropriateness of spending limited public funds test.

OPG clients have also experienced the following barriers and challenges during DFV proceedings:

- Applications for summary dismissal of an Application for a DVO pursuant to paragraphs 58 and 59 of the Magistrates Courts Practice Direction No. 4 of 2022: Domestic and Family Violence have yielded mixed and inconsistent outcomes.
- Lack of enquiry or assessment of a client's capacity and impairment.
- Limitations on court liaison service assessments and funded capacity assessments for DFV matters.

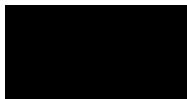
- Being found guilty of breaching a DVO may have serious implications on a client's ability to reside in public housing or supported (disability or mental health) accommodation, their ability to work, and their eligibility for visas or citizenship.
- Limited funding for independent reports or assessments.
- Restrictions on support services and other family networks when orders are made.
- Limitations on exploration of support services that could be implemented or trialled prior to final orders being made.
- It is unclear whether police are complying with the requirements of the *Police Powers and Responsibilities Act 2000* when serving documents on a person with impaired decision-making capacity. Courts should ascertain whether an application for a DVO has been properly served on the respondent before an order is made.

Please see **Attachment A** for case examples which illustrate the above experiences and concerns.

OPG welcomes the review of sentencing for DFV offences and recognises its potential to improve experiences and outcomes for people with impaired decision-making capacity who are involved in DFV proceedings.

I trust this information is of assistance. Should you require further information, please contact Ms Kelly Unsworth, Principal Policy Officer, OPG, by email at policy@publicguardian.qld.gov.au or on 07 3738 9397.

Yours sincerely



Shayna Smith
Public Guardian

Attachment A – Case examples

Scenario 1 – police application naming OPG client as respondent after attending incidents at an NDIS Supported Independent Living home

Adult A is a 30-year-old living with diagnoses of moderate to severe intellectual disability, an acquired brain injury, anxiety, and personality vulnerabilities (susceptible to personality disorder). They have an additional diagnosis of epilepsy and asthma. Adult A is an NDIS participant and receives 1 to 1 disability support.

The Public Guardian has been appointed for a five-year period to make decisions for Adult A about their accommodation, contact, health care, service provision and legal (not related to property or finance) matters. It is important to note that decisions made by appointed substitute decision makers are not enforceable. A person cannot be compelled to comply with a substitute decision made about their personal matters.

Adult A frequently presents at various hospital emergency departments and contacts emergency services and mental health lines. They have some insight into their mental health.

Historically, Adult A had several ex-partners or friends who financially exploited them.

Adult A is the named respondent in four separate DFV proceedings. Conditions include prohibition from remaining at or entering the aggrieved's residence, locating the aggrieved, contacting the aggrieved, and following or approaching the aggrieved at any place.

Adult A has made disclosures to OPG that they are being emotionally and physically threatened by the aggrieved.

This scenario demonstrates how some adults with impaired decision-making capacity may not understand the conditions of a DVO and therefore may be at risk of further interaction with the justice system through inadvertent breach of the DVO. It also raises the question whether Division 9 of the DFVP Act was satisfied when the DVO was first made, as discussed above.

Scenario 2 – police application naming OPG client as respondent after attending an incident at home with parent/carer

Adult B is a 40-year-old with diagnoses of autism spectrum disorder, moderate intellectual disability, schizophrenia, anxiety, and obsessive-compulsive disorder. Adult B is an NDIS participant and receives 1 to 1 support.

The Public Guardian has been appointed for a two-year period to make decisions for Adult B about their accommodation, contact, health care, service provision and legal (not related to property or finance) matters.

QPS made a DVO application after being called to a disturbance at the family home between Adult B (the respondent) and their parent (the aggrieved).

There are several barriers which impact Adult B's ability to comply with a DVO. Adult B requires extensive verbal prompts to achieve daily tasks. They are 'triggered' by the aggrieved's behaviours and cannot consistently emotionally regulate or manage their comments to the aggrieved. They live within walking distance of the aggrieved's property.

OPG understands the aggrieved's behaviour may also constitute DFV against Adult B and has advocated for Adult B's legal rights in a cross application. The court has powers under the DFVP Act to provide referrals and support for the aggrieved, who was indicating signs of carer fatigue and a need for further education or support around engagement and communication styles that are appropriate for Adult B's diagnoses. This pathway would support the aggrieved to address their behaviour and resolve the conflict between Adult B and the aggrieved.