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16th May 2025

The Hon. Ann Lyons
Chair
Queensland Sentencing Advisory Council
GPO Box 2360
Brisbane Qld 4001

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

Dear Chair,

Re: QSAC Consultation – 'Assessing the impacts of domestic and family violence sentencing reforms'

Thank you for the opportunity to provide comments on the Queensland Sentencing Advisory Council (**QSAC**) Consultation Paper, 'Assessing the impacts of domestic and family violence sentencing reforms' (**Consultation Paper**). Since the enactment of s9(10A) of the *Penalties and Sentences Act 1992* (**P&S Act**) in 2016 and the enactment of reforms to increase the maximum penalties for breach of a domestic violence order (**DVO**) in 2015, we have observed a notable increase in sentencing outcomes for domestic and family violence matters for our clients, wherein matters which would not ordinarily result a custodial sentence, have resulted in a custodial sentence, and matters that would be expected to have a custodial sentence have resulted in longer custodial sentences than what would otherwise be expected. We continue to hold concerns about the impacts of these laws on Aboriginal and Torres Strait Islander persons in exacerbating overrepresentation numbers, especially considering how much work remains to be done to increase the provision of culturally competent rehabilitation services for DFV behaviours and other prevention and early intervention initiatives and programs to address the root causes of these behaviours. We have expressed concerns about the effectiveness of any potential deterrent effect of laws that are focussed on increasing punitive outcomes, particularly, when alleged offenders have disability, mental illness, cognitive impairments, and/or are subject to

entrenched disadvantage. In this submission, we have also outlined a number of recommended amendments to relevant legislative frameworks, for consideration by the Council, which we feel would have a positive impact on sentencing for DFV offences and which support offenders to address the underlying drivers of DFV behaviours.

Preliminary consideration: Our background to comment

The Aboriginal and Torres Strait Islander Legal Service (Qld) Limited (ATSILS), is a community-based public benevolent organisation, established to provide professional and culturally competent legal services for Aboriginal and Torres Strait Islander peoples across Queensland. The founding organisation was established in 1973. We now have 25 offices strategically located across the State. Our Vision is to be the leader of innovative and professional legal services. Our Mission is to deliver quality legal assistance services, community legal education, and early intervention and prevention initiatives which uphold and advance the legal and human rights of Aboriginal and Torres Strait Islander peoples.

ATSILS provides legal services to Aboriginal and Torres Strait Islander peoples throughout Queensland. Whilst our primary role is to provide criminal, civil and family law representation, we are also funded by the Commonwealth to perform a State-wide role in the key areas of Community Legal Education, and Early Intervention and Prevention initiatives (which include related law reform activities and monitoring Indigenous Australian deaths in custody). Our submission is informed by over five decades of legal practise at the coalface of the justice arena and we, therefore, believe we are well placed to provide meaningful comment, not from a theoretical or purely academic perspective, but rather from a platform based upon actual experiences.

Introductory comments

Any analysis of sentencing practices in Queensland must simultaneously involve careful consideration of commitments under the National Agreement on Closing the Gap (**NACTG**), such that any proposed amendments to the existing regime do not inadvertently worsen progress towards targets to reduce incarceration rates of Aboriginal and Torres Strait Islander persons and that, where possible and appropriate, opportunities are taken to improve the current regime to promote alternatives to incarceration.

As at the time of writing, overincarceration of Aboriginal and Torres Strait Islander persons persists, despite the commitments contained in the NACTG.

The Closing the Gap Information Repository provides up-to-date data (sourced from the Australian Bureau of Statistics) in relation to how the nation, states and territories are tracking towards the priority reforms and targets in the NACTG.

With respect to Target 10 of the NACTG, which provides that by 2031, the rate of Aboriginal and Torres Strait Islander adults held in incarceration will be reduced by at least 15%, the Closing the Gap Information Repository provides that:

- at the National level, the target is, in fact, worsening and that as at 30 June 2024, the age-standardised rate of Aboriginal and Torres Strait Islander prisoners was 2,304.4 per 100,000 adult population, which is an increase from the previous year at 2,041.5 per 100,000 adult population in 2022; and
- at the Queensland level, the target is also worsening.[1]

With respect to Target 11 of the NACTG, which provides that by 2031, the rate of Aboriginal and Torres Strait Islander young people (10-17 years) in detention will be reduced by at least 30%, the Closing the Gap Information Repository provides that:

- at the National level, the trend for the target shows no change from the baseline; and
- at the Queensland level, the target is worsening.[2]

The causes for over-representation of Aboriginal and Torres Strait Islander persons in the criminal justice system are complex and multi-faceted. Such was the subject of analysis and commentary in QSAC's 2021 Connecting the Dots Report, in which existing criminological literature relating to the causes of over-representation was discussed[3]. In particular, contextual factors to relevant offending were raised, including the impacts of unemployment and generational unemployment, lack of educational attainment, poverty, low socio-economic status, homelessness, complex health needs including mental health and physical and/or cognitive impairment, alcohol and substance abuse (including the impact of the same on individuals in utero) and intergenerational trauma. Also discussed was criminological literature that recognised differential treatment faced by Aboriginal and Torres Strait Islander

[1] Productivity Commission (Cth), *Closing the Gap Information Repository*, (2024), available at <https://www.pc.gov.au/closing-the-gap-data/dashboard/se/outcome-area10>.
[2] Productivity Commission (Cth), *Closing the Gap Information Repository*, (2024), available at <https://www.pc.gov.au/closing-the-gap-data/dashboard/se/outcome-area11>.
[3] Queensland Sentencing Advisory Council (Qld), *Connecting the dots: the sentencing of Aboriginal and Torres Strait Islander peoples in Queensland*, Sentencing Profile (March 2021) 4-10.

persons in interactions with the criminal justice system including over-policing resulting in higher incidences of arrest, conviction and imprisonment[4].

Appropriate consideration of such matters upon sentencing is consistent with the principles of individualised justice, proportionality in sentencing and substantive equality before the law.

Consultation Questions

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?

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?

We have combined our response to Questions 1 and 2 as they contain overlapping content.

We have observed that since 2015/2016, there has been a notable increase in sentencing outcomes for domestic violence matters for our clients, more often than not leading to harsher penalties for our clients. In particular, we have observed that section 9(10A) of the P&S Act, is frequently used by Magistrates to increase sentences

[4] Note 3.

for repeat offenders of minor domestic violence offences or technical breaches, with Magistrates expressly making comments in their sentencing remarks to reflect such, for example, that domestic offences are treated seriously, that repeat domestic violence offenders need to be punished because they 'don't get it', and that domestic violence is a scourge in the community. We have also observed that in circumstances where the offence is a minor non-contact breach, Magistrates are tending to impose custodial sentences, such as where the respondent and aggrieved were on the bus together, or the respondent and aggrieved were walking down the street together.

Measures to assess the impact of this reform should include a quantitative analysis of changes in sentence severity (i.e., prison vs community orders), incarceration and remand rates before and after 2015 and include a breakdown of Indigenous vs non-Indigenous offenders for each metric. Fundamentally, there also needs to be a qualitative analysis of judicial reasoning and the consideration of other relevant factors including cultural factors, for example, in sentencing remarks. It is important to understand how judges are balancing s9(10A) with other sentencing considerations including with respect to Aboriginal and Torres Strait Islander background, such that there is sufficient balancing of consideration of systemic and cultural disadvantage in sentencing. There is a risk, with reforms such as these, that Magistrates will feel compelled to impose harsher sentencing to send a message, as appears to be the intent of the reforms, however, this must also be considered in the context of systemic and cultural factors, and whether increasing custodial sentencing of Aboriginal and Torres Strait Islander offenders will counterintuitively increase the risk of recidivism, especially in the context of the limited culturally competent rehabilitation programs to address DFV behaviours. It follows, that recidivism rates should also be analysed.

Additional measures to assess the impact of this reform could include:

- consideration of whether/how often culturally appropriate interventions are being used for Aboriginal and Torres Strait Islander offenders;
- consideration of victim safety and the effect on reporting DFV to see whether the amendments have caused a chilling effect on the reporting of DFV in Aboriginal and Torres Strait Islander communities;

Consideration of the above could provide a more comprehensive picture of whether the laws have been effective merely at achieving more and longer custodial sentences for offenders, whether the reforms have, in fact, reduced DFV and/or whether the reforms have addressed the root causes of offending so as to reduce DFV.

In our view, some key factors that could be impacting the operation of this reform are as follows:

(a) The lack of widely available, culturally competent/safe rehabilitation programs and healing programs to address root causes of offending - In the context of Aboriginal and Torres Strait Islander offenders, to have the best chance of success, rehabilitation programs must be delivered by community-controlled organisations preferably within the local community that the individual belongs, to provide the cultural safety required to promote engagement by the individual. We are aware that there is a very limited number of culturally safe rehabilitation/healing programs throughout the State, especially in rural and remote areas. We see this as an area where there needs to be additional funding to empower local community-controlled organisations to expand delivery of such programs.
(b) Access to culturally competent legal representation - sometimes our legal service is unable to represent an individual due to a conflict of interest, and this results in the individual needing to seek out alternative legal assistance, or represent themselves.

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 aggravating factor impacts a number of human rights, including, but not limited to:

(a) the right to liberty and security of person: s29 of the *Human Rights Act 2019* (**HR Act**);
(b) the right to protection from torture and cruel, inhuman or degrading treatment: s17 of the HR Act, noting the risks associated with an Indigenous person in custody, along with risks to safety associated with the existing prison overcrowding issues;
(c) the right to protection of families and children: s26 of the HR Act, for example, where minor offences might land a parent in jail and the impact such has on the family;
(d) the right to recognition and equality before the law: s15 of the HR Act, noting that overrepresentation of Aboriginal and Torres Strait Islander persons in the cohort of DFV offenders means these reforms will disproportionately affect Aboriginal

and Torres Strait Islander persons and the impact of over-policing of Aboriginal and Torres Strait Islander persons can result in an indirect discriminatory impact on Aboriginal and Torres Strait Islander persons; and

(e) cultural rights of Aboriginal and Torres Strait Islander peoples: s28 of the HR Act, noting the impacts of interruption to connection with Country;

(f) rights enshrined in the United Nations Convention on the Rights of Persons with Disabilities (**UNCRPD**), noting that a significant proportion of individuals in contact with the criminal justice system, particularly, in our client cohort, have cognitive impairment, mental illness, communication barriers, disabilities (FASD), etc. and that increasing custodial outcomes for those with disabilities/impairments is very unlikely to have any deterrent effect, but could counter-intuitively exacerbate negative impacts on the person which are associated with detention.

In our view, what appears to be pertinent is whether the inherent limitations on human rights that arise as a consequence of the s9(10A), are proportionate. In our view, they are not proportionate, especially when considering the negative implications on Aboriginal and Torres Strait Islander individuals as has been outlined earlier in this submission. Consideration of human rights in applying s9(10A), has the potential to ameliorate effects of disproportionate and potentially unjust outcomes, for example, if the offender has a cognitive disability and this impacts the ability of the individual to properly regulate their emotions. Whilst the provision allows for consideration of 'exceptional circumstances', this is not a defined term. There is opportunity for a more rigorous framework to be inserted into the legislation which would provide better guidance on what constitutes 'exceptional circumstances', and that could capture scenarios such as those described in which a custodial sentencing response is not warranted.

In our view, the following amendments to the existing legislative frameworks could be considered, which would improve consideration of human rights in sentencing of DFV offences:

- The reintroduction of greater judicial discretion by allowing courts to consider domestic violence context in sentencing, but not expressly as an aggravating factor.
- Clarification of what 'exceptional circumstances' means, by adding a definition. If a definition is not preferred, alternatives could be to add a framework for matters to consider when determining whether exceptional circumstances exist, or by including additional examples which reflect cultural, systemic and human rights considerations. Some suggestions of examples that could be included are as follows:

  - where the offence occurred in the context of mutual violence/coercive control - a woman is charged with assault occasioning bodily harm after scratching her partner during an argument, but there is a longstanding history of coercive control and physical abuse by male partner and she acted in self-defence or as a reaction to psychological trauma;
  - where a person lacks capacity to regulate emotions due to disability/impairment - a young man with an intellectual disability and post-traumatic stress disorder is charged with wilful damage for punching a wall during a heated argument with his mother (or sibling). The offence, whilst in a domestic setting, would disproportionately punish a person whose disability contributed to the incident.
  - where the offender is fulfilling cultural obligations or where kinship roles are implicated – an Aboriginal woman is charged with stalking for visiting a former partner's family home repeatedly to speak with her sister, despite being told not to come, but she was attempting to fulfil a cultural obligation relating to a community conflict resolution process. There was no intent to intimidate or coerce.
- Express reference to the consideration of relevant human rights to reinforce the court's duty to do so and enshrine obligations under the Convention on the Rights of persons with Disabilities into domestic legislation.
- Creating a tiered/risk-based response, where there is nuance for technical vs harmful offending, as well as first-time vs repeat breaches, intent and level of harm or coercion. This could be expressly included in the legislative framework.

Additionally, we recommend consideration of legislating the principle expounded in the High Court case of *Bugmy v The Queen* [2013] HCA 27, namely that the effects upon an offender of profound deprivation do not diminish over time and should be given full weight when sentencing the offender. The impact of the Bugmy decision in the context of sentencing Aboriginal and Torres Strait Islander persons was aptly described by Jackson L (2013) as follows:

> "*the effect of the decision is that Aboriginal offenders will be able to rely upon evidence of systemic social deprivation as a relevant factor in the determination of an appropriate sentence on an individual basis. What is particularly important about this decision is the recognition that the effects of a background of profound social deprivation do not diminish over time or with repeat offending. If sentencing courts are to give full weight to the effects of social deprivation, this may affect*

the numbers of Aboriginal people entering the prison population and the over-representation of Aboriginal people in the prison system."[5]

Question 4 – systemic 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?

In our view, the following are key issues that the Council should consider when reviewing changes in sentencing practices resulting from the DFV sentencing reforms, in particular, with respect to the impact on Aboriginal and Torres Strait Islander peoples:

(a) the impacts of existing socio-disadvantage and intergenerational trauma on the rates of DFV experienced by Aboriginal and Torres Strait Islander persons;
(b) the:
    (i) impacts of intergenerational trauma, child removal, dispossession from lands and systemic racism and the role of such in contributing marginalisation of at-risk individuals; and
    (ii) social and economic disadvantage including in relation to housing, employment and education;
    (iii) impacts of trauma that the individual has experienced in their life, for example, if they were the victim of a crime prior to the offending including as a child;
    (iv) impacts of physical health and mental health issues that might have been brought on or exacerbated by the aforementioned factors;
    (v) impacts of substance abuse/misuse that might have been brought on or exacerbated by the aforementioned factors,

    to identify underlying drivers of the individual's offending;
(c) over-policing of Aboriginal and Torres Strait Islander persons in the context of responses to DFV (as evidenced in the Independent Commission of Inquiry into Qld Police Service responses to DFV);

[5] L Jackson, 'Casenote: *Bugmy v R* (2013) 302 ALR 192' (2014) 8(10) *Indigenous Law Bulletin* 29.

(d) the significant need for more culturally competent DFV rehabilitation programs for males and females and prevention and early intervention initiatives to address root causes of offending behaviours;
(e) coming from a position of understanding that jailing the disadvantaged without appropriate culturally safe rehabilitative supports will not reduce recidivism and might in fact entrench criminality;
(f) the issues relating to misidentification of the person most in need of protection, which is a known issue when police respond to incidents of DFV involving one or more Aboriginal and Torres Strait Islander persons (as also evidenced in the Independent Commission of Inquiry into Qld Police Service responses to DFV);
(g) the recognition of the high proportion of people with a disability/mental illness/cognitive impairment within the cohort of individuals in that come into contact with the criminal justice system and including those that perpetrate/are victims of DFV and consideration of the limited (if any) deterrent effect for such persons;
(h) the protective factors of the individual's connection to community, kin and culture including spiritual wellbeing;
(i) the protective factors of the individual participating in relevant programs run by local community-controlled organisations to address root causes for offending behaviour including, for example, programs that address underlying trauma via healing programs;
(j) the protective factors of diverting the individual into a community-led programs/initiatives as an alternative to incarceration; and

- the long-standing overincarceration of Aboriginal and Torres Strait Islander individual, including the high numbers of individuals on remand, and the commitments under the NACTG to drive down incarceration levels.

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?

As noted earlier, there is potential for inconsistencies in sentencing as a result of the lack of clarity on what constitutes 'exceptional circumstances'. Please refer to our comments in response to Question 3 for our recommendations on what could be changed in order to address this.

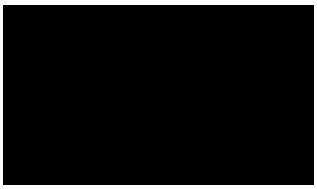
We offer the example of someone who is repetitively labelled as a perpetrator of domestic violence but has not actually committed an act of violence. What they have done is kept in contact, often because the aggrieved has now become a single mother of a child or multiple children and needs help and money from her partner. She invites

him around to assist. We have observed that most males will go without a second thought of any order that might be in place, prioritising the needs of their partner and/or children. This type of person should be distinguished from someone who regularly assaults their partner.

In our answer to Question 3, we recommended creating a tiered/risk-based response, where there is nuance for technical vs harmful offending, as well as first-time vs repeat breaches, intent and level of harm or coercion, and that this could be expressly included in the legislative framework. A tiered approach could address nuances such as the one demonstrated in this example.

We thank you for the opportunity to provide feedback on the Consultation Paper.

Yours faithfully,



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