Preliminary Consultation: Implementing the *Hear Her Voice* reports

Background

In March 2021, the Queensland Government established the independent Women's Safety and Justice Taskforce (the Taskforce), chaired by the Honourable Margaret McMurdo AC, to examine coercive control and review the need for a specific offence of 'commit domestic violence' and the experience of women across the criminal justice system.

The Taskforce's first report, *Hear her voice – Report One – Addressing coercive control and domestic and family violence in Queensland* (the first report) was released on 2 December 2021. It identifies fundamental systemic and structural issues in Queensland's justice system relating to its approach to matters of domestic and family violence (DFV). It made 89 recommendations for broad systemic reform. The Queensland Government response to the first report was released on 10 May 2022. The response outlined the Queensland Government's commitment to support or support in principle all 89 recommendations.

In the first report, the Taskforce recommended that no new offences to criminalise domestic and family violence commence until service and justice system responses are improved, as to do so would involve an unacceptable risk of unintended consequences. The Taskforce proposed a four-phase plan to prepare for and implement legislation to address coercive control safely and effectively so that we can better protect the lives of women and girls in Queensland. As part of the four-phase plan, the Taskforce proposed two separate stages of legislative reform to address coercive control.

On 14 October 2022, the Queensland Government introduced the Domestic and Family Violence Prevention (Combatting Coercive Control) and Other Legislation Amendment Bill 2022 containing the first stage of legislative reform into Parliament. The Queensland Government has also made a commitment to introduce a Bill to criminalise coercive control before the end of 2023.

On 14 November 2022, *A Call for Change*, the Report released by the Commission of Inquiry into Queensland Police Service Responses to Domestic and Family Violence was delivered to the Queensland Government. The establishment of the Commission of Inquiry was Recommendation 2 of the first report. On 21 November 2022, the Queensland Government announced that it supported in principle all of the recommendations in *A Call for Change.*

The Taskforce's second and final report, *Hear her voice – Report Two – Women and girls' experiences across the criminal justice system* (the second report), was released on 1 July 2022. This report focused on women and girls' experiences in the criminal justice system as victim-survivors of sexual violence and as accused persons and offenders. The second report included 188 recommendations for government to improve women and girls' experiences of the criminal justice system. The Queensland Government response to the second report was released on 21 November 2022 and outlined the Government's commitment to support 103 recommendations in full, support 71 recommendations in principle, and noted 14 recommendations of the second report.

Purpose of consultation

The Taskforce's reports stressed the importance of ongoing consultation with stakeholders in the development of legislation implementing its recommendations.

The Queensland Government has already indicated its support for the recommendations that are the subject of this discussion paper which will form part of the second tranche of legislative reform implementing the Taskforce reports. Please note that there will be further consultation on a draft bill relating to these recommendations and as well as consultation on recommendations relating to the hierarchy of sexual offences in Queensland, procedure and evidence in sexual offence proceedings and a non-public register of serious and high-risk domestic violence offenders.

This consultation process is intended to provide stakeholders with an opportunity to provide feedback to the Department of Justice and Attorney-General (DJAG) on the best way to legislate for and implement these recommendations, as well as any technical and operational issues that you anticipate may arise, rather than provide views on the policy decision to support, or provide in principle support for, these recommendations.

This discussion paper is designed to assist you in providing preliminary feedback on the relevant recommendations and to guide consultation. Specific questions are posed throughout the discussion paper on issues we'd like to hear your views on. You can choose to answer all or just a selected number of these questions or alert DJAG to other relevant issues relating to the implementation of the recommendations.

You can provide us with a written submission and/or attend a consultation session to discuss your feedback with DJAG and other stakeholders in your local area (the details of the session relevant to you/your organisation and your geographical location are contained in the covering letter).

To assist you throughout the paper we have provided hyperlinks to existing Queensland legislation or legislation in other jurisdictions which might assist you to engage with the discussion questions.

Structure of this discussion paper

For ease of user reference this discussion paper is divided into four parts:

- Part One – Legislation addressing coercive control and domestic and family violence
- Part Two – Legislation addressing sexual violence
- Part Three – Legislation relating to the publication of domestic and family violence and sexual violence proceedings
- Part Four – Legislation addressing the experiences of women and girls as accused persons and offenders

The table of contents below breaks down the discussion paper into specific legislative initiatives.

We acknowledge that sexual violence is a frequent form of domestic and family violence and the majority of women and girls who offend are victims of both sexual violence and domestic and family violence.

The language used in this discussion paper

In this discussion paper, a perpetrator of domestic, family and/or sexual violence is referred to as a 'perpetrator', a 'defendant-perpetrator' or an 'offender'. Legal terms, such as 'defendant' and 'respondent' are also used throughout the discussion paper to refer to a person who has been charged with perpetrating domestic, family and/or sexual violence or who has had a domestic violence order made against them.

The terms 'victim', 'complainant-victim' and 'victim-survivor' are used in this discussion paper to describe those individuals who have been subjected to domestic, family and/or sexual violence. Other legal terms,

such as ‘complainant’ and ‘aggrieved’ have also been used to describe victims of sexual violence or the person protected under a domestic violence order.

DJAG acknowledges that where we have used these terms, we may be capturing people who have been misidentified as the primary perpetrator of violence, or the primary victim of violence, within their relationship.

Table of Contents

Part One

Legislation addressing coercive control and domestic and family violence

Links to legislation referenced in this part:

- *Criminal Code Act 1899* (Qld) – Section 359D
- *Criminal Law (Sexual Offences) Act 1978* (Qld) – Section 4A
- *Domestic and Family Violence Protection Act 2012* (Qld)
- Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Bill 2022 (Qld)
- *Evidence Act 1977* (Qld) – Section 103B
- *Penalties and Sentences Act 1992* (Qld) – Section 9; Section 12A; Part 8A
- *Security Providers Act 1993* (Qld)

Hear her voice – Report One

Chapter 3.9 – Legislating against coercive control

Recommendation 74: to create a new court based domestic violence perpetrator diversion scheme

Summary of the Taskforce findings and recommendation

The Taskforce noted that while 75% of respondents never breach their domestic violence order (DVO), for the 25% who do, over half go on to breach repeatedly.

The Taskforce heard from many victims that breaches are not being taken seriously and, while some seek justice through criminal justice mechanisms, others do not want their partner or family member to be punished, they just want them to get help so the violence will stop.

The Taskforce particularly noted the disproportionate number of Aboriginal and Torres Strait Islander peoples named on DVOs who are charged with and imprisoned for contraventions of those orders. The Taskforce said that the scheme should be developed with a particular focus on meeting the cultural needs of Aboriginal and Torres Strait Islander peoples and people from Culturally and Linguistically Diverse communities by diverting them from the criminal justice system.

To maximise the opportunity for earlier intervention of perpetrators, and to minimise risk of further harm to victims, the Taskforce recommended amending the *Domestic and Family Violence Protection Act 2012* (DFVP Act) to create a new court based domestic violence perpetrator diversion scheme ("court based DV-PDS / DV-PDS") for adult perpetrators. Given the potential safety risk for victims, it was the Taskforce's intention that the scheme would only capture those perpetrators who breach their first DVO for the first time. It is not intended to be available for breaches of DVOs that are also serious criminal offences or for recidivist domestic violence offenders.

The first report stated that the intervention program is intended to divert the perpetrator away from a criminal justice response and, where possible, away from a destructive path of abuse before the behaviour escalates further and to provide the perpetrator with support and strategies.

The Queensland Government response supported this recommendation and stated that the Government will establish a new court-based domestic violence perpetrator diversion scheme.

Proposed approach to implementation based on the Taskforce recommendations for the purpose of discussion

Eligibility criteria for the DV-PDS

It is proposed that the eligibility criteria for the scheme could be as follows:

- the person is charged with an offence of contravention of a DVO;
- the person has acknowledged responsibility to the court for the conduct that is alleged to constitute the contravention of the DVO;
- the DVO that they have contravened is the only DVO that has ever been made against the person;
- the person has never previously been convicted of contravention of a DVO or other offence involving domestic and family violence;
- the behaviour constituting the contravention would not otherwise constitute an indictable offence; and
- the person indicates a willingness to participate in an approved provider program or counselling with an approved provider, whichever is applicable.

No requirement of a guilty plea

It is proposed that a defendant-perpetrator would not be required to enter a guilty plea to be eligible for the scheme but must acknowledge, to the court, responsibility for the conduct that is the subject of the alleged contravention of DVO. It is also proposed that the person's acknowledgment of responsibility for the offence would be inadmissible as evidence in a proceeding for that offence and would not constitute a plea.

Suitability assessment

It is proposed that if a defendant-perpetrator meets the eligibility criteria, the court could make an order that an approved provider conduct a suitability assessment of the person. The suitability assessment would need to be provided to the court within 14 days or some longer time as allowed by the court. The 14 day time period has been proposed to allow sufficient time for a suitability assessment to occur whilst the court maintains oversight and delay is minimised.

It is proposed that the suitability assessment would be required to:

- include an indication of whether there is a suitable approved diversion program or counselling for the defendant-perpetrator and indicate when the defendant-perpetrator would be able to commence participation in the program or counselling;
- consider the person's character, cultural background, including whether the person identifies as Aboriginal and/or Torres Strait Islander, personal history, language skills, any disabilities, psychiatric or psychological conditions, alcohol or drug problems and any other relevant matter. This reflects the existing criteria in section 72 of the DFVP Act with an additional consideration of the person's cultural background, including whether the person identifies as Aboriginal and/or Torres Strait Islander; and
- address victim safety. This could be done by the service engaging a Victim Advocate, as is currently required by the *Perpetrator Intervention Services Requirements*, to enable risk assessment and safety planning, information sharing and referrals.

Criteria for making a diversion order

If a defendant-perpetrator meets the eligibility requirements and a suitability assessment has been prepared and provided to the court, it is proposed that the court would then be able to make a diversion order if:

- the court is satisfied that there is an <u>appropriate</u> approved program or approved counselling in which the defendant-perpetrator can commence immediately or within a reasonable time;
- the defendant-perpetrator consents to the making of the order; and
- it is appropriate and desirable to make the diversion order having regard to:
    - any views and wishes of the complainant-victim, having regard to any current contact between the complainant-victim and defendant-perpetrator, whether any pressure has

been applied, or threat has been made, to the complainant-victim by the defendant-perpetrator or someone else on behalf of the defendant-perpetrator;
    - the nature of the offending behaviour that constitutes the contravention offence in the context of the relationship between the defendant-perpetrator and complainant-victim as a whole; and
    - the suitability assessment.

Wishes of the complainant-victim to be taken into account

There could be a requirement on the prosecution to make reasonable attempts, prior to court, to obtain the view and wishes of the complainant-victim in order to provide them to the court. The complainant-victim would not be required to attend court to provide their views and wishes but could provide their views to the prosecution prior to the court mention.

Court discretion on the nature of the diversion and service of the order

It is proposed that:

- the court would be required to have regard to whether it is a culturally appropriate program or counselling but would retain ultimate discretion to order participation in a program that is not tailored to the defendant-perpetrator's cultural background (keeping in mind the requirement for the defendant-perpetrator's consent);
- the defendant-perpetrator would only be able to take part in counselling provided by an approved provider if there is no approved program available to the defendant-perpetrator to participate in and there is approved counselling available;
- the diversion order would state the time within which the defendant-perpetrator must complete the approved program or counselling;
- after making a diversion order, the court would be able to adjourn the criminal proceedings for the contravention of DVO offence for a period not exceeding 12 months to allow for the defendant-perpetrator to participate in and complete the diversion program;
- consistent with current section 186 of the DFVP Act, the court would be required to provide a copy of a diversion order to a complainant-victim; and
- current section 184 of the DFVP Act would be amended to include reference to a diversion order to ensure a defendant-perpetrator is given a copy of the diversion order.

Obligations of approved providers and power to bring the matter back before the court

It is also proposed that:

- an approved provider or counsellor would be required to notify the court and the Police Commissioner if they become aware that a defendant-perpetrator has contravened a diversion order within 14 days of the contravention, but that they need not do so if they are satisfied that the contravention is minor or the respondent has taken steps to remedy the contravention;
- approved providers and counsellors would have an ongoing obligation to assess victim safety and risk and to assist with victim safety planning services;
- the prosecution would be able to bring the matter back before the court if the defendant-perpetrator commits a further breach of the DVO, is charged with another domestic violence offence, commits domestic violence or if a further DVO is made against the defendant-perpetrator whilst subject to a diversion order;
- the prosecution would be required to advise the approved provider or counsellor if they are bringing the matter back before the court;
- the defendant-perpetrator could bring the matter back before the court, if they require further time to complete the approved program or counselling; and
- an approved provider or counsellor would be required to notify the court and the Police Commissioner within 14 days of a defendant-perpetrator completing an approved program or approved counselling.

Consequences of compliance with a diversion order

It is proposed that if a defendant-perpetrator completes an approved program or counselling under a diversion order that:

- no plea to the charge would be taken; and
- the court would be required to discharge the defendant-perpetrator without any finding of guilt.

Consequence of non-compliance with a diversion order

It is proposed that, if a defendant-perpetrator does not comply with or complete a diversion order then the defendant-perpetrator would be required to enter a plea for the original offence. If a plea of guilty is entered, the court could:

- sentence the defendant-perpetrator for the offence having regard to their partial completion of the program or counselling; or
- sentence the defendant-perpetrator for the offence, having regard to their failure to complete the program or counselling or some part of the program or counselling as an aggravating factor.

If the matter was brought back before the court by the prosecution because of the commission of a further contravention of the DVO, a charge of another domestic violence offence, commission of domestic violence or the making of a further DVO against the defendant whilst subject to a diversion order, the court could:

- revoke the diversion order and require the defendant-perpetrator to enter a plea for the original offence. If the defendant-perpetrator enters a plea of guilty, the court could:
    - sentence the defendant-perpetrator for the offence having regard to their partial completion of the program or counselling; or
    - sentence the defendant-perpetrator for the offence, having regard to their failure to complete the program or counselling or some part of the program or counselling as an aggravating factor.
- allow the diversion order to continue. In deciding whether the diversion order should continue, the court should have regard to:
    - any views and wishes of the complainant-victim, having regard to any current contact between the complainant-victim and the defendant-perpetrator, whether any pressure has been applied, or threat has been made, to the complainant-victim by the defendant-perpetrator or someone else on behalf of the defendant-perpetrator; and
    - the nature of the behaviour which has caused the matter to be brought back before the court in the context of the relationship between the defendant-perpetrator and complainant-victim as a whole.

Power to amend or revoke diversion order

It is proposed to provide that the prosecution, defence representative or defendant could make an application to the court to vary or revoke the diversion order. If such an application is made then the court could:

- vary the order;
- revoke the order and require the defendant to enter a plea for the original offence.

When a diversion order must and may be considered by the court in civil applications under the DFVP Act

It is proposed that when making or varying a protection order, if a diversion order has previously been made against the respondent, the court must consider the respondent's failure to comply with the order and may consider the respondent's compliance with a diversion order. It is proposed, however, that the court must not refuse to make a protection order or decide to vary a DVO merely because the respondent has complied with a diversion order that has previously been made against them.

Commencement

It is proposed that the amendments would apply to any person who is charged after they commence.

Questions for Consultation

1. Should the scheme set out the purpose for which the order is being made, similar to section 151C of the *Penalties and Sentences Act 1992* (the PSA), which sets out the purposes for which drug and alcohol treatment orders are made? If the scheme should include that provision should the purposes of the scheme / for which the order are made be:
    a) to divert perpetrators earlier in their offending to interventions that address their behaviour and promote ongoing behavioural change and divert them from the criminal justice system;
    b) to hold perpetrators of domestic violence accountable; and
    c) to keep victims safe.

    Are there other purposes that should be included?

2. Should the scheme have a provision similar to section 151G of the PSA, which provides that the court cannot make an order if it would pose an unacceptable risk to the safety and welfare of any person who is in a domestic relationship with the offender, a person employed or engaged by an approved provider or counsellor or a member of the community?

3. Should the scheme have a provision similar to that in section 151I of the PSA or section 70 of the DFVP Act, requiring that an explanation be given to the offender including potential impacts on their privacy and the consequences of non-compliance?

4. Section 151ZA of the PSA provides that a person is not liable to prosecution for a relevant drug offence resulting from any admission made by the person for the purposes of preparing a suitability assessment report for the person administering a treatment order for the person. The person can still be prosecuted for the relevant drug offence if evidence of the offence, other than the admission made by the person or evidence obtained because of the admission, exists. This provision exists to encourage full and frank disclosure during a suitability assessment.

    Should the scheme provide for an immunity from prosecution for statements made during a suitability assessment, similar to section 151ZA of the PSA?

5. Should the diversion scheme apply where there are multiple offences but there is a sufficient factual connection between them, such as two contraventions of a DVO for text messages sent separately?

6. Should the diversion scheme extend to offences other than a contravention of domestic violence order, including contravening a police protection notice under section 178 of the DFVP Act?

7. Should a person have to enter a plea of guilty to be eligible for the scheme?

    If the requirement were to be that a person enter a guilty plea, will this potentially have different impacts on First Nations people?

    Are there any alternatives that should be considered?

8. Should the eligibility criteria for the scheme which requires that a person has never been convicted of an offence involving domestic and family violence, extend to offending committed by a person when they were a child?

9. Is there any way in which the proposed eligibility criteria could be improved?

10. Suitability assessments need to be provided within 14 days or some longer period as allowed by the court. Is this an appropriate timeframe taking into account potential waitlists for assessments? Should there be a mandated time period from when a program must start? Is there an alternative to the court adjourning the matter to allow the suitability assessment to take place that might avoid the delay?

11. Should the requirements for when an approved provider must notify the court of a contravention be different to the current civil scheme in the DFVP Act and, if so, what should they be?

12. What potential supports could be provided to a defendant-perpetrator between the ordering of the suitability report and the commencement of the program to mitigate any risk to the victim during the interim period?

13. Is there anything further that could be done, including by Police, to better mitigate risks to victim safety while a perpetrator participates in the scheme?

14. Is there anything further that could be done in the design of the scheme to improve the mechanisms by which the court is provided with information from the approved program or counselling provider?

15. It is proposed that people would be eligible for the scheme if they are charged after the amendments commence, irrespective of whether the conduct that constitutes the offence was committed before commencement. Is this appropriate?

16. Are there any other issues you have identified with the scheme proposed? What could be changed to improve the scheme?

Recommendation 75: to introduce a new facilitation offence to stop a person facilitating domestic abuse on behalf of a perpetrator

Taskforce Findings and Recommendation

During consultation, the Taskforce heard stories about friends and family of perpetrators pressuring victims to have contact with perpetrators and, on some occasions, intimidating, berating and abusing victims on behalf of perpetrators, including when a DVO was in place. It was also noted by the Taskforce that perpetrators can hire third parties, including private investigators, to locate and monitor an aggrieved. The Taskforce found that some private investigators even advertise in a way which suggests that they will undertake surveillance work for a person who is unable to do it themselves due to a DVO. The Taskforce noted that under the current provisions of the DFVP Act, only conduct undertaken by the person named as the respondent on a DVO can be prosecuted for contravening a DVO.

To help keep victims safe by holding third parties accountable, the Taskforce recommended that the DFVP Act be amended to introduce a new facilitation offence to stop a person facilitating domestic abuse on behalf of a perpetrator against a person named as an aggrieved on a DVO, with a circumstance of aggravation if it is done by a licensed private investigator or other person for reward. This is intended to send a message to the community that DFV is not a private matter to be dealt with behind closed doors but, rather, that they have a responsibility to act in a way which does not assist in perpetuating domestic violence.

The Taskforce recommended that a new offence be created under Part 7 (Offences) in the DFVP Act to provide that a person commits a misdemeanour if, without reasonable excuse, they:

- participate in domestic violence against another person on behalf of a respondent to a DVO; and
- the person knew, or ought reasonably to have known, that the other person was named as an aggrieved on a DVO.

The Taskforce considered this type of behaviour to be especially serious when engaged in by a licensed private investigator or other person for reward. To reflect this seriousness, the Taskforce recommended that the new offence carry a circumstance of aggravation.

The Queensland Government response supported this recommendation and stated that the Government will progress amendments to criminalise facilitation of DFV with a circumstance of aggravation where it is for a reward.

Proposed approach to implementation based on the Taskforce recommendations for the purpose of discussion

It is proposed that the Taskforce's recommendation could be implemented by creating a new criminal offence of "Enabling, Aiding or Facilitating Domestic Violence" under the DFVP Act. The offence would relate to third parties, that is, persons other than an aggrieved or a respondent to a DVO.

Elements of the offence

It is proposed that the new offence could have the following elements:

- a person, without reasonable excuse, participates in behaviour against an aggrieved to a DVO, that, if done by the respondent to that DVO, would constitute domestic violence;
- domestic violence is to be defined as per section 8 of the DFVP Act;
- "participates" is to be defined as meaning enabling, aiding or facilitating;
- the person who participated in the alleged conduct was motivated to act because of their relationship with the respondent to the DVO; and
- that the person knew or ought reasonably to have known that the other person (to whom the conduct was directed) was an aggrieved to a DVO against the respondent.

It is proposed that it would be immaterial whether the respondent to the DVO was aware that the person charged with the offence participated in the conduct against the aggrieved that would have constituted domestic violence were it to have been done by the respondent.

It is also intended that the prosecution would not be required to prove that the person charged with the offence knew that their conduct amounted to enabling, aiding or facilitating domestic violence were it to be committed by the respondent.

A circumstance of aggravation could be created if the person charged with the offence is a licensed professional or participated in the conduct for "reward".

Defences

It is proposed that the defendant would be able to raise, but then the prosecution would have to disprove beyond a reasonable doubt, that the person had a reasonable excuse for the behaviour that is alleged to be the subject of the offence.

Existing defences in the *Criminal Code Act 1899* (Qld) (Criminal Code) would also be available.

Penalties

The offence could have the same maximum penalty for a contravention of a DVO, namely three years imprisonment, and be designated a misdemeanour. The Taskforce recommended that it be an indictable offence that is able to be disposed of summarily only at the election of the prosecution.

The aggravated offence could have a maximum penalty of five years imprisonment. The Taskforce recommended the aggravated offence be designated a crime and be an indictable offence that is able to be disposed of summarily only at the election of the prosecution.

The Taskforce also recommended that the aggravated offence be designated as a "disqualifying offence" for private investigators under the *Security Providers Act 1993* (Qld) (recommendation 77 of the first report). This means that a person would be automatically excluded from holding a licence as a "security provider" under that Act if they have been convicted of the aggravated offence within 10 years of their application for the licence.

Aggrieved unable to aid, abet or counsel commission of the offence

Section 180 of the DFVP Act could also be amended to include that an aggrieved does not aid, abet, counsel or procure the commission of the new offence and is not punishable as a principal offender if they encourage, permit or authorise conduct by a person who commits an offence under the new provision.

Transitional

It is intended that the amendments would apply to any person who commits conduct constituting the alleged offence after the amendments commence.

Questions for Consultation

17. The Taskforce recommended that an element of the offence be that the person charged with the new offence was motivated to act because of their relationship with the respondent to the DVO. As per section 23(3) of the Criminal Code, motive is, unless otherwise expressly provided, immaterial to criminal responsibility. Would a requirement to prove an intention be preferable rather than a requirement to prove motivation? If so, what should that intention be? What would the challenges be in proving that intention?

18. The Taskforce was silent as to whether the offence should extend to acts directed towards adults and children listed as named persons protected by a DVO. Should the offence extend to acts of violence committed by third parties against an adult or child named as a protected person on a DVO as well as an aggrieved? If so, why? If not, why not?

19. Should the new offence extend to other offences in the DFVP Act, specifically, contravention of a police protection notice (section 178) and contravention of release conditions (section 179)?

20. Should section 180 of the DFVP Act be amended to include that an aggrieved does not aid, abet, counsel or procure the commission of the new offence and is not punishable as a principal offender if they encourage, permit or authorise conduct by a person who commits an offence under the new provision?

21. Section 181 of the DFVP Act provides that an offence under that Act is only an indictable offence if the maximum penalty is more than 3 years imprisonment. However, the Taskforce recommended that the facilitation offence simpliciter be an indictable offence with a maximum penalty of 3 years imprisonment. What are the advantages and disadvantages of the new offence being indictable?

22. The Taskforce recommended that it should be a circumstance of aggravation if the person who committed the offence is a licensed private investigator or another person who participates in the conduct for reward:

    a) Private investigators are part of a class of people, namely "security providers", who hold a security licence under the *Security Providers Act 1993* (SP Act). A security provider is defined in the SP Act as a bodyguard, crowd controller, private investigator, security adviser, security equipment installer, security officer, and security firm. Should "licensed private investigator" instead be rephrased as a person holding a security licence?

b) The new offence will need to define "reward". "Reward" is defined in the SP Act as meaning "reward under an arrangement". "Arrangement" is defined as including a scheme, agreement, understanding, promise or undertaking (express or implied). Is this definition of "reward" too broad? Would it be appropriate to rephrase it as deriving an advantage or benefit? Benefit is broadly defined in the Criminal Code as including property, advantage, service, entertainment, the use of or access to property or facilities, and anything of benefit to a person, whether or not it has any inherent or tangible value, purpose or attribute.

23. The Queensland Government will ensure community education activities are in place to support any amendments to the facilitation offence to ensure public understanding. Do you have any suggestions around the best approaches for this work (e.g. campaigns, stakeholder and community engagement, information resources) that would be most effective, engaging and impactful to communicate with particular audience groups? If yes, why?

24. Can you identify any specific channels that would be most effective to communicate about the facilitation offence with these audience groups? E.g. particular media channels, through frontline services, community groups, through health and police touchpoints, etc.

Recommendation 76: to require a court making a Domestic Violence Order to impose an additional standard condition that the perpetrator must not counsel or procure someone else to engage in behaviour that if engaged in by the perpetrator would be domestic violence

Taskforce Findings and Recommendation

This recommendation is closely linked to recommendation 75 above. In order to actively dissuade perpetrators from encouraging third parties to commit acts of domestic violence on their behalf, the Taskforce recommended that sections 56 and 106 of the DFVP Act, which outline the standard conditions that must be included on police protection notices and DVOs, be amended to include an additional standard condition that the respondent must not counsel or procure someone else to engage in behaviour that, if engaged in by the respondent, would constitute domestic violence against the aggrieved.

The Queensland Government response supported this recommendation and stated that the Government will progress amendments to require a court making a DVO to impose an additional standard condition that the perpetrator must not counsel or procure someone else to engage in behaviour that if engaged in by the perpetrator would be domestic violence.

Proposed approach to implementation based on the Taskforce recommendations for the purpose of discussion

It is proposed that the Taskforce's recommendation could be implemented by amending sections 56 and 106 of the DFVP Act to require an additional standard condition be included in police protection notices and DVOs that the respondent must not counsel or procure someone else to engage in behaviour that would constitute domestic violence against the aggrieved were such behaviour engaged in by the respondent. Domestic violence would be defined as per section 8 of the DFVP Act.

It is proposed that section 60 of the DFVP Act could also be amended to clarify that the new standard condition does not prohibit the respondent from asking a lawyer to contact the aggrieved or from asking another person, including a lawyer, to contact or locate the aggrieved for a purpose authorised under an Act.

It is proposed that the new standard condition would appear on police protection notices issued after the amendments commenced. In line with this, the new standard condition would be included on DVOs for proceedings commenced after the amendments commence.

Questions for Consultation

25. It is proposed that the wording of the new standard condition could be that the respondent must not counsel or procure someone else to engage in behaviour that would constitute domestic violence against the aggrieved were such behaviour engaged in by the respondent. Is this wording for the new standard condition appropriate? How could it be improved?

26. Sections 56(1)(b)-(c) and 106(b)-(c) of the DFVP Act stipulate that if the order or notice includes a named person who is an adult and/or a child, then there must be an additional condition (or conditions) that the respondent must be of good behaviour towards the named person/child, not commit associated domestic violence against the named person/child and must not expose the named child to domestic violence. The Taskforce was silent as to whether the new standard condition should also apply to named persons and children as sections 56 and 106 do. Should the new condition extend to adults and children listed as named persons on the order or notice or just an aggrieved?

27. While not explicitly recommended by the Taskforce, it is proposed that section 60 of the DFVP Act could be amended to clarify that the new standard condition does not prohibit a respondent from asking a lawyer to contact the aggrieved or from asking another person, including a lawyer, to contact or locate the aggrieved for a purpose authorised under an Act. Is this appropriate?

28. It is intended that the new standard condition would be included on DVOs that are made in matters where the application is filed after the amendments commence. Is this appropriate? If not, why not?

Recommendation 78: to create a new offence to criminalise coercive control

Taskforce Findings and Recommendation

Through its research and extensive consultation, the Taskforce found that there is no one criminal offence in Queensland that sufficiently holds perpetrators of coercive control accountable for the full spectrum of physical and non-physical abuse against their victims. Noting that coercive and controlling behaviours are a violation of human rights and result in long-lasting harm to victims, their children and the wider community, the Taskforce recommended amendments to the Criminal Code to create a new offence to criminalise coercive control.

The Taskforce considered that this was one way to address coercive control which would both condemn the abuse and deter those who might be inclined to rely on it as a means of controlling others. A standalone offence would also ensure that human rights are best protected and promoted.

Central to the Taskforce's recommendation was that the new offence should be modelled on the coercive control offence that operates in Scotland, with necessary adjustments to reflect Queensland's laws, systems and particular needs. The Taskforce strongly believed that the success of the new offence would hinge on there being sufficient lead up time prior to commencement. As such, the first report emphasised that the new offence should not commence until at least 15 months after passage to enable implementation activities to be undertaken and to enable sufficient services and supports to be in place before commencement.

The Queensland Government response supported this recommendation and the criminalisation of coercive control and stated that the Government will progress amendments in accordance with the staged approach to reform recommended by the Taskforce.

Proposed approach to implementation based on the Taskforce recommendations for the purpose of discussion

Name of the offence

The Taskforce did not prescribe the exact name that the offence should have but recommended that it include the words coercive control and make some reference to the offence as a course of conduct. The Taskforce said that the name of the offence should not include the term 'maintaining'. One potential option is "Unlawfully Engaging in a Course of Coercively Controlling Conduct". Another is "Unlawful coercive control in a relevant relationship."

Elements of the offence

It is proposed that the elements of the offence that must be proved by the prosecution could be that:

- A person (the first person) and another person (the second person) are in a 'relevant relationship' as defined in section 13 of the DFVP Act; and
- The first person engages in conduct:
    - on two or more occasions;
    - consisting of one or more of the acts described in section 8 (Meaning of domestic violence) of the DFVP Act;
    - the acts of domestic violence are directed by the first person towards the second person; and
    - the acts of domestic violence would be likely to cause the second person serious harm, reasonably arising in all the circumstances, where that harm will be defined to include physical, emotional, financial or psychological harm, fear, alarm or distress.

What it would not be necessary to prove

It would **not** be necessary to prove that:

- the acts of domestic violence actually did cause the second person serious harm;
- the first person had any specific intention, including any intention to cause harm to the second person; and
- if the act of domestic violence was unauthorised surveillance or economic abuse of the second person, that the second person was aware of the act of domestic violence.

It is also proposed to provide that an act of domestic violence can be directed by the first person towards the second person even where the acts of domestic violence are committed towards either a third person, including a child, relative or friend of the second person, the property of the second person, or an animal of the second person.

Defences

It is proposed that it will be a defence when the defendant proves, on the balance of probabilities, that their conduct was reasonable in the context of the relationship as a whole.

Penalty, sentencing and disposition

It is also proposed that unlawful stalking will be a statutory alternative verdict to the offence, the maximum penalty for the offence will be 14 years imprisonment and the offence will be an indictable offence and a crime.

It is intended to provide that the offence could be dealt with summarily on a plea of guilty, but at whose election is to be determined after consultation.

It is proposed to provide that the offence is a serious violent offence pursuant to Schedule 1 of the PSA. Restraining order powers will be modelled on those currently provided for the offence of Unlawful Stalking at section 359F of the Criminal Code (as proposed to be amended by the current Bill).

Questions for Consultation

29. What should the name of the new coercive control offence be?

30. For educative purposes, should the offence explicitly list the types of behaviour in section 8 of the DFVP Act rather than just refer to section 8 of the DFVP Act? ?

31. The Scottish Act that criminalises coercive control defines harm as "physical and psychological harm", with psychological harm including "fear, alarm and distress". The proposed definition for the Queensland legislation is broad and would encompass everything in the Scottish legislation. Is a narrower definition of "harm" such as the one contained in the Scottish Act preferrable? If so, why?

32. Would the requirement to prove any of the elements make the offence too difficult to prove? Are there any experiences in proving the elements of unlawful stalking that can be drawn upon in that regard?

33. If the offence provides for an embedded defence, would it be necessary to replicate the provisions in section 359D of the Criminal Code (particular conduct that is not unlawful stalking) and provide for specific categories of conduct that do not constitute the offence?

34. The Taskforce recommended that the offence be able to be dealt with summarily only on a plea of guilty but did not comment on at whose election the offence should be dealt with summarily. Should the offence be dealt with summarily on the prosecution or the defence's election? What are the reasons to justify it being one or the other?

35. It is intended that the amendments apply to any person who commits an offence, or any of the acts constituting the offence, after the amendments commence. Is this an appropriate approach?

36. The Queensland Government will ensure community education activities are in place to support introduction and effect of the new coercive control offence to ensure public understanding. Does anything from the Scottish campaign 'Hidden in plain sight' (https://womensaid.scot/project/hidden-in-plain-sight-domestic-abuse-and-coercive-control/) for domestic abuse and coercive control resonate with you as having potential to be effective and impactful for a Queensland audience? If yes, what and why? If no, why not?

37. What would you consider to be the most effective way to communicate and educate on this new offence (e.g. campaigns, stakeholder and community engagement, information resources)? What channels of communication do you believe would be the most effective (e.g. particular media channels, through frontline services, community groups, through health and police touchpoints, etc.)?

38. Are there any other issues you have identified with the proposed approach to the coercive control offence?

Recommendation 79: to introduce aggravating factors for domestic violence offences for non-compliance with a court order and for exposing a child to DFV

Taskforce Findings and Recommendation

During consultation, the Taskforce received a significant number of submissions which highlighted the particular difficulties faced by victims with children. The Taskforce emphasised that children are often

overlooked as victims of coercive control and that exposure to coercive control has immediate and long-lasting impacts that often, but not always, result in negative life outcomes. This includes becoming vulnerable to developing complex trauma which can affect the neurological development of the brain and lead to impairments in cognitive, emotional, social, and arousal functions of the brain.

Based on this, the Taskforce considered that offending which contravenes a court order or exposes a child to DFV is particularly serious and should be reflected on the criminal history and in sentencing a perpetrator. The relevant recommendation by the Taskforce was to progress amendments to the PSA to ensure that the new coercive control offence holds perpetrators accountable for non-compliance with court orders and harm caused to children by DFV and coercive control. While these factors can currently be taken into account by a sentencing court, the Taskforce was of the view that making the aggravating factors explicit would reinforce the seriousness of these circumstances.

The Queensland Government response supported this recommendation and stated that the Government will progress amendments to provide for an explicit aggravating sentencing factor where the offender has committed a domestic violence offence in breach of a court order or where the offence exposed a child to domestic violence.

Existing Queensland provisions

Section 9 of the PSA provides for sentencing guidelines and lists out the purposes of sentencing, as well as a number of aggravating and mitigating factors. Section 9(10A) provides that in determining the appropriate sentence for an offender convicted of a domestic violence offence, the court must treat the fact that it is a domestic violence offence as an aggravating factor, unless the court considers it is not reasonable because of the exceptional circumstances of the case. Examples of exceptional circumstances are made explicit and are that the victim of the offence has previously committed an act of serious domestic violence, or several acts of domestic violence, against the offender or that the offence is manslaughter under the Criminal Code, section 304B.

Section 12A of the PSA provides for convictions for offences relating to domestic violence offences. It applies if a complaint or an indictment for a charge for an offence states the offence is also a domestic violence offence and the offender is convicted of the offence.

The requirements on the court in section 12A flow from whether or not a conviction is recorded for the offence. If a conviction is recorded in relation to the offence, the conviction must also be recorded as a conviction for a domestic violence offence. It must be recorded or entered in that way unless the court makes an order to the effect it is not satisfied the offence is also a domestic violence offence.

If the court convicts a person of an offence that has to be recorded or entered on their criminal history, or an offence under Part 7 of the DFVP Act, then the prosecution can also make an application for a previous offence to be either recorded or entered. If, after considering the application, the court is satisfied the previous offence is a domestic violence offence, the court must order that the previous offence be recorded or entered; again which of those actions the court must take being determined by whether a conviction had been recorded for the offence. Section 12A also provides that a person against whom the domestic violence offence was committed is not compellable as a witness in proceedings before the court to decide the application. Proof that an offence is a domestic violence offence lies on the prosecution.

There is also provision for the court to correct any errors made in recording or entering an offence as a domestic violence offence and it is made explicit that there is no requirement for a matter to be recorded or entered in an offender's traffic history.

Finally in Queensland, section 10 of the DFVP Act provides for a meaning of "exposed to domestic violence." It provides that a child is exposed to domestic violence if the child sees or hears domestic violence or otherwise experiences the effects of domestic violence.

Under the schedule to the DFVP Act, a child does not have an age limit but is defined by reference to the relationship between the child and the aggrieved or respondent. A child of an aggrieved or of a respondent, means a child who is a biological, adopted, or step child of that person or in the care or custody of that person. Under schedule 1 of the *Acts Interpretation Act 1954*, a child, if age rather than descendancy is relevant, means an individual who is under 18. Section 9(2)(c)(ii) of the PSA provides in sentencing an offender, a court must have regard to the nature of the offence and how serious the offence was, including the effect of the offence on any child under 16 years who may have been directly exposed to, or a witness to, the offence.

The DFVP Act provides for examples of a child being exposed to domestic violence as including overhearing threats of physical abuse, overhearing repeated derogatory taunts, including racial taunts, experiencing financial stress arising from economic abuse, seeing or hearing an assault, comforting or providing assistance to a person who has been physically abused, observing bruising or other injuries of a person who has been physically abused, cleaning up a site after property has been damaged or being present at a domestic violence incident that is attended by police officers.

Potential further amendments

If passed, the Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Bill 2022, will amend the following sections in the PSA:

- section 9 to insert a mitigating factor which requires a court, when sentencing an offender who is a victim of domestic violence, to treat the effect of the domestic violence on the offender and the extent to which the commission of the offence is attributable to the effect of the violence, as a mitigating factor, unless the court considers it is not reasonable to do so because of exceptional circumstances; and
- section 11 to provide that the history of DVOs made or issued against an offender, other than orders made or issued when the offender was a child, may be considered by a sentencing court when determining an offender's character.

Proposed approach to implementation based on the Taskforce recommendations for the purpose of discussion

It is proposed that section 9 of the PSA could be amended to insert a new aggravating factor that applies to any offence that falls within the definition of domestic violence offence under section 1 of the Criminal Code, and:

-
- during the commission of the offence a child was exposed to domestic and family violence within the meaning of section 10 of the DFVP Act; or
- the offence committed was also a breach of a domestic and family violence order or other court order or injunction.

It is proposed that a new provision could be inserted, or the existing section 12A amended to provide that where a new aggravating factor applies, it must be entered or recorded on the person's criminal history.

The intention would be that where those offences are entered or recorded on a person's criminal history it would be explicit as to which aspect of the aggravating factor was applied. For example, the entry on the criminal history might read, 'domestic violence offence – child exposed' or 'domestic violence offence – breach of domestic violence order, court order or injunction'.

Otherwise, it is proposed the existing procedures under section 12A of the PSA for recording and entering domestic violence convictions on criminal histories could be replicated, including the procedure that applies where no conviction is recorded for the offence and to previous convictions.

It is proposed that the amendments would apply to any person who commits an offence or any of the acts constituting the offence, after the amendments commence.

Questions for Consultation

39. Should there also be an explicit aggravating factor for where the complainant of a domestic violence offence is a child and the defendant is an adult? This might not be explicitly captured either by the existing aggravating factors in the PSA or the new proposed 'exposure' aggravating factor. If that aggravating factor should be made explicit, should it also be subject to the proposed amendments about recording and entering convictions on criminal histories?

40. There are different definitions of "child" across legislation in Queensland. For the purposes of the proposed aggravating factor in the PSA, should child be defined as:

    a. somebody who is neither the complainant nor the defendant and who is under 18 years of age, which is similar to the law in Scotland?
    b. someone who, by reference to the relationship between that person and the complainant or defendant, is a child as is the case in the schedule to the DFVP Act? This definition would not be constrained by age.
    c. someone who is under the age of 16 years, to keep consistency with section 9(2)(c)(ii)?
    d. alternatively, should it remain undefined so that the definition in schedule 1 of the Acts Interpretation Act 1954 will apply, which is, that a child, if age rather than descendancy is relevant, means an individual who is under 18? or
    e. should it be some combination of these definitions?

41. It is proposed that the amendments would apply to any person who commits an offence or any of the acts constituting an offence, after the amendments commence. Is this an appropriate approach?

Hear her voice – Report Two

Chapter 2.12 – The use of preliminary complaint evidence for domestic and family violence related offences

Recommendation 76: to expand the admission of preliminary complaint evidence to all domestic violence offences

Taskforce Findings and Recommendation

In recommending that a new offence be created to criminalise coercive control in its first report, the Taskforce acknowledged that the potential use of evidence of preliminary complaint in matters involving coercive control should be explored further. The Taskforce considered this issue in the second report.

In Chapter 2.12 of the second report, the Taskforce noted that victims of coercive control may be more likely to disclose the abuse they have experienced in a safe and trusted environment to a friend, confidant or family member before reporting it to authorities. To allow for these disclosures to be admissible in trials for DFV-related offences, the Taskforce recommended that the *Evidence Act 1977* (Evidence Act) be amended to expand the admission of preliminary complaint evidence in section 4A of the *Criminal Law (Sexual Offences) Act 1978* (CLSO Act) to all domestic violence offences. Further, in consideration of the expanded use, the Taskforce recommended moving section 4A of the CLSO Act in its entirety into the Evidence Act as a discrete Division.

The intention of the Taskforce in making this recommendation was that preliminary complaint evidence would be admissible in proceedings for any criminal offence that is also a domestic violence offence within the meaning of section 1 of the Criminal Code.

Preliminary complaint evidence relates to any disclosures by a victim about the offending which are made before their first formal witness statement to a police officer. Currently in Queensland, preliminary complaint evidence can only be admitted as an exception to the hearsay rule in trials involving sexual offences. The Taskforce noted that DFV-related offences are similar to sexual offences in so far as both types of offending involve contact of an intimate nature between two people and most frequently occur in private. In its second report, the Taskforce noted that it could see no reason why preliminary complaint evidence should be able to be admitted in relation to sexual offences but not DFV-related offences.

Further, the Taskforce noted that it is likely in many matters involving coercive control that there may also be charges of a sexual nature, which means that presently preliminary complaint evidence would only be able to be led in relation to the sexual offences. As such, the Taskforce was of the view that allowing preliminary complaint evidence to be admitted in trials for DFV-related offences may better contextualise the complainant's evidence about the totality of their abuse, noting that this is particularly important where the case involves coercive control which requires consideration of the whole relationship over time.

The types of preliminary complaint evidence that the Taskforce envisaged being able to be admitted if the law was changed include:

- disclosures by the victim in conversations with relatives, friends, colleagues or neighbours, including via electronic means;
- disclosures by victims when engaging with support services, including medical professionals, counsellors or hairdressers, in the form of conversations and in records of those conversations; and
- initial disclosures by victims to police about the offender's conduct, including audio recordings and body-worn camera footage.

If the legislation is amended to simply allow for the admission of preliminary complaint evidence in DFV-related offences as well as sexual offences, the evidence would be relevant to the complainant's credibility only, as opposed to evidence of the facts in issue. This would mean that disclosures made by the victim to others could be compared to the victim's evidence given in court for the purpose of enabling the fact finder (usually a jury) to assess the credibility and reliability of the victim. This is in contrast to the position in Uniform Evidence Law (UEL) jurisdictions where preliminary complaint evidence is able to be used as evidence of the facts in issue in some circumstances. Facts in issue are those facts which the prosecution must prove in order for their case to succeed.

While the Taskforce did not go so far as to recommend that preliminary complaint evidence should be admissible as evidence of the facts in issue in trials, it did note that the Government may wish to consider such an expansion to bring the exception to the hearsay rule in Queensland more into line with how similar exceptions are treated in the UEL jurisdictions. If the Government were to adopt this expansion, it would mean that preliminary complaint evidence would be admissible as evidence of the facts in issue in sexual offence and domestic violence offence trials, in addition to the credibility and reliability of the victim.

The Queensland Government response supported this recommendation and stated that the Government will progress amendments to the Evidence Act that expand the admission of preliminary complaint evidence to DFV offences and relocate the current provisions relating to sexual offences from the CLSO Act to the Evidence Act.

Proposed approach to implementation based on the Taskforce recommendations for the purpose of discussion

It is proposed that the exception to the hearsay rule that allows for the admissibility of preliminary complaint evidence in sexual offence trials could be expanded to also allow for the admissibility of preliminary complaint evidence in proceedings for all domestic violence offences. In doing so, section 4A of the CLSO Act could be removed and a new Division with the expanded section relating to preliminary complaint evidence could be inserted into the Evidence Act.

It is proposed that the new section in the Evidence Act could be named "Evidence of complaint generally admissible in sexual assault and domestic violence offences". This is different to the name of section 4A of the CLSO Act which is "Evidence of complaint generally admissible". The purpose of the different name would be to clarify that preliminary complaint evidence will be generally admissible in sexual and domestic violence-related offences only but will not be generally admissible in relation to other criminal offences.

"Sexual offence" is defined in the CLSO Act as any offence of a sexual nature and includes a prescribed sexual offence. "Sexual assault offence" is defined in the Evidence Act as:

(a) an offence of a sexual nature, including, for example

  (i) an offence against a provision of the Criminal Code, chapter 32; and

  (ii) an offence against a provision of the Criminal Code, chapter 22; or

(b) an act or omission that would constitute an offence mentioned in paragraph (a) if the act or omission had occurred

  (i) in Queensland; or

  (ii) after the offence provision commenced; or

(c) an alleged offence mentioned in paragraph (a).

It is proposed that the definition of "sexual assault offence" in the Evidence Act would be adopted in the new section that will allow for the admissibility of preliminary complaint evidence in sexual assault and domestic violence-related offences in the Evidence Act.

The Taskforce recommended that, in expanding the admissibility of preliminary complaint evidence for domestic violence offences, that "domestic violence offence" be defined as per section 1 of the Criminal Code. It is proposed, however, that for the purposes of the new section, which would be inserted in the Evidence Act, "domestic violence offence" be defined as per section 103B of the Evidence Act.

"Domestic violence offence" is defined in section 1 of the Criminal Code as an offence against an Act, other than the DFVP Act, committed by a person where the act done, or omission made, which constitutes the offence is also—

(a) domestic violence or associated domestic violence, under the DFVP Act, committed by the person; or

(b) a contravention of the DFVP Act, section 177(2).

"Domestic violence offence" is defined in section 103B of the Evidence Act as:

(a) an offence against the DFVP Act, part 7; or

(b) an offence against another Act committed by a person where the act or omission that constitutes the offence is also—

  (i) domestic violence or associated domestic violence under the DFVP Act committed by the person; or

  (ii) a contravention of the DFVP Act, section 177(2).

It is proposed that admissible preliminary complaint evidence could be led to assess the credibility of the victim in sexual offence and domestic violence-related offence trials. As is currently the case in Queensland, such evidence would be admissible regardless of when the preliminary complaint was made.

It is proposed that preliminary complaint evidence could be admissible in domestic violence-related offence proceedings for matters where the defendant is charged after commencement of the amendments.

Questions for Consultation

42. Is it appropriate for the proposed new section in the Evidence Act to take on the definition of "domestic violence offence" as defined by the Evidence Act? Or should "domestic violence offence" in the new section be defined as per section 1 of the Criminal Code?

43. It is intended that preliminary complaint evidence in sexual and domestic violence-related offence trials would be admissible regardless of when the preliminary complaint was made as this is in line with the current approach in section 4A of the CLSO Act. Is it appropriate to keep the legislative provision that allows for the admissibility of preliminary complaint evidence in relevant matters regardless of whether the preliminary complaint is recent or delayed?

44. The second report notes that the Queensland Government may wish to consider whether preliminary complaint evidence should also be admissible as evidence of the facts in issue in trials of domestic violence and sexual assault offences to move Queensland more into line with how similar exceptions to the hearsay rule are treated in the UEL jurisdictions.

    Should the new section relating to preliminary complaint evidence expand the admissibility of preliminary complaint evidence so that it may be used as evidence of the facts in issue in sexual offence and/or DFV offence trials? Please provide your reasons as to why or why not.

45. It is proposed that the new section would apply to proceedings in which the defendant is charged after the commencement of the amendment. This would be irrespective of whether the conduct constituting the alleged offence occurred before commencement. This would be consistent with the general approach to procedural and evidence amendments but protects matters that are currently on foot from forensic disadvantage. Do you agree with this approach? If not, please provide reasons.

46. Would the expansion of preliminary complaint evidence for all DFV offences have any implications for the sexual assault counselling records scheme?

A Call for Change

Chapter 6 – Recruitment, training and support

Recommendation 20: to amend the *Domestic and Family Violence Protection Act 2012* to repeal section 113(3)(c)

Commission of Inquiry Recommendation

In its report, *A Call for Change*, the Commission of Inquiry into Queensland Police Service Responses to Domestic and Family Violence (the Commission), noted that it had observed an anomaly in the operation of the DFVP Act which has the potential to leave victim-survivors unprotected. Section 113(3)(c) of the DFVP Act has the effect that a Police Protection Notice (PPN) ends if the court adjourns the application for a protection order and does not make a temporary protection order. The Commission's report notes that a consequence of this could be that if, in a busy call over, a Magistrate does not consider and make a temporary protection order, then the aggrieved would be unprotected for the length of the adjournment. The Commission therefore recommended the repeal of section 113(3)(c) of the DFVP Act.

The Queensland Government has supported-in-principle all of the recommendations of *A Call for Change*.

Policy intent of the recommendation

The policy intent behind this recommendation is to provide for the continued protection of a victim-survivor by way of continuity of a PPN, in circumstances where a busy Magistrate may not have turned their mind

to whether a temporary protection order should be made at the first mention for an application for a protection order, before adjourning it.

The problem identified by the Commission may be most likely to occur when a PPN is issued, neither the aggrieved nor respondent attend the first court date and the respondent has not been served with the application. In those circumstances, the matter would need to be adjourned. If the police prosecutor does not ask the court to make a temporary protection order and the Magistrate does not turn their mind to whether one needs to be made, then the aggrieved would have no legal protection until the matter is next in court.

Current use of section 113(3)(c) and potential consequences of its repeal

If section 113(3)(c) is repealed, an unintended consequence could be that a person misidentified as a respondent on a PPN, would still be subject to a PPN during an adjournment, even if the court has formed a view that a temporary protection order would not be appropriate.

Another circumstance where a temporary protection order may not be appropriate is if a respondent requires an assessment to determine whether they have capacity to partake in the legal proceedings. A Magistrate may make an initial determination that they are not satisfied that the respondent has the capacity to understand the effect and criminal consequences of a DVO and decline to make a temporary protection order. Repealing section 113(3)(c) would mean that the respondent would be subject to the PPN during the adjournment, including the potential criminal consequences of breaching the PPN despite there being questions about their legal capacity to understand the effect of the PPN.

Possible approaches to implementing the recommendation

There are several approaches that could be taken to implement this recommendation:

- Repeal section 113(3)(c) of the DFVP Act as recommended by the Commission;
- Amend section 113(3)(c) in a way that would leave discretion to the court not to make a temporary protection order whilst also ensuring that a PPN ends. This could be, for example, clarifying that the PPN continues in force until a court makes an order that the PPN comes to an end. Clarification could also be inserted to confirm that if, on adjournment, no domestic violence order is made and no order is made ending the PPN, then the PPN will continue; or
- Amend the DFVP Act to clarify that a court must consider whether to make a temporary protection order on a first return date when a matter is required to be adjourned.

Questions for Consultation

47. Are there other consequences of implementing the recommendation by repealing section 113(3)(c) of the DFVP Act?

48. Which of the above proposed approaches is preferred? Why? Is there a more favourable alternative approach to give effect to the policy intent of the recommendation?

Chapter 14 – Impacts of cultural issues

Recommendation 50: to amend section 97 of the *Domestic and Family Violence Protection Act 2012* to clarify the court's discretion to make orders of less than five years duration where circumstances require it

Commission of Inquiry Recommendation

Section 97 of the DFVP Act provides that a protection order continues in force until the day stated by the court in the protection order or if no day is stated, the day that is 5 years after the day the protection order is made. It also provides that the court may order that a protection order continues in force for any period

the court considers is necessary or desirable to protect the aggrieved from domestic violence or a named person from associated domestic violence but for a period of less than 5 years only if the court is satisfied there are reasons for doing so. In deciding the period for which a protection order is to continue in force, the principle of paramount importance to the court must be the safety, protection and wellbeing of people who fear or experience domestic violence, including children.. If the court orders that a protection order continues in force for a period of less than 5 years, the court must give reasons for making the order.

The court already has the power to make an order for any length of time that it considers is necessary or desirable to protect the aggrieved, however, there is no explicit requirement for the court to consider what would be an appropriate length for an order.

In its inquiries, the Commission found that there was a consistent theme, particularly in First Nations communities, of conditions that prohibit contact between a respondent and an aggrieved where compliance with that condition was impractical. Most commonly these were non-contact conditions placed on two people who would still have ongoing contact because they are in a continuing relationship, because their parenting or care arrangements required it or because of the practicalities of living in a small community.

The Commission found that the statutory presumption that a Protection Order will be in place for five years, in combination with onerous and impractical conditions, gives rise to an increased risk of the parties being charged with contravention offences. In the case of First Nations people, this compounds existing disadvantage and contributes to their overrepresentation in the criminal justice system.

The Commission said that a five year order may not always be appropriate and that discretion should always be exercised by the court to reflect the genuine needs of an aggrieved person.

The Queensland Government has supported-in-principle all of the recommendations of *A Call for Change*.

Possible approaches to implementing the recommendation

The policy intent of this recommendation is to encourage the use of judicial discretion to ensure that the length of a protection order reflects the unique needs and circumstances of the parties in each case.

A potential approach to implementing this recommendation could be to amend section 97 of the DFVP Act to include an explicit provision that the court must consider what would be an appropriate period of time for a protection order to be in force. The existing requirement in section 97(3) of the DFVP Act (that the safety, protection and wellbeing of people who fear or experience domestic violence is the paramount consideration) would not be changed.

Questions for Consultation

49. Is the proposed approach outlined above for implementing recommendation 50 of the Commission's report suitable? If not, why?

    Alternatively, is there another option for implementing the intent of recommendation 50?

50. Are there any consequences of amending section 97 of the DFVP Act to implement the policy intent of recommendation 50 of the Commission's report that might need to be considered?

Part Two

Legislation addressing sexual violence

Links to legislation referenced in this part:

- *Crimes Act 1900* (NSW) – Part 3, Division 10, Subdivision 1A
- *Criminal Code Act 1899* (Qld) – Chapter 32
- *Criminal Code Act 1924* (Tas) – Section 2A
- *Criminal Law (Sexual Offences) Act 1978* (Qld) – Section 4; Section 5
- *Criminal Procedure Act 1986* (NSW) – Chapter 6, Part 5, Division 1, Subdivisions 3 and 4
- Criminal Procedure Act 2009 (Vic) – See sections 346 and 352
- *Evidence Act 1977* (Qld) – Section 21; Part 2, Division 4C; Section 132BA
- *Evidence Act 1995* (NSW) – Section 41
- *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) – See sections 48 to 56 for new provisions to be inserted into the *Jury Directions Act 2015* (Vic)

Links to other resources referenced in this part:

- Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* – Executive Summary and Parts I to II (see pages 88 to 90); Parts VII to X and appendices (see pages 116 to 194)

Hear her voice – Report Two, Part Two

Chapter 2.7 – Consent, mistake of fact and stealthing

Recommendation 43: to amend sections 348 (Meaning of consent) and 348A (Mistake of fact in relation to consent) in the Criminal Code to create an affirmative consent model

Taskforce Findings and Recommendation

The Taskforce recommended, by majority, that Queensland should move to an affirmative model of consent.

In contrast to Queensland's current 'communicative model', an affirmative consent model has been described as a 'yes means yes' approach which requires clear and unequivocal positive communication about consent.

The Taskforce's recommendation for reform of the definition of consent also had regard to the need for consistency with other Australian jurisdictions and found that consistent language around the definition of consent across the country would benefit the smooth implementation of the national respectful relationships curriculum and ensure minimum confusion for Australians moving between states and territories.

The Queensland Government response supported this recommendation and stated that the Government will progress amendments to create an affirmative model of consent in Queensland.

Proposed approach to implementation based on the Taskforce recommendations for the purpose of discussion

Consent to be 'agreed' rather than given

The Taskforce accepted what it had heard from many women that, in practice, the 'giving' of consent suggests that women and girls are 'gatekeepers' of sexual propriety and the term 'agreed' was more reflective of modern community standards, which value equality and mutual respect. In accordance with the Taskforce's recommendation it is proposed to amend section 348(1), meaning of consent, from "freely and voluntarily given" to "freely and voluntarily agreed".

Expansion of examples in which consent is not freely and voluntarily given

It is proposed to amend section 348(2) of the Criminal Code, which currently provides a non-exhaustive list of circumstances where consent is not freely and voluntarily given, to provide further examples of where consent will not be freely and voluntarily agreed. The Taskforce found that the benefits of this approach include that it would add clarity and remove ambiguity about situations where consent is absent, it reflects contemporary community standards, provides statutory guidance to jurors, supports QPS when making charging decisions, and provides an educative function. Section 348(2) would continue to be a non-exhaustive list but would be expanded to reflect the circumstances set out in section 61HJ of the *Crimes Act 1900* (NSW) and would include examples such as:

- the person is asleep or unconscious;
- the person is so affected by alcohol or another drug as to be incapable of consenting to the sexual activity;
- the person participates in the sexual activity because the person or another person is unlawfully detained; and
- the person participates in the sexual activity because the person is overborne by the abuse of a relationship of authority, trust or dependence.

Grievous bodily harm to be prima facie evidence of a lack of consent

The Taskforce heard about women and girls being subjected to non-consensual sexual violence from perpetrators who were likely influenced by violent pornography. Consistent with the Taskforce's recommendation it is proposed to amend section 348, meaning of consent, such that if the person alleging sexual violence has suffered resulting grievous bodily harm, those injuries must be taken to be evidence of a lack of consent unless the accused person can prove otherwise. The proposed amendment would be modelled on section 2A(3) of the *Criminal Code Act 1924* (Tas). It is proposed that this would be best achieved through additional subsection to section 348 of Queensland's criminal code.

Voluntary intoxication

Currently in Queensland voluntary intoxication can be relevant to deciding whether a defendant held an honest belief about consent but must not be considered relevant to decide whether the belief was reasonable. The majority of the Taskforce considered the current construction of the law in Queensland on voluntary intoxication was leading to confusion and error in its application and that a clearer position would assist in community education. Consistent with the Taskforce's recommendation it is proposed to amend section 348A(3) to make it clear that in considering mistaken belief about consent to sexual activity, no regard must be had to the voluntary intoxication of an accused person. Under this proposal voluntarily intoxication would be irrelevant to considering whether a defendant's mistake of fact was honest, and reasonable.

Limiting the application of the excuse of mistake of fact

It is proposed to amend section 348A to include a subsection that provides that an accused's belief that the other person was consenting to the sexual activity was not reasonable if the accused person did not, within a reasonable time before or at the time of the sexual activity, say or do anything to find out whether the other person consented to the sexual activity. This would be consistent with the position in section 61HK(2) of the *Crimes Act 1900* (NSW).

Limitation on the excuse of mistake of fact will not apply in certain circumstances

The Taskforce recommended that the limitation on the excuse of mistake of fact should not apply to persons with cognitive impairment, mental impairment, or another type of impairment that impacted the accused's ability to communicate if their impairment was a substantial cause of the person not saying or doing anything (referred to in this discussion paper as a safeguard provision). Consistent with the provisions at sections 61HK (3) and (4) of the *Crimes Act 1900* (NSW) the onus of proof for establishing impairment would be on the accused person.

Delayed commencement

The Taskforce recommended that the proposed amendments would not commence until at least 6 months after passage of the Bill to allow for a comprehensive community education campaign and the establishment of the proposed trial of an expert evidence panel to support the new limitation on the excuse of mistake of fact (see the discussion on Recommendation 80 below).

Questions for consultation

51. Strangulation can often lead to unseen/invisible injuries that constitute grievous bodily harm, and may go undetected. Where the strangulation constituted grievous bodily harm, would there be difficulty in obtaining the necessary medical evidence to prove it? If so, what practical steps could be taken during implementation to improve this situation?

52. The proposed amendment to section 348A of the Criminal Code, to require an accused to do or say something to ensure consent is agreed, requires the fact finder to look at what the defendant said or did at a reasonable time before or at the time of the offence.

    a) Does "reasonable time" require legislative clarification, in the context of adopting an affirmative consent model? Should it instead be "immediately before"?

    b) Is clarification required in the provision so it is clear that the legislation intends to make it a requirement that the accused does or says something to find out whether the person was consenting generally, but specifically to act on the indictment, particularly in circumstances where there was otherwise consensual sexual activity between the person and the accused?

53. The application of the safeguard provision relating to the limitation of the excuse of mistake of fact will require the application of a two-step test applied on the balance of probabilities:

    - The accused had a cognitive impairment, mental impairment or another type of impairment that impacted on the accused's ability to communicate; and
    - The impairment was a substantial cause of the person not doing or saying anything.

    a) The safeguard exists to ensure the protection of defendants who experience communication difficulties as a result of recognised impairments. In New South Wales and Victoria, "cognitive impairment" and "mental health impairment" are defined. Should Queensland also define these terms?

    b) In New South Wales and Victoria, the terms "cognitive impairment" and "mental health impairment" are used consistently across legislation, for example, in mental health proceedings when a person would also have the equivalent to an insanity defence. Would issues arise if these definitions were used for chapter 32 proceedings but not for mental health court proceedings?

    c) It is anticipated that expert evidence would be required to show the existence of a relevant impairment. Would there be other evidence that could be relied on to prove the accused person had a relevant impairment?

    d) Do you think expert evidence is required to prove the impairment was a substantial cause of the failure to communicate (the second limb)? Would this evidence be admissible?

    e) Should a judge have to be satisfied of the existence of an impairment impacting communication before leaving the matter to a jury for further consideration?

54. Where the safeguard provision is likely to apply, do you think issues relating to a defendant's capacity will be able to be identified early in proceedings for a sexual offence? Are there likely to be any situations where the issue could not be identified until the period immediately before trial/during the taking of evidence? If so, please provide examples.

55. Defence have an obligation to provide the prosecution with advance notice of expert evidence under section 590B of the Criminal Code. Will this provision be sufficient to ensure the prosecution has advance warning of any expert evidence defence has intention on calling, particularly where the prosecution wish to call their own expert? Should a new provision be introduced to require defence to give notice within 14 days of presentation of the indictment of an intention to adduce evidence in relation to issues of defendant's capacity and the operation of the safeguard under an amended section 348A?

56. What evidence would need to be provided to the expert? For example, a full brief of evidence, including criminal history, psychological history etc like what currently occurs in an assessment for a referral to the Mental Health Court?

57. The Queensland Government will ensure community education activities are in place to support the introduction of any amendments to consent and mistake of fact offences to ensure public understanding. Does anything from the NSW campaign 'Make no doubt' (https://www.nsw.gov.au/family-and-relationships/make-no-doubt) for sexual consent resonate with you as having potential to be effective and impactful for a Queensland audience? If yes, what and why? If no, why not?

58. What would you consider to be the most effective way to communicate and educate on this offence (e.g. campaigns, stakeholder and community engagement, information resources)?

59. What channels of communication do you believe would be the most effective (e.g. particular media channels, through frontline services, community groups, through health and police touchpoints, etc.)?

Recommendation 44: to expressly reference stealthing conduct as non-consensual sexual activity

Taskforce Findings and Recommendation

The Taskforce noted that the practice of stealthing, a term used to describe non-consensual condom sabotage or removal, appeared to be increasing but that very few cases had been successfully prosecuted as rape. The Taskforce recommended clarifying the law to make it clear that stealthing constitutes rape.

Tasmania, the Australian Capital Territory, New South Wales and Victoria have passed laws criminalising stealthing. All have done so by amending the 'meaning of consent' or by providing legislative examples of when consent is not given.

The Queensland Government response supported this recommendation and stated that the Government will progress amendments to the Criminal Code to make it clear that consent to a particular activity, such as sexual activity with a condom, is not taken to be consent to other activities.

Proposed approach to implementation based on the Taskforce recommendations for the purpose of discussion

It is proposed to amend section 348 to add an additional subsection, modelled on section 61HI(5) of the *Crimes Act 1900* (NSW), to provide:

A person who consents to a particular sexual activity is not, by reason only of that fact, to be taken to consent to any other sexual activity.

Example –

A person who consents to a sexual activity using a condom is not, by reason only of that fact, to be taken to consent to consent to a sexual activity without using a condom.

Questions for Consultation

60. If stealthing already constitutes an existing criminal offence and this amendment is merely clarifying the current law in Queensland, would it be appropriate for these amendments to operate retrospectively?

61. What would you consider to be the most effective way to communicate and educate on this offence (e.g. campaigns, stakeholder and community engagement, information resources)?

62. What channels of communication do you believe would be the most effective (e.g. particular media channels, through frontline services, community groups, through health and police touchpoints, etc.)?

Chapter 2.9 – Treatment of victim-survivors in trials for sexual offences

Recommendation 56: to progress amendments to section 21 (Improper questions) of the *Evidence Act 1977* to include examples of improper questions

Taskforce Findings and Recommendation

Section 21 of the *Evidence Act 1977* (Evidence Act) provides the court discretion to disallow improper questions put to a witness in cross-examination or inform a witness that an improper question need not be answered.

The Taskforce noted that while section 21 generally disallows the asking of improper questions, this did not correlate with what the Taskforce heard from victims, and those who support them, about their experience of cross-examination. The Taskforce found that despite the protection intended to be provided by section 21, service providers gave many examples of cases where victims of sexual assault were traumatised by brutal and apparently irrelevant cross examination. This included feedback that cross-examination in sexual offence matters in Queensland was 'akin to character assignation', that clients had to endure 'badgering and intimidating cross-examination' and section 21 is 'severely limited in scope and detail and requires significant strengthening.'

The Taskforce considered that it would be helpful if section 21 provided practical, contemporary examples of the sorts of questions that are improper in order to improve the experience of victims giving evidence in court and to help ensure that juries only hear relevant evidence. Accordingly, the Taskforce recommended to progress amendments to section 21 to include examples of improper questions, including those provided at section 41 of the *Evidence Act 1996* (NSW) (NSW Evidence Act).

The laws of evidence in the Commonwealth, New South Wales, Victoria, South Australia, Tasmania and the Australian Capital Territory all provide that a court *must* disallow an improper question. The Taskforce considered whether to recommend that the law in Queensland be similarly amended, therefore removing a court's discretion to allow such questions. However, the Taskforce felt that to make a determination that would have implications for evidence impacting cases other than those relating to sexual violence and domestic violence would go beyond its terms of reference. The Taskforce suggested that the Queensland

Government give consideration to consulting more widely on amending section 21 to state that the court *must* disallow an improper question being put to a witness in all court proceedings.

The Queensland Government response supported this recommendation and stated that the Government will progress amendments to the Evidence Act to include examples of improper questions including those provided at section 41 of the NSW Evidence Act.

Proposed approach to implementation based on the Taskforce recommendations for the purpose of discussion

It is proposed that the Taskforce's recommendation could be implemented by amending section 21 of the Evidence Act to include examples of improper questions, including those at section 41 of the NSW Evidence Act.

It is proposed that section 21(4) of the Evidence Act could be amended to provide that an ***improper question*** means a question that–

(a) is misleading or confusing; or

(b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; or

(c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate; or

(d) has no basis other than a stereotype (for example, a stereotype based on the witness's gender identity, sex, sex characteristics, sexuality, race, culture, ethnicity, age or mental, intellectual or physical disability).

At this stage, it is proposed that sections 21(1)-(3) of the Evidence Act remain unchanged. The decision whether to amend section 21 to use the mandatory 'must' rather than 'may' will be considered further after considering the results of this consultation.

Questions for Consultation

63. In addition to the examples of improper questions provided in section 41(1) of the NSW Evidence Act, are there other types of improper questions which should be included in section 21? For example, the Taskforce heard from some concerned stakeholders about lengthy cross-examinations that seemed largely irrelevant and appeared to be a 'character assassination'. Is there a way to legislatively address this problem?

64. Should section 21 include examples of what is not an improper question, similar to section 41(3) of the NSW Evidence Act? If so, are there any other types of questions that are not improper and should be included?

65. Should section 21 be amended to use the mandatory 'must' rather than 'may'? If not, please provide examples of circumstances where it would be desirable or appropriate for a court to exercise its discretion to allow an improper question?

66. Section 21 of the Evidence Act currently applies to improper questions put to any witness in cross-examination. If section 21 is amended to use the mandatory 'must' rather than 'may', should this apply to all witnesses, or should the duty only apply to improper questions put to a vulnerable witness? Why?

67. If section 21 is amended to use the mandatory 'must' rather than 'may', is it necessary *or* desirable for the legislation to expressly state that a party may object to a question on the grounds it is improper, but regardless of whether such an objection is made the court has a positive duty to disallow such a question? (See the examples in section 41(4) and (5) of the NSW Evidence Act). If so, why? If not, why not?

Recommendation 58: to progress amendments to sections 4 and 5 of the *Criminal Law (Sexual Offences) Act 1978*

Taskforce Findings and Recommendation

Criminal offences constitute a crime against the state. Victim-survivors are not parties to proceedings but are witnesses for the prosecution, which many victim-survivors find disempowering. Their evidence is tested through the process of cross-examination, which is a necessary and important part of the criminal justice process.

The Taskforce heard that many victim-survivors appearing as witnesses in trials for sexual offences were treated in a way that they found unnecessarily traumatic, and which prevented them from giving their best evidence. Existing protections are often underutilised or insufficient to mount an objection. The Taskforce considered that there is a need for legislative change to court processes and procedures so that a victim-survivor's dignity is preserved and the trauma of recounting the sexual violence in evidence in minimised, while still ensuring the accused person's trial is fair.

The Taskforce examined how existing provisions under the *Criminal Law (Sexual Offences) Act 1978* (CLSO Act) provide protections to victims in the context of a criminal prosecution. The CLSO Act regulates 'the admission of certain evidence in proceedings relating to sexual offences and the mode of taking evidence in such proceedings, to protect persons concerned in the commission of sexual offences from identification, and for related purposes.' Provisions for other types of evidence and victim safeguards are contained in the Evidence Act or the common law.

Section 4 of CLSO Act limits the evidence that can be given about the "general reputation of the complainant with respect to chastity". Section 4(3) provides that the Court shall not grant leave to cross-examine or receive evidence about the complainant's sexual activities with any person *"unless it is satisfied that the evidence sought to be elicited or led has substantial relevance to the facts in issue or is a proper matter for cross-examination as to credit."* Section 4(4) outlines when a matter may have substantial relevance. Section 4(5) outlines where a matter may go to credit. This had led to some perverse outcomes, ventilated before the Taskforce, including children and incest survivors being questioned about unrelated sexual abuse and the impact of that trauma on them.

The Taskforce recommended amending section 4 of the CLSO Act to reflect that 'leave should not be granted unless the court is satisfied that the probative value of any evidence about the complainant's sexual activities outweighs any distress, humiliation, embarrassment or other prejudice that the complainant may suffer as a result of its admission'. This recommendation is consistent with comparable provisions in New South Wales, Tasmania, Victoria and West Australia and the recommendation made by the Australian Law Reform Commission (ALRC) in 2010. The recommendations framed by the ALRC noted their formulation safeguarded complainants against 'irrelevant and harassing cross-examination' while upholding 'the defendant's right to a fair trial'. The ALRC noted prior sexual activity is not normally relevant to the issue of consent. Adopting this approach is consistent with elevating the interests of victims in a balanced and trauma-informed way.

Section 5 of the CLSO Act excludes members of the public from the courtroom while the complainant is giving evidence. The Taskforce recommended amending section 5 to ensure that the court is closed when a complainant is giving evidence, including when a complainant is giving evidence in a pre-recording, the

playing of the pre-recorded evidence in trial proceedings, and when a complainant is giving evidence in person in court. This will mean that the court is closed regardless of the different forms in which a complainant gives evidence, which was the intention of the legislation.

The Taskforce concluded that clarifying section 5 is intended to ensure that other recommendations made by the Taskforce in the second report, in particular, recommendations 53 to 55 regarding special witness measures, recording the evidence of victim-survivors and video-recorded interviews between police and the victim-survivor, would not change the position that the victim-survivor's evidence, regardless of its form, is heard in closed court.

The Queensland Government response supported this recommendation and stated that the Government will progress amendments to the current content of sections 4 and 5 of the CLSO Act to ensure that the law reflects contemporary community attitudes to sexual offending and to make it clear that a court should be closed when a victim-survivor's evidence is heard during a trial, regardless of the form in which the evidence is given.

Proposed approach to implementation based on the Taskforce recommendations for the purpose of discussion

It is proposed that the existing legislation could be amended to remove outdated language, adopt the Taskforce recommendation and achieve consistency across jurisdictions. Based on the provisions enacted in other Australian jurisdictions, and based on the recommendation of the ALRC, an amended section 4 would provide that:

1. The complainant must not be cross-examined, and the court must not admit any evidence, as to the sexual reputation of the complainant.
2. Sexual history evidence is not admissible to support an inference that the complainant is the type of person who is more likely to have consented to the sexual activity to which the charge relates
   (a) *sexual history evidence* is defined as evidence that relates to or tends to establish the fact that the complainant—
      i. was accustomed to engaging in sexual activities; or
      ii. had freely agreed to engage in sexual activity (other than that to which the charge relates) with the accused person or another person.
3. The complainant must not be cross-examined, and the court must not admit any evidence, as to the sexual activities of the complainant, other than those to which the charge relates, without the leave of the court.
4. The court must not grant leave unless it is satisfied that the evidence has significant probative value and that it is in the interests of justice to allow the cross examination or to admit the evidence, after taking into account the distress, humiliation and embarrassment that the complainant may experience as a result of the cross-examination or the admission of the evidence.

Provisions requiring an application for leave to question a complainant or adduce evidence of sexual activities which are not subject of charge, to be filed in advance of any hearing could also be inserted into the CLSO Act.

It is further proposed that section 5 of the CLSO Act could be amended to insert a new subsection which provides that section 5(1) applies irrespective of the form in which a complainant gives evidence, including, but not limited to–

(a) giving evidence in a remote room by audio-visual link, telephone or other alternative arrangements;

(b) giving evidence in a pre-recording;

(c) playing video and/or audio recorded evidence in a trial proceeding, including body worn camera footage of the complainant providing a version to police or another person; and

(d) giving evidence in person in the trial proceeding.

Questions for Consultation

68. Should the test to be applied by a court considering an application for leave be extended to include the other aspects of the test as recommended by the ALRC, that is, the age of the complainant, the number and nature of the questions the complainant is to be asked, the risk the evidence may arouse discriminatory belief or bias, prejudice, sympathy or hostility, and the right of the defendant to fully answer and defend the charge?

69. Should Queensland include a provision similar to section 352 of the *Criminal Procedure Act 2009* (Vic) that sexual history evidence is generally not regarded as substantially relevant (or having significant probative value) by virtue of any inference that it may raise regarding general disposition, nor should it be regarded as a proper matter for cross-examination unless special circumstances show it would likely materially impair confidence in the reliability of the complainant?

70. The exclusion of evidence of a complainant's sexual history other than that which relates to the charge includes exclusion of evidence of previous consensual sexual activities with the defendant without the leave of the court. This is the existing position under the law. Is this well understood? Is there a need for further training? Does the suggested amended provision better articulate the law and the court's obligation to disallow evidence touching on these matters?

71. Will requiring advance notice to bring an application for leave to cross-examine or adduce evidence of uncharged sexual activity cause unfair prejudice to the Crown or defence? If so, how? How can this be remedied?

72. Should the contents of the leave application be legislated? For example, in Victoria, written applications to cross-examine must be filed 14 days in advance of a trial and must address the initial questions sought to be asked of the complainant, the scope of questioning sought to flow from the initial questions, and how those questions are substantially relevant to a fact in issue or are a proper matter for cross-examination as to credit.

73. Are there any other arrangements for giving evidence that need to be explicitly included in the amended section 5?

Recommendation 59: to remove sections 4 and 5 of the *Criminal Law (Sexual Offences) Act 1978* to form dedicated parts in the *Evidence Act 1977*

Taskforce Findings and Recommendation

In addition to the amendments recommended above, the Taskforce recommended that sections 4 and 5 of the CLSO Act be removed from the CLSO Act to form dedicated parts in both the Evidence Act and the *Youth Justice Act 1992* that deal with proceedings for sexual offences.

The Taskforce noted that this would ensure that all evidence provisions are considered together and would focus the minds of all involved in the proceeding, including less experienced legal practitioners, to the relevant protective provisions. The Taskforce recognised that an increased awareness of the provisions would also minimise the risk of a retrial, which would be apt to cause further distress to a victim-survivor.

The Queensland Government response supported this recommendation and stated that the Government will progress legislative amendments that move the subject matter currently contained in sections 4 and 5 of the CLSO Act (amended in accordance with the response to recommendation 58) to a dedicated part of the Evidence Act.

Proposed approach to implementation based on the Taskforce recommendations for the purpose of discussion

To implement the Taskforce's recommendation, it is proposed that the amended sections 4 and 5 of the CLSO Act could be moved to a new Division 3A in Part 2 of the Evidence Act. This could be named "Evidence of witnesses in proceedings for a sexual offence".

The CLSO Act defines "sexual offence" as any offence of a sexual nature, including a prescribed sexual offence. A "prescribed sexual offence" means rape, attempted rape, assault with intent to commit rape and sexual assault (under section 352). In moving the provision, it is proposed to adopt the broader definition under schedule 3 of the Evidence Act, which defines "sexual assault offence" as

(a) an offence of a sexual nature, including, for example

  i. an offence against a provision of the Criminal Code, chapter 32; and

  ii. an offence against a provision of the Criminal Code, chapter 22; or

(b) an act or omission that would constitute an offence mentioned in paragraph (a) if the act or omission had occurred

  i. in Queensland; or

  ii. after the offence provision commenced; or

(c) an alleged offence mentioned in paragraph (a).

Questions for Consultation

74. Are there any concerns with moving sections 4 and 5 of the CLSO Act to the Evidence Act?

75. Is there a need to replicate these provisions in the *Youth Justice Act 1992*? Why or why not?

76. Are there any identifiable issues with adopting the definition of sexual offence contained in the Evidence Act?

Chapter 2.13 – Jury directions and the use of expert evidence in trials for sexual offences

Recommendation 77: to progress amendments to the *Evidence Act 1977* providing for jury directions to be given that address misconceptions about sexual violence

Taskforce Findings and Recommendation

The Taskforce heard that victims' experiences in the criminal justice system were influenced by common misconceptions about sexual violence ('rape myths'). The Taskforce concluded that jurors needed to be better directed in complex criminal trials, and in relation to common misconceptions about sexual violence, to neutralise the extent to which this influences their deliberations and decisions.

Queensland's existing jury directions are contained in legislation and common law. Model directions are contained in the Queensland Supreme and District Courts Criminal Directions Benchbook.

Currently, the majority of jury directions are given as part of the judge's summing up at the conclusion of the evidence, after the prosecution and defence have closed their case. However, there are rare occasions

where it is appropriate to direct the jury about evidential issues during the course of the trial (for example, where special witness provisions are employed).

The Taskforce considered the issue of the timing of jury directions. The Taskforce acknowledged the benefit of giving directions to a jury about evidence at the time it is presented in court, so the jury can consider evidence in its proper context. New South Wales and Victoria have both passed legislation that allows the trial judge to give jury directions in relation to consent at any time during a trial, including before evidence is adduced, and to repeat the same direction during the trial. In New South Wales, the approach is more flexible, with the trial judge having a discretion on timing; however, in Victoria, upon the commencement of the most recent legislative amendments, the trial judge *must* give the direction at the earliest time in the trial that the trial judge determines is appropriate. The Taskforce were evenly divided on whether a section should be included in Queensland legislation that outlines the timing in which a judge can give and repeat jury directions during trial proceedings.

The Taskforce noted the Royal Commission into Institutional Responses to Child Sexual Abuse also made recommendations to abolish or reform certain jury directions. Aspects of recommendation 65 were partially implemented through the abolition of the *Longman* direction (common law position regarding delay and forensic disadvantage) and introduction of 132BA of the Evidence Act.

The Queensland Government response supported this recommendation and stated that the Government will progress amendments to the Evidence Act to introduce jury directions that address misconceptions about sexual violence and will consult with the sexual violence support sector and legal stakeholders on the development of the directions.

Recommendations of the Royal Commission into Institutional Child Sexual Abuse

The Taskforce identified an opportunity to use this tranche of reforms to re-consider Queensland's response to the other aspects of Royal Commission recommendations regarding jury directions, namely recommendations 65 and 66.

The parts of the Royal Commission recommendation 65 which may be reconsidered at this juncture pertaining to jury directions are related to:

- Delay and the complainant's credibility – the judge must not direct that delay affects a complainant's credibility unless a warning or direction is requested by an accused and warranted by the evidence, and when given, must not use expressions, 'dangerous' or 'unsafe to convict' or 'scrutinise with great care';
- Uncorroborated evidence – the judge must not direct that it is 'dangerous or unsafe to convict' on the uncorroborated evidence of the complainant, or that the uncorroborated evidence of a complainant should be 'scrutinised with great care';
- Children's evidence – the judge must not direct that children as a class are unreliable witnesses and must not give a direction on the reliability of a child's evidence solely based on the child's age. As above, the judge should not warn or direct that the child's evidence be 'scrutinised with great care' or that it would be 'dangerous to convict' on the uncorroborated evidence of a child.

The Royal Commission recommendation allows for directions to continue to be made where the particular circumstances of the case require, but mandates the removal of currently used expressions, 'dangerous or unsafe to convict' and 'scrutinise with great care'. In making this recommendation, the Royal Commission concluded that in some states and territories, jury directions and warnings continue to reflect judges' assumptions that have been discredited by social science research. The Royal Commission also concluded that juries may continue to be affected by myths and misconceptions about how 'real' victims of child sexual abuse will behave. To address these problems, the Royal Commission was satisfied that no state or territory should retain the common law directions. The Royal Commission noted that the QLRC recommended in 2009 that section 632 (Corroboration) of the Criminal Code be amended to prevent the use of expressions such as 'scrutinise with great care', 'dangerous to convict' or 'unsafe to convict' when giving jury directions.

In 2019, the Queensland Government released a consultation draft of the Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019. This included what would become section 132BA of the Evidence Act, but also included a proposed amendment to section 632 (delay and corroboration). Subsequent amendments were made to the Bill removing the section 632 amendments, with the Attorney-General stating this was done in response to feedback and having regard to the approach in other jurisdictions.

Royal Commission Recommendation 66 relates to abolition of the *Markuleski* direction. A *Markuleski* direction requires a trial judge to tell the jury that if they have reasonable doubt concerning the truthfulness or reliability of the complainant's evidence in relation to one or more charges, that must be taken into account when assessing the complainant's truthfulness and reliability with respect to any other charges. The direction is intended to reduce the risk of unfair prejudice to the accused. In recommending that the *Markuleski* direction be abolished, the Royal Commission made reference to several Victorian cases and noted that, at the time of writing, a Bill to abolish the direction was before the Victorian Parliament. The Royal Commission made a number of observations about the limitations of the *Markuleski* direction by reference to various Victorian Court of Appeal decisions where comments had been made about the direction, including that:

- it may undermine the 'separate consideration' direction, that is, a direction in which juries are instructed that they must consider each charge separately and that where the evidence in relation to separate offences is different the verdict in respect of different charges need not be the same;
- it risked leading the jury to engage in impermissible 'tendency reasoning'. Tendency reasoning is to reason that because an accused person engaged in conduct on one occasion, they are more likely to have engaged in that conduct on another occasion. There are occasions where such evidence is admissible but must be subject to judicial direction; and
- the direction directs the jury to do something they are already likely to do, and that it may be inappropriate where it is open to the jury to convict on one count and to acquit on another.

The Royal Commission concluded that the criticisms made against the *Markuleski* direction were more persuasive than the arguments in favour of it, namely, the risk of unfair prejudice to the accused. In this regard, the Royal Commission noted that while the purpose of jury directions is to ensure the accused is tried according to law, some jury directions have been more likely to have improved the accused's prospects of acquittal, to the detriment of the community at large and the complainant.

New South Wales and Victoria have both implemented legislative provisions that reflect the findings of the Royal Commission in relation to delay and credibility, uncorroborated evidence and the reliability of children's evidence (and have codified related jury directions). Victoria and South Australia have both abolished the *Markuleski* direction. In light of the findings regarding jury directions made by the Taskforce, and calls for greater national consistency, this is an opportunity to re-consider the recommendations of the Royal Commission regarding jury directions with greater emphasis on the views of victim-survivors and the input from the sexual violence support sector, while still ensuring fairness to an accused.

Proposed approach to implementation based on the Taskforce recommendations for the purpose of discussion

It is proposed that the Taskforce's recommendation could be implemented by inserting new provisions in the Evidence Act providing for jury directions about sexual offences. The provisions would be applicable in criminal trials which relate, wholly or partly, to a charge for a sexual offence.

Jury trials

In criminal proceedings where it is a trial by jury, it is proposed that, consistent with section 292 of the *Criminal Procedure Act 1986* (NSW), a trial judge *must* give a 'consent direction' if:

a) the judge considers there is a good reason to give the direction; or
b) there is a request made by a party to give a direction and the judge does not have a good reason *not* to make that direction.

In determining whether there are good reasons for giving a direction, the trial judge would have to have regard to any submissions made by the prosecution or defence (or accused if they are unrepresented).

The direction may be given at the request of the prosecution, defence counsel (or accused if they are self-represented), or on the trial judge's own motion.

Judge-alone trials

In a trial without a jury (judge-alone trial), it is proposed that the court's reasoning in relation to any of the matters set out in the directions must be, to the extent the court thinks fit, consistent with how a jury would be directed about the matter in the particular case.

Content of consent directions

1. Circumstances in which non-consensual sexual activity occurs

It is proposed that this direction inform the jury that experience shows that non-consensual sexual activity can occur—

- in many different circumstances; and
- between different kinds of people, including:
    - people who know one another; or
    - people who are married to one another; or
    - people who are in an established relationship with one another; or
    - people of the same or different sexual orientations; or
    - people of any gender identity, including people whose gender identity does not correspond to their designated sex at birth.

The content of this proposed direction takes into account section 292A of the *Criminal Procedure Act 1986* (NSW) and recommendation 78 of the Victorian Law Reform Commission's (VLRC) *Improving the Justice System Response to Sexual Offences* report.

2. Responses to non-consensual sexual activity

It is proposed that this direction inform the jury that—

- there is no typical, proper or normal response to non-consensual sexual activity; and
- people may respond to non-consensual sexual activity in different ways, including by freezing and not saying or doing anything; and
- the jury must avoid making assessments based on preconceived ideas about how people respond to non-consensual sexual activity.

The content of this direction takes into account section 292B of the *Criminal Procedure Act 1986* (NSW).

3. Lack of physical injury, violence or threats

It is proposed that this proposed direction inform the jury that—

- there are many different circumstances in which people do and do not consent to a sexual act;
- people who do not consent to a sexual activity may not be physically injured or subjected to violence, or threatened with physical injury or violence; and
- the absence of injury or violence, or threats of injury or violence, does not necessarily mean that a person is not telling the truth about an alleged sexual offence.

The content of this proposed direction takes into account section 292C of the *Criminal Procedure Act 1986* (NSW).

4. Responses to giving evidence

It is proposed that this direction inform the jury that—

- trauma may affect people differently, which means that some people may show obvious signs of emotion or distress when giving evidence in court about an alleged sexual offence, but others may not; and
- the presence or absence of emotion or distress does not necessarily mean that a person is not telling the truth about an alleged sexual offence.

The content of this proposed direction takes into account section 292D of the *Criminal Procedure Act 1986* (NSW).

5. Behaviour and appearance of complainant

It is proposed that this direction inform the jury that it should not be assumed that a person consented to a sexual activity because the person—

- wore particular clothing or had a particular appearance; or
- consumed alcohol or another drug; or
- was present in a particular location; or
- acted in a manner perceived to be flirtatious or sexual.

The content of this proposed direction takes into account section 292D of the *Criminal Procedure Act 1986* (NSW).

Timing of directions

Whether the jury directions can be given before evidence is adduced, and whether the judge may repeat the same jury directions at any time during the trial, will be settled after consultation.

Questions for Consultation

77. Once a request has been made by the prosecution or defence for the judge to direct the jury, when should the judge provide the direction? Should the timing of the direction be mandatory or discretionary?

78. If a jury direction is provided by the judge as soon as practicable, including before evidence is adduced, should the judge be able to repeat the same jury direction at any time during the trial?

79. Should a judge have to give the prosecution and defence an opportunity to make a submission opposing the making of a direction on its own motion before making a direction?

80. Should any guidance be provided on what a 'good reason' would be to make or not make a direction?

81. The VLRC report recommended that the jury direction in relation to circumstances in which non-consensual sexual activity occurs include a consumer of sexual content or services and the worker providing the content or services. The *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) implements this recommendation by including 'people who provide commercial sexual services and people for whose arousal or gratification such services are provided'. Should this example be included?

82. The VLRC report recommended a further jury direction in relation to counterintuitive behaviours, such as maintaining a relationship or communication with the perpetrator after non-consensual sexual activity. Is a similar jury direction required in Queensland? If so, should this jury direction be named 'counterintuitive behaviours to non-consensual sexual activity', 'maintaining a relationship or communication' or something else?

83. The VLRC report recommended that the jury direction relating to 'responses to giving evidence' also apply to *reporting* alleged sexual offences. This approach has been implemented in the *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic). In practice, is there a need for the direction to extend to reporting?

84. Sections 293A and 294 of the *Criminal Procedure Act 1986* (NSW) provide for, respectively, directions to be given if there are differences in the complainant's account, and in relation to delay or lack of complaint in trials for sexual offences. Are similar jury directions required in Queensland?

85. Are there any reasons why the outstanding Royal Commission recommendations referred to above regarding jury directions should not be implemented as part of this proposed tranche of reform?

86. Do you see benefit in the Queensland Government implementing a community education campaign specifically addressing rape myths? If yes, why? If no, why not?

87. What would you consider to be the most effective way to communicate and educate on this offence (e.g. campaigns, stakeholder and community engagement, information resources)?

88. What channels of communication do you believe would be the most effective (e.g. particular media channels, through frontline services, community groups, through health and police touchpoints, etc.)?

Recommendation 80: to establish an expert evidence panel for sexual offence proceedings

Taskforce Findings and Recommendation

Recommendation 80 of the second Taskforce report is for the establishment of an expert evidence panel for sexual offence proceedings that can be used by the prosecution, defence and the court.

The Taskforce found that an expert panel was necessary to support its recommendations for both:

- the introduction of an affirmative consent model in Queensland (Recommendation 43), where the Taskforce identified those with cognitive, mental health or other impairments could be unfairly disadvantaged by a requirement to show they took reasonable steps to ascertain consent; and
- the admission of expert evidence about the nature and effects of domestic and family violence and sexual violence (Recommendation 79), to help inform the court and juries about the impacts of trauma on victim-survivors of sexual violence.

As noted above, the Taskforce considered it critical that the requirement for an accused to do or say something to ascertain consent should not apply to an accused with a cognitive, mental or other type of impairment that impacted on their ability to communicate if the impairment was a substantial cause of the accused not saying or doing anything. The Taskforce recognised expert reports would be required to ascertain the extent of any impairment and its impact on behaviour and recommended the establishment of the panel to ensure that the expert evidence presented in court is accessible to all and of high quality. The Taskforce recommended delayed commencement of the affirmative consent provisions until the establishment of the expert panel and provision of appropriate and equitable funding to the ODPP and LAQ to obtain necessary expert reports

In findings related to recommendation 79, the Taskforce cited consultation feedback which supports the view that rape myths sometimes operate within the criminal justice system to the detriment of victim-survivors and found that the impacts of trauma on victim-survivors are sometimes not well understood by police, the legal profession or judicial officers. Research commissioned by the Taskforce suggested that rape myths influence community members' understanding and attitudes towards sexual consent. The

Taskforce found that the admission of expert evidence about the nature and effects of sexual violence may help address this lack of understanding of sexual offending.

The Taskforce supported the establishment of an expert evidence panel in Queensland, finding that the panel was necessary not only to ensure that the expert evidence was of the highest quality but also to ensure that the expert evidence presented in court is accessible to both the prosecution and defence on an equal footing.

For the establishment and maintenance of the panel, the Taskforce recommended that the independent sexual violence case review board (Recommendation 46) would be involved in offering advice.

The Queensland Government response supported this recommendation in principle and stated the Government supported the intent of this recommendation and will trial a pilot expert evidence panel for sexual offence proceedings that can be used by the prosecution, defence and the court.

Proposed approach to implementation based on the Taskforce recommendations for the purpose of discussion

It is proposed that this recommendation could be implemented by introducing a legislative framework to support the establishment of an expert evidence panel pilot (EEP Pilot) to run in two locations to be prescribed by regulation.

The overarching purpose of the expert evidence panel is for the court and parties to have access to a vetted and appointed group of witnesses with specialised knowledge who are able to give high-quality evidence to support the jury and court understanding of issues in sexual offences proceedings.

It is proposed that the EEP Pilot would be rolled out in two stages over two years:

- The **first stage** (proposed to be legislated in this Bill) would establish the expert evidence panel for the purposes of supporting the affirmative consent amendments by enabling parties to draw from an appointed list of suitably qualified experts who are able to give high-quality expert evidence in a proceeding (where relevant and admissible) in relation to a defendant's cognitive, mental or other communicative impairment, and its impact on a defendant's behaviour, under the amended section 348A of the Criminal Code; and
- The **second stage** (proposed to be legislated as part of a future Bill) would support the amendments for the admissibility of expert evidence about sexual violence by expanding the role of the panel to enable parties and the court to appoint an expert witness in a proceeding to give evidence about the nature and effects of sexual violence.

It is proposed that the EEP Pilot would be evaluated after two years of operation to inform rollout across Queensland.

Timing and links to other recommendations

It is not proposed to progress amendments for establishment of the independent sexual violence case review board (Recommendation 46) or for the admission of expert evidence about the nature and effects of sexual violence (recommendation 79) as part of this Bill. These initiatives are proposed to form part of legislation to be introduced in 2024.

Establishment of the EEP Pilot

Under the EEP Pilot, it is proposed that a panel of suitably qualified experts would be appointed by the chief executive (DJAG) and funded to give evidence in relevant proceedings. The legislative and operational framework for establishing the EEP pilot would largely be modelled on the Queensland Intermediary Scheme Pilot Program, established under Part 2, Division 4C of the Evidence Act.

Legislation is proposed to outline the suitability criteria for appointment to the panel, which would include requiring that an expert demonstrate specialised knowledge, gained by training, study or experience in an aspect of a field of "specialised knowledge", including in prescribed relevant fields. Under the first stage of the EEP Pilot, it is intended that experts who can give evidence in relation to a defendant's cognitive, mental

or other communicative impairment, and its impact on a defendant's behaviour, would be appointed. Criteria could be expanded or amended when future amendments are progressed to allow for the admissibility of evidence about the nature and effects of sexual violence.

It is proposed to allow the chief executive to ask for a criminal history report when deciding whether a person is suitable to perform the role of an expert witness, and that regard may also be had to whether a person has been subject to professional discipline or been denied or removed from professional registration. It is proposed that a person would be able to be removed from the expert evidence panel if they are no longer considered suitable to be an expert witness.

Proposed operation of stage one of the EEP Pilot

Under the first stage, the EEP Pilot is intended to provide parties in pilot locations with access to expert witnesses who will conduct assessments relevant to the affirmative consent amendments. It is anticipated these would be neuro-cognitive psychological or psychiatric assessments by approved experts of defendants with potential cognitive impairments, mental health impairments or other impairments that may impact on their ability to communicate.

In a relevant proceeding, which would be a sexual offence proceeding (meaning an offence against a provision of Chapter 32 of the Criminal Code) in a pilot location where section 348A of the Criminal Code is or may be relevant, parties to the proceeding would be able to engage an expert from the panel (funded under the pilot) for the purposes of conducting assessments and giving evidence in the proceeding.

The expert evidence panel provisions would be intended to apply to relevant proceedings which are started (by a complaint being made or the defendant being arrested or served a notice to appear) after the commencement of the panel provisions, irrespective of whether the act or omission constituting the alleged offence happened before the commencement.

Admissibility of and ability to lead expert evidence

In the first stage, the establishment of the panel would not be intended to expand the admissibility of expert evidence in pilot locations. It is intended that the existing common law requirements for admissibility would continue to apply until amendments are progressed (in a subsequent Bill) in response to recommendation 79 which would include abolishing certain common law rules.

Outside of pilot locations, it is intended that expert evidence could still be led (where relevant and admissible) with respect to the exception for an accused with cognitive or other impairments; however, parties and courts in these locations would not be able to draw from the expert evidence panel which would only be funded for pilot locations.

Questions for Consultation

89. Do you anticipate barriers to admissibility with respect to evidence about a defendant's cognitive, mental, communicative or other impairments (as relevant to the proposed amendments to section 348A of the Criminal Code)?

90. Should the legislative framework be prescriptive with respect to the training, study or experience necessary to be appointed to the expert evidence panel, for example by being confined to particular relevant fields? If so, what should be prescribed?

91. Should the legislation provide that a person on the panel should be excluded from being engaged as an expert in a particular relevant proceeding for certain reasons or in certain circumstances (see, for example, matters outlined at section 21AZL(5) of the Evidence Act in relation to appointment of an intermediary and 'excluded persons')?

92. Should the legislation for the expert evidence panel include a provision in relation to jury directions to be given in a proceeding where an expert is appointed from the panel?

93. Should parties to a relevant proceeding in the pilot locations be allowed to engage and call an expert who is not appointed to the expert evidence panel?

94. Which two locations would be most suitable for the proposed EEP Pilot? Do you have any feedback or anticipate any operational issues with respect to the proposed pilot locations of Brisbane and Townsville?

95. Based on your experience, are there any relevant factors you would like taken into account during the design of the expert evidence panel which may assist in ensuring the pilot can collect representative data from across the state?

96. What matters should be considered as part of the evaluation of the EEP Pilot?

Part Three

Legislation relating to the publication of domestic and family violence and sexual violence proceedings

Links to legislation referenced in this part:

- *Child Protection Act 1999* (Qld) – Section 189B
- *Criminal Law (Sexual Offences) Act 1978* (Qld) – Part 3
- *Domestic and Family Violence Protection Act 2012* (Qld) – Section 159; Section 160
- *Domestic and Family Violence Protection Regulation 2012* (Qld) – Regulation 3(2)(b)
- *Recording of Evidence Act 1962* (Qld) – Section 5B
- *Recording of Evidence Regulation 2018* (Qld) – Part 2, Division 3

Hear her voice – Report Two

Chapter 2.14 – Limitations on publishing the identity of victims and accused people

Recommendations 81 & 82: to clarify publication of sexual violence proceedings with the consent of the complainant and provide for release of transcripts for approved research purposes

Taskforce findings and recommendations

Subsequent to being given its initial terms of reference, the Taskforce was asked to consider legislative restrictions on publishing domestic violence and sexual violence proceedings.

In respect of sexual violence offences, these restrictions are primarily found in the CLSO Act. They are intended to provide protection and anonymity to victim-survivors of sexual offences. However, they have been criticized as disempowering and silencing for victim-survivors because they prevent them from publicly telling their stories if they wish to do so.

The Taskforce acknowledged the importance of the principle of open justice and the role that good media reporting has to play in encouraging victim-survivors to come forward and report sexual offences. High profile allegations of sexual violence and publication of victims' experiences of sexual offending and domestic and family violence are often associated with a spike in reports and help-seeking.

The Taskforce also acknowledged movements such as #Metoo and #LetHerSpeak as well as the advocacy of Grace Tame and Nina Funnell, which have highlighted that whilst legislation should continue to protect victim-survivors who want anonymity it is important that those who want to speak out and share their story are empowered to do so. The Royal Commission into Institutional Responses to Child Sexual Abuse also identified publication of victim-survivor experiences as a factor contributing to people feeling motivated, compelled and encouraged to speak up about their own experiences.

The Taskforce also acknowledged that sensationalist media reporting can be harmful, as it can perpetuate stereotypes, produce copy-cat behaviours and trigger trauma for victim-survivors.

Some stakeholders also expressed caution and distrust of the media, acknowledging that once consent has been given it can be hard for the victim-survivor to control how the narrative of the story plays out. These stakeholders stressed the importance of confidentiality for some victim-survivors and gave examples of unethical reporting.

Some legal stakeholders also raised concerns about the risk that publication might pose to a fair investigation and trial including because of jurors accessing details outside of the evidence presented in court, the public account given by a victim-survivor differing from the one given in court creating grounds

for an appeal, tainting witnesses prior to police interview and prejudicing potential future jury pools. There was also concern that reporting might put victim-survivors at risk of defamation action, pressure from the media and potentially expose accused persons to acts of vigilantism.

The Taskforce acknowledged these concerns but said that these risks could be dealt with by the courts' inherent power to restrict publication and noted that the complainants of other offences (such as grievous bodily harm and common assault) are not restricted from telling their stories.

The Taskforce also considered that children who are victim-survivors of sexual offences should be empowered to consent to information being published and to self-publish information if they choose but that there should be special protections to ensure that a child understands the consequences of consenting to publication and to prevent their exploitation. The Taskforce said that in this respect regard should be had to the Victorian model which requires an expert statement supporting a child's consent.

The Taskforce said that victim-survivors should be empowered to determine what is published and how that information is published.

The Taskforce also found that the existing law in the CLSO Act is antiquated, unclear and confusing. It is unclear what can be published and when it is necessary to get the complainant's consent.

The Taskforce was firmly of the view that any publication must not identify other victims without their consent.

The Taskforce said that there should be no change to the current limitation on identifying victims of sexual offences without their consent.

Ultimately, the Taskforce recommended that the CLSO Act be amended to:

- update and modernise the language of all provisions in the Act generally;
- clarify that it is a defence to the prohibition against publication of identifying information about victims of sexual offences that an adult victim-survivor with capacity consented to the publication and that the publication was consistent with any limitations set by the victim-survivor;
- ensure that publication continues to be prohibited where publication would identify or lead to the identification of another victim-survivor without their consent or a child (including a child offender);
- include a requirement that the court, when considering making an order allowing the publication of identifying information, must take into account the views and wishes of the victim-survivor;
- enable victim-survivors of sexual violence to self-publish identifying information, at any stage of the proceedings, so long as it does not identify another victim-survivor without their consent or a child (including a child offender) and does not put at risk the fairness of future court proceedings; and
- enable children who are victim-survivors of sexual offences to self-publish, or consent to the publication of, identifying information with safeguards to ensure that the child has the capacity to consent, is making a free and informed decision, and has understood the potential consequences of their decision. The publication must not identify another victim-survivor (without their consent) or a child (including a child offender) and must not put at risk the fairness of future court proceedings.

Section 189B of the *Child Protection Act 1999* (the Child Protection Act) allows for the chief executive to provide access to information that is reasonably necessary for prescribed research. The Taskforce found that the absence of an equivalent provision for criminal proceedings is a significant impediment to evidence-informed reform of the criminal justice system's response to sexual offending. The Taskforce therefore recommended that:

- modelled on section 189B of the Child Protection Act, amendments be made to the CLSO Act enabling the Director-General of DJAG to release transcripts of proceedings for sexual offences for approved research purposes; and

- an amendment to the *Recording of Evidence Regulation 2018* to allow for the release of these research transcripts for free or at a reduced cost.

The amendments were recommended not to commence until the Queensland Government has developed and implemented a guide for media to support responsible reporting of sexual violence.

The Queensland Government response supported these recommendations and noted that the amendments to the CLSO Act commence after the development and release of the guide to support the responsible media reporting of sexual violence offences in response to another recommendation of the Taskforce (Recommendation 84).

The existing law for the release of research transcripts

The protections in the CLSO Act only apply to complainants in respect of whom a sexual offence is alleged to have been committed. Sexual offences include rape, attempt to commit rape, assault with intent to commit rape and sexual assault.

Section 6 of the CLSO Act creates a criminal offence prohibiting the publication of the identity of those complainants in any report **concerning an examination of witness or a trial.** An examination of witnesses is confined to indictable sexual offences taken pursuant to the *Justices Act 1886*. A trial includes both a trial and a sentence. The court can make an order allowing for publication if there are good and sufficient reasons for doing so. Section 3 defines a report broadly to mean an account in writing and an account broadcast or distributed in any way in or as sound or visual images.

Under section 8 certain types of reports are exempt from an offence under section 6, including reports made for appeals, law reports, reports made for the purposes of the Child Protection Act, the *Criminal Law (Rehabilitation of Offenders) Act 1986* or made to or on behalf of the Crime and Corruption Commission.

Section 10(1)(a) of the CLSO Act creates a criminal offence prohibiting the publication of the identity of a victim-survivor in any report, that **does not concern an examination of witnesses or a trial.**

It is a defence to a charge under section 10(1)(a), that an adult complainant with capacity authorised publication in writing before the statement or representation was made.

The maximum penalty for both offences is two years imprisonment or 100 penalty units. For a corporation it is 1000 penalty units. Under section 12, executive officers of corporations (such as media companies) can be found personally liable for these offences.

The Taskforce was advised by DJAG that there have been no prosecutions under these provisions from 2012-13 to 2022.

Lack of clarity in the existing law

The Taskforce found that these provisions are antiquated (having been drafted in 1978 and prior to the advent of social media) and they are unclear as to whether:

- victim-survivors only need to consent to the publication of their identity in forms other than media or broadcast distribution;
- victim-survivors only need to consent to the publication of their identity when the report does not concern an examination of witnesses or a trial; and
- whether a victim-survivor can self-publish identifying information about a sexual offence and, if so, whether this extends to children.

Approach in other jurisdictions

Whilst the exact approach in other jurisdictions varies slightly, all other Australian jurisdictions allow the publication of a victim-survivor's identity with their consent.

The narrowest approach is that taken by the Northern Territory where adult victim-survivors can consent to publication only once all legal proceedings have been finalised.

The Taskforce rejected taking a similar approach in Queensland because it would constitute a narrowing of the circumstances in which a complainant can consent, thereby further disempowering them. There is no requirement in the existing law that the consent be given after the proceedings have been finalised, only that consent be given prior to the statement or representation being made.

The broadest approach to publication is in Victoria. It allows for publication at any stage of the proceeding unless it identifies another victim without their permission. A child can consent where there is a supporting statement from a medical doctor, psychologist or prescribed person.

In most other Australian states and territories similar provisions are located in an Evidence Act, however in Victoria they are located in the *Judicial Proceedings Reports Act 1958* and in New South Wales in the *Crimes Act 1900*.

The existing law for the release of research transcripts

Section 189B of the Child Protection Act allows for the chief executive to provide access to information that is reasonably necessary for prescribed research.

The Chief Executive must also be satisfied that the information will not be published in any way that could reasonably be expected to identify an individual that it relates to. An example is provided in the legislation, which is where publishing the name of a small town or community in which a high-profile case occurred could reasonably be expected to lead to identification of the individuals involved, even if the individuals' names are not published. The chief executive can impose any conditions that are considered appropriate, authorise the release of the information to another party or authorise contact to ask a person if they want to participate in the research.

The section allows for these powers to be exercised in respect of a 'client' who under the Child Protection Act means a child to whom the act applies, a person who was a child to whom the Act applied, a family member of either of those people and a person who was or is an approved carer.

There is no equivalent provision which allows for release of transcripts for criminal proceedings. The Taskforce found that the absence of such a provision is a significant impediment to evidence-informed reform of the criminal justice system's response to sexual offending.

Section 5B(1) of the *Recording of Evidence Act 1962* provides that the chief executive must ensure appropriate arrangements are in place to ensure the availability of copies of records or transcriptions of records under the Act. Section 5B(3)(b) provides that such arrangements must include arrangements for providing copies of records or transcripts on request to persons (other than a judicial officer), at no cost or at a cost that is less than the amount that would otherwise be payable, in accordance with entitlements prescribed under a regulation.

For the purposes of section 5B(3)(b) of the *Recording of Evidence Act 1962*, division 3 of the *Recording of Evidence Regulation 2018* outlines particular persons who are entitled to a copy of a record or a transcript of a record under the *Recording of Evidence Act 1962* at no cost or a cost that is less than the amount that would otherwise be payable.

People who are entitled to a free copy of a transcript of proceedings include (but are not limited to) victims of a personal offence that is the subject of a criminal proceeding in the Supreme or District Court and defendants in a criminal proceeding in the Supreme or District Court. Parties to legal proceedings may also apply for a full or partial waiver of the fees for a copy of a record or copy of the transcript of a proceeding on financial hardship grounds.

The Taskforce noted that the costs of transcripts is extremely high and that the cost should not become a barrier to researchers accessing those transcripts.

Proposed approach to implementation based on the Taskforce recommendations for the purpose of discussion

A proposed approach could be to:

1. Repeal existing provisions in the CLSO Act including the offences in sections 6 and 10 and instead insert a new part in some other appropriate legislation such as the Evidence Act or alternatively create a stand-alone piece of legislation.

2. Provide, in these new provisions, that it is an offence (a publication offence) for:
   - a person to publish information;
   - that is likely to lead to the identification of any complainant to a sexual offence.

3. Provide that is a defence to that offence, proof of which lies on the defendant on the balance of probabilities, that:
   - any complainant whom the publication was likely to lead to the identification of, consented to the publication, before it was published;
   - the publication was consistent with any limitations set by those complainants;
   - the publication was not likely to identify any other complainant of any other sexual offence; and
   - the publication was not likely to identify a child, including a child who has committed an offence.

4. Provide that the offence does not apply to the complainant of a sexual offence (whether or not an adult or a child) who publishes information that is likely to lead to their own identification and that:
   - is not likely to lead to the identification of any other complainant of a sexual offence without their consent;
   - is not likely to lead to the identification of a child (including a child offender); and
   - does not put at risk the fairness of future court proceedings.

5. Provide that the offence does not apply where the publication is for an authorised purpose where the meaning of an authorised purpose replicates the existing purposes in sections 8 and 11 of the CLSO Act including:
   - a report produced for the purposes of the legal proceedings for the sexual offence including any appeal;
   - a report made to or on behalf of DJAG, the commissioner of the police service, the Queensland College of Teachers or the department for the time being administering the Child Protection Act for the purposes of the department or other entity to or on behalf of which it is made;
   - a report made to or on behalf of a relevant education entity for the purposes of the entity to or on behalf of which it is made, if the report relates to a defendant mentioned in column 1, item 5(1) or 7A of the table in the *Criminal Law (Rehabilitation of Offenders) Act 1986*, section 9A;
   - a report made to or on behalf of the Crime and Corruption Commission; or
   - a defendant who has an order from the Supreme Court as per below.

6. Provide that a defendant charged with a sexual offence can apply, at any time during proceedings for the sexual offence, to the Supreme Court for an order allowing for publication to occur which would otherwise constitute the publication offence. The Supreme Court would be able to make such an order:
   - where it considers it is necessary for the purpose of inducing persons to come forward who are likely to be needed as witnesses (either at trial or in an appeal);
   - the conduct of the applicant's defence is likely to be substantially prejudiced or the defendant is likely to suffer substantial injustice in an appeal if the order is not made; and
   - having regard to the views and wishes of all the complainants of the sexual offence

7. Define **publish** to mean disseminate or provide access to the public or a section of the public by any means, including by—
   - publication in a book, newspaper, magazine or other written publication;
   - broadcast by radio or television;

- public exhibition; or
- broadcast or electronic communication (including but not limited to social media).

8. Define **consent** to mean informed consent given by a person who was an adult (over the age of 18 years) and with the capacity to provide that consent.

9. Define **consent in the case of a child** (a person under 18 years of age) to mean informed consent given by the child with the capacity to provide it and with a supporting statement from a doctor, psychologist or prescribed person evidencing that the child has the capacity to provide the consent (consistent with the Victorian legislation).

10. Define a **sexual offence** to mean any offence of a sexual nature, including but not limited to, rape, attempt to commit rape, assault with intent to commit rape and sexual assault (consistent with the existing definition of a sexual offence in CLSO Act).

11. Provide that the maximum penalty for the offence is two years imprisonment or 100 penalty units for a person and 1000 penalty units for a corporation (consistent with the existing penalties for these offences).

12. Provide that executive officers of corporations (such as media companies) can be found personally liable for these offences (consistent with their existing liability under the CLSO Act).

Commencement

The proposed amendments could apply to matters where the conduct constituting the alleged offence is committed after the amendments commence. Commencement will not occur until the publication of an appropriate media guide.

Questions for Consultation

97. In which legislation should the new provisions about publication appear? Should they be inserted into the Evidence Act, in keeping with where they primarily appear in other jurisdictions? Or should we have a standalone piece of legislation in Queensland for provisions about publication of court proceedings and offences, like there is in Victoria? If these provisions should appear in some other existing piece of legislation, where should that be?

98. The proposed approach set out above does not require victims or other people to make any application to a court for there to be publication. Only a defendant would be required to make an application to the court.
    a) Should there need to be an application made to the court to allow for publication or should publication simply be allowed to happen other than where it is prohibited by the offence?
    b) Particularly in the case of self-publication should complainants be required to make an application to the court to self-publish noting that such applications will be costly and may be complex enough to require legal representation?
    c) For other types of publication is the imposition of the offence and defence sufficient or should there be some court oversight?
    d) If there is a requirement for the court to consider an application then who should be allowed to be heard at that application and what other requirements of the application should there be?

99. The existing provisions in the CLSO Act cover a complainant 'in respect of whom a sexual offence **is alleged to have been committed**.' It is unclear whether this would require there to have been a charge laid. For the offence to apply should there be a requirement that the sexual offence has been charged or should it be sufficient that any of the statements or representations that are published would amount to a sexual offence if charged? Alternatively, should there be some other threshold and, if so, what should it be?

100. The existing provisions make a distinction between reports concerning an examination of witnesses or a trial and other statements or representations. The proposed approach does not maintain that distinction. Is there any rationale for maintaining a distinction moving forward between publications relating to court proceedings and other types of publication? If so, what should be the different requirements in respect of those publications?

101. The existing provisions in the CLSO Act require that the complainant's consent be communicated in writing but the Taskforce was silent about whether the consent needs to be communicated in any particular way. Should there be a requirement that the consent of the complainant be provided in writing?

102. Are the requirements for what amounts to consent when a person is a child (under 18 years of age) appropriate? What other safeguards should be in place about the consent of a person who is a child?

103. Is it too onerous to expect complainants to assess the impacts of self-publication on the prospects of a fair trial, as recommended by the Taskforce? Should that requirement be removed in the case of self-publication?

104. Is the onus and standard of proof (on the defendant and the balance of probabilities) appropriate for the proposed defence?

105. The proposed definition of "publish" reflects the definition in the Victorian legislation. The definition of "report" in section 3 of the CLSO Act is an account in writing and an account broadcast or distributed in any way in or as sound or visual images. Noting that it may not be desirable to define publish so broadly that it captures private communications, should the definition be any different than what is proposed? If so, what should it be?

106. Are there any other categories of publication that should be exempted from the offences? Are all of the existing categories of exemption as adapted from sections 8 and 11 of the CLSO Act still necessary?

107. The possible proposed approach maintains the effect of sections 11(3) and 11(4) of the CLSO Act by allowing a defendant to apply to the Supreme Court for a publication order where it is necessary for the purpose of inducing persons to come forward who are likely to be needed as witnesses (either at trial or in an appeal) and the conduct of the applicant's defence at the examination or trial is likely to be substantially prejudiced or the defendant is likely to suffer substantial injustice in an appeal if the order is not made. Is this appropriate? Should this issue be dealt with in some other way that does not require an application to the court or is this a necessary safeguard?

108. Is it appropriate for the amendments to apply where the conduct is **committed** after the proposed amendments commence? Alternatively, should the amendments apply to matters where the defendant is **charged** after the proposed amendments commence? Please provide reasons as to why a particular approach is preferred.

109. In Victoria, the prohibition on identifying sexual offence victims ends immediately upon the death of the victim. This allows any person, including family and friends of the deceased victim, and the media, to publish identifying details about the deceased victim. Should there be a similar provision in Queensland?

Recommendation 83: to remove the prohibition on publication of the identity of a person accused of prescribed sexual offences before committal

Taskforce Findings and Recommendation

Currently, sections 7 and 10(1)(b) of the CLSO Act prohibit the publication of information that identifies the name, address, school or place of employment of **a person accused** of a prescribed sexual offence, or any information that is likely to lead to the identification of the accused person until they are committed for trial or sentenced for the charge. The court does have, however, discretion to make an order allowing for the publication of information concerning an examination of witnesses that identifies or is likely to lead to the identification of an accused person before a committal order is made.

A sexual offence is defined in the same way as referred to above in respect of recommendation 81 and includes rape, attempt to commit rape, assault with intent to commit rape and sexual assault. The offence of publishing identifying information of a person accused of a prescribed sexual offence before a committal order is made carries a maximum penalty of two years imprisonment.

The Taskforce noted that since 2010, reforms to streamline the committal process mean that in many cases where the defendant is legally represented and the parties agree, the committal is an administrative process completed by the registrar or clerk of the court, rather than a hearing before a magistrate.

In considering the prohibitions created by sections 7 and 10(1)(b) of the CLSO Act, the Taskforce noted that the Northern Territory and South Australia are the only other Australian jurisdictions that prohibit the publication of the identity of an accused person before they are committed for trial or sentenced for a sexual offence charge. Legislation in other Australian jurisdictions only restricts the publication of information that may identify a person accused of sexual offending where it may lead to the identification of the victim-survivor.

In making recommendation 83 in the second report, the Taskforce considered risks associated with the removal of premature publication of the identity of a person accused of a prescribed sexual offence. These risks included the difficulty people charged with prescribed sexual offences may face in overcoming public identification given the stigma associated with sexual offending, the inadvertent identification of victims or other child witnesses, and retribution in some communities. The Taskforce noted that the removal of the prohibition may also increase the risk of 'trial by media' and could discourage some people from disclosing sexual offences. The Taskforce acknowledged that there could be particular problems for those in small communities, including First Nations communities.

The Taskforce noted, however, that other sexual offences, such as sexual offences against children, are not covered by the prohibition on publication, neither are other criminal offences, including the most serious offence of murder.

The Taskforce also considered that the removal of the prohibition may encourage other people who were assaulted, particularly by an alleged perpetrator that is identified, to report their assault and noted that it could also help prevent a perpetrator from further offending. The Taskforce noted that, if handled sensitively,

increased public reporting may contribute to positive community discussions about gender-based violence, may challenge stereotypes and may reduce the level of secrecy and stigma involved.

On balance, the Taskforce concluded that the desirability for open justice, including the importance of media reporting on this prevalent but often hidden issue of sexual assault, outweighed the risks identified. The Taskforce also did not consider that there was an ongoing justification for treating charges for certain sexual offences differently to all other criminal offences.

The Taskforce recommended that before any amendments to the CLSO Act commence, the Queensland Government should develop and implement updated guidance for media organisations to ensure that media positively contribute to primary prevention through increasing community understanding and dispelling harmful misconceptions (Recommendation 84).

The Queensland Government response supported this recommendation and stated that the Government will progress amendments to the CLSO Act that implement this recommendation. The amendments will commence after the development and release of the guide to support the responsible media reporting of sexual violence in response to recommendation 84.

Proposed approach to implementation based on the Taskforce recommendations for the purpose of discussion

A proposed approach to give effect to recommendation 83 of the Taskforce's second report could be to repeal sections 7 and 10(1)(b) of the CLSO Act and remove any subsequent references to section 7, including in section 8(2) of the CLSO Act.

A new section could also be inserted into the CLSO Act or another piece of legislation, that provides that an application may be made by a person accused of a prescribed sexual offence (defendant), alleged victim (complainant) or the prosecution, seeking an order prohibiting the publication of information that identifies or is likely to lead to the identification of the defendant before they are committed for trial or sentenced upon the charge, whichever comes first. Such an order would not prohibit the publication of information about proceedings, including committal proceedings, that identifies the defendant after a committal order is made or the defendant is sentenced for the prescribed sexual offence.

The proposed new section would include matters that the court must consider when deciding whether to make an order prohibiting the publication of information that identifies or is likely to lead to the identification of a defendant. One consideration would be any views expressed by the complainant about the application.

It would be an offence to publish identifying information of a defendant to a prescribed sexual offence if such an order were to be made. The offence could have a maximum penalty of 100 penalty units or 2 years imprisonment for an individual or 1000 penalty units for a corporation, which are the same maximum penalties under sections 7 and 10 of the CLSO Act.

The proposed amendments allowing for the publication of identifying information of a defendant to a prescribed sexual offence could apply to matters where the conduct constituting the alleged offence is committed after the amendments commence.

Questions for Consultation

110. Should an application for an order prohibiting the publication of information that identifies or is likely to lead to the identification of a defendant to a prescribed sexual offence be able to be made by the defendant, prosecution, or complainant? If the persons who may make such an application should be further restricted, please provide reasons.

111. Are there any other considerations that the court should have regard to when deciding whether to make an order prohibiting the publication of information identifying a defendant to a prescribed sexual offence before they are committed for trial or sentenced for the offence?

112. Section 695A of the Criminal Code provides the court power to protect a victim of violence by prohibiting the publication of information about proceedings. Section 695A(5) provides that an application for an order prohibiting the publication of information about the address of a person against whom violence is alleged to have been committed may be heard in chambers and only in the presence of persons the judicial officer allows.

    Should there be provision that an application for an order prohibiting the publication of identifying information of a defendant to a prescribed sexual offence before committal to be heard in chambers and only in the presence of persons the judicial officer allows?

113. Is an approach that allows for publication of information identifying a defendant to a prescribed sexual offence in circumstances where the conduct is committed after the proposed amendments commence appropriate? Alternatively, should the amendments apply to matters where the defendant is charged after the proposed amendments commence? Please provide reasons as to why a particular approach is preferred.

114. Do you think the maximum penalty of 1000 penalty units ($143,750) is sufficient to deter a large media corporation from publishing this information in breach of a court order? If not, what is an appropriate penalty?

Recommendation 86: to enable approved media representatives to make an application for de-identified transcripts of domestic and family violence proceedings

Taskforce Findings and Recommendation

In the second report, the Taskforce noted that Queensland legislation limits public access to, and reporting of, civil DFV proceedings. The second report notes that these safeguards are intended to protect victims' safety but also recognises that these limitations could be contributing to the skewing of reporting of DFV matters towards the most extreme and violent cases, which in turn, contributes to common misconceptions of DFV.

The Taskforce also noted that the *Domestic and Family Violence Protection Regulation 2012* (DFVP Regulation) allows for publication of information given in evidence in DFV proceedings if the respondent to a DVO is later convicted of an offence under another Act that is factually related to the order or death is an outcome of violence within the relevant domestic relationship.

Given that the offence must be under another Act, the effect of the DFVP Regulation as it stands is that information about contraventions of DVOs, police protection notices and release conditions cannot be published, despite these being criminal offences. The Taskforce noted that this does not appear to be reflected in practice and may be an unintended consequence.

The second Taskforce report recommends that the DFVP Regulation be amended to clarify that the prohibition on publication does not extend to criminal proceedings under the DFVP Act.

The Taskforce carefully considered reducing other barriers to public reporting of DFV matters, including by removing the requirement that the court be closed, opening the court to accredited journalists only, and removing the requirement that both parties must authorise publication of identifying information. Ultimately, having regard to the safety, protection and wellbeing of victims, the Taskforce supported continued restrictions on publication of DFV proceedings and restricted access to records of proceedings and documents tendered.

However, acknowledging the value of the media in the primary prevention of DFV and the principle of open justice in our society, the Taskforce recommended to progress amendments to the DFVP Act to:

- enable media representatives approved by the Chief Magistrate to make an application to the court for de-identified transcripts of proceedings so as not to lead to the identification of a person involved in proceedings, or of children, while maintaining the confidentiality and protections on publication in the DFVP Act; and
- require the court, when considering an application, to consider whether the provision of such transcripts is in the public interest, subject to the principles in the DFVP Act that the safety and wellbeing of people who fear or experience DFV is paramount.

Combined with media education and guidelines, the Taskforce was of the view that access to de-identified transcripts by reputable media outlets could support improved reporting about all types of DFV (not just those that result in serious criminal charges or death) while preventing the release of information likely to lead to the identification of a person involved in the proceedings, or of children.

In this regard, the Taskforce recommended that the amendments do not commence until the Queensland Government has implemented Recommendation 6 in the first report relating to a review of the Domestic and Family Violence Media Guide.

The Queensland Government response supported this recommendation and stated that the Government will progress amendments to the DFVP Act and the DFVP Regulation to provide de-deidentified transcripts of proceedings to media representatives in appropriate circumstances. The response stated these amendments will commence once the Domestic and Family Violence Media Guide has been reviewed in response to recommendation 6 of the first Taskforce report.

Proposed approach to implementation based on the Taskforce recommendations for the purpose of discussion

Clarification that prohibition on publication does not extend to criminal proceedings

It is proposed that regulation 3(2)(b) of the DFVP Regulation could be amended to clarify that the exception in that regulation applies when a person has later been convicted of an offence, including an offence under the DFVP Act, that was factually related to the DVO. The DFVP Regulation could be amended to reflect that identifying information can only be published about adults, and not children, concerned in a proceeding under the DFVP Act.

Currently, section 160 of the DFVP Act has the effect that media representatives are not entitled to a copy of the transcript of criminal proceedings under the DFVP Act. Such proceedings, however, take place in an open court, which means that media representatives can sit in and listen to the proceedings and accredited media representatives are able to record the proceedings.

Access to de-identified transcripts & publication of DFV civil proceedings

It is proposed that, to give effect to the Taskforce's recommendation, section 159(2) of the DFVP Act could be amended to include an allowance for media to publish information about a proceeding under the DFVP Act but that the information published must not identify or be likely to lead to the identification of a party, witness or child concerned in a proceeding under the DFVP Act.

The Taskforce was silent about whether the media should be able to publish information about civil DFV matters that were started before or after the recommended amendments commence. One proposed approach could be a prospective approach, which would limit publication of information about DFV matters to those that are commenced after this proposed change to the DFVP Act.

It is also proposed that section 160(2) of the DFVP Act could be amended to allow for an accredited media representative to make an application for and, if approved, be provided with de-identified transcripts of proceedings that do not lead to the identification of a party, witness or child involved in the proceeding. The court would only be able to approve the provision of a de-identified transcript if the court considers such provision is in the public interest subject to the principles outlined in section 4 of the DFVP Act.

Section 160(2)(d) of the DFVP Act allows for a person expressly authorised by the chief executive (magistrates court) to obtain a copy of a document or record of proceedings under the Act. Section 160(2)(d) does not expressly require that decisions made under that subsection are in the public interest subject to the principles in the DFVP Act and are decisions that are made administratively and not in court by a judicial officer. Currently, the authority to make decisions under section 160(2)(d) is delegated by the Director-General to the Executive Director, Magistrates Court Services.

The Taskforce was also silent about whether accredited media representatives should be able to apply for transcripts of DFV matters that were started before or after the proposed changes to the DFVP Act. One proposed approach could be a prospective application, meaning that accredited media representatives would only be able to apply for deidentified transcripts for proceedings that start after the proposed changes commence. It is proposed that "accredited media representative" could be defined as media personnel who are accredited pursuant to the Supreme Court's *Media Accreditation Policy* which is attached to Magistrates Courts Practice Direction No. 1 of 2014 (amended).

Questions for Consultation

115. The Media Accreditation Policy describes the process by which media personnel are or can become accredited with the Supreme, District and Magistrates Courts. The policy stipulates that once an applicant is accredited, the Principal Registrar will enter the applicant's name and contact details in the Accredited Media List. Is it appropriate that "media representatives approved by the Chief Magistrate" be defined as "accredited media" who are media personnel accredited pursuant to the Supreme Court's Media Accreditation Policy?

116. Recommendation 86 includes amending the DFVP Regulation to clarify that the prohibition on publication does not extend to criminal proceedings under the Act, whether or not the publication of those proceedings would identify a party (other than a child) to a domestic violence order.

    Currently, regulation 3(2)(b) allows for a blanket exception to the prohibition of identifying information any person listed in section 159(1)(b) which includes a party, witness and/or child concerned in a proceeding under the DFVP Act. Should the DFVP Regulation be amended to clarify that the exception does not apply to information that identifies or would likely lead to the identification of a child?

117. If the DFVP Regulation is amended to allow identifying information to be published in relation to criminal proceedings under the DFVP Act, should section 160 of the DFVP Act also be amended to allow for media representatives to obtain an unredacted transcript of criminal proceedings under the DFVP Act? If this consequential amendment were to be made, would the obligation that media representatives not publish identifying information about a child be sufficient? Alternatively, would court resources need to be allocated so that any identifying information of a child is redacted before the transcript is provided to the media representative?

118. Should the court be required to redact transcripts of civil DFV proceedings before providing them to accredited media representatives, noting that this would require significant resources of the court? Alternatively, is it appropriate for approved accredited media representatives to be provided an unredacted transcript noting that the publication of identifying information of a party, witness or child is an offence under section 159 of the DFVP Act? Please provide reasons as to why a particular approach is preferred.

119. It is proposed that media would only be able to publish information about proceedings under the DFVP Act that commenced after the commencement of the amendment to section 159(2) of the DFVP Act. Is this prospective approach appropriate? Are there any good arguments why the amendment should be retrospective?

120. It is proposed that media representatives would only be able to apply for deidentified transcripts of proceedings that start after the commencement of the amendment to section 160(2) of the DFVP Act. Is this prospective approach appropriate? Are there any good reasons why the amendment should be retrospective?

121. To give effect to recommendation 86, should an application by an accredited media representative for a transcript of proceedings under the DFVP Act be determined by a judicial officer, noting that this may cause a delay? Alternatively, could such an application be considered by the Executive Director, Magistrates Court Services under delegated authority?

122. When an application for a transcript of DFV proceedings is made by an accredited media representative, who should be notified and/or have a right to heard on the application? For example, should the aggrieved and respondent be notified of the application? Should the aggrieved and respondent also have the right to be heard about whether or not they agree with the application.

123. The Taskforce recommended that these amendments to the DFVP Act and the DFVP Regulation not commence until the Queensland Government has implemented Recommendation 6 in the first report relating to a review of the Domestic and Family Violence Media Guide. Noting that the media guide will not provide legal advice to media organisations, are there particular issues that the revised guide should address to assist media to implement the approach to Recommendation 86 proposed above?

Part Four

Legislation addressing the needs of women and girls as accused persons and offenders

Links to legislation referenced in this part:

- *Bail Act 1980* (Qld) – Section 11; Section 16
- *Child Protection Act 1999* (Qld) – Schedule 3 see definition of "family group" and "kin"
- Crimes Act 1914 (Cth) – See Volume 1 > Part IB > Division 2 > Section 16A
- *Criminal Code Act 1899* (Qld) – Section 77C
- *Domestic and Family Violence Protection Act 2012* (Qld) – Section 19; Section 20
- *Penalties and Sentences Act 1992* (Qld) – Section 9
- *Youth Justice Act 1992* (Qld) – Section 150

Hear her voice – Report Two, Part Three

Chapter 3.4 – Women and girls' experiences in watchhouses on remand and when applying for bail

Recommendation 110: to progress amendments to the *Bail Act 1980* to require a police officer or court considering bail to have regard to the probable effect of a refusal of bail on family and dependents

Taskforce Findings and Recommendation

The Taskforce recommended amending section 16(2) of the *Bail Act 1980* (Bail Act) to require a police officer or court considering bail to have regard to the probable effect that a refusal of bail would have on the person's family or dependants, and to consider a person's responsibility to family and dependants when making bail conditions.

The Taskforce noted that women are proportionally more likely to be refused bail and held in custody on remand than men. The Taskforce heard feedback that refusing a woman bail significantly limits her ability to seek legal assistance and to make arrangements for the care of dependant children, employment, housing and possessions in preparation for her trial or sentencing.

The Taskforce agreed in principle that bail should be preferred for pregnant women who are at risk of giving birth on remand but did not recommend gendered amendments to the Bail Act, such as to strengthen the presumption of bail for pregnant or breastfeeding women and women with young children. The second report notes that amendments should ensure that 'dependants' may include future dependants where a women is pregnant or expecting a child through other means.

If women are granted bail, an issue frequently raised in the Taskforce's consultation forums was that women's child caring responsibilities put them at risk of breaching bail conditions. The Taskforce heard feedback that bail conditions, which may include a requirement to live at a specified address or to report to a named police station on certain days at certain times, can be particularly onerous for a person who is a primary caregiver as conditions can impact on their ability to transport children to attend appointments, find alternative care arrangements, and attend to other parental responsibilities.

The Queensland Government response supported this recommendation and stated that the Government will progress amendments to the Bail Act to require a police officer or court to consider a person's family and care giving responsibilities when making decisions about bail.

Proposed Approach

Granting Bail

It is proposed that this recommendation could be address by amending section 16(2) of the Bail Act to add a new subparagraph to include, as a consideration, a defendant's caring responsibilities to family and dependants and the probable impact that the refusal of bail would have on the family or dependants.

This amendment would be intended to ensure watchhouse staff and courts take a more holistic view of a person's life (namely, responsibilities to family and dependants) and the impact on the community when assessing the unacceptability of risk in deciding whether to refuse or grant bail.

The new consideration in relation to family and dependant responsibilities would be one of the numerous considerations already included at section 16(2), which itself is non-exhaustive and provides that 'the court or police officer shall have regard to all matters appearing to be relevant'. A court or police officer can currently take into consideration a defendant's 'character, associations, home environment, employment and background of the defendant'. The proposed amendment would merely expand and clarify this provision by making specific reference to any caring responsibilities the defendant may have for family members or dependants and the impact that a refusal of a grant of bail may have on those family members or dependants.

Bail conditions

It is proposed that section 11 of the Bail Act could be amended by inserting a new subsection which provides that, when considering the imposition of a special condition under subsection (2), the court or police officer should consider a defendant's responsibilities to family and dependants and the impact that bail conditions would be likely to have on the ability for the defendant to attend to their responsibilities.

This amendment would be intended to encourage the making of bail conditions which are less onerous and not inconsistent with a defendant's existing family and care giving responsibilities, such as transporting children, attending medical appointments and finding alternative care arrangements. It is intended that this would reduce the instances of bail conditions being unavoidably or inadvertently breached by defendants with these responsibilities.

Definitions and transitional issues

It is proposed that a definition of 'dependant' could be included which encompasses future dependants (as well as current dependants) where a defendant is pregnant or expecting a child through other means.

It is proposed that the amendments to the Bail Act would apply to bail decisions and applications made after commencement, irrespective of whether the conduct constituting the alleged offence occurred before commencement.

Questions for Consultation

124. Is there an alternative legislative approach to achieve the intent of ensuring a police officer or court considering bail has regard to the probable effect that a refusal of bail would have on the person's family or dependants?

125. With respect to the proposed amendment to section 11, would it be helpful to further define or include legislative examples of 'responsibilities to family and dependants' which may be relevant to consider in making bail conditions? If so, how should this be done?

126. How should "family" be defined, noting, for example, that the definitions of "family relationship" and "relative" provided in the DFVP Act encompass a person who may reasonably be considered a relative by people who may have a wider concept of relative?

127. Should the definition of "dependants" be defined broadly enough to include those in an "informal care relationship"? An "informal care relationship" is defined in section 20 of the DFVP Act as existing between two people if one of them is dependent on the other person for help in an activity of daily living but does not exist between a child and their parent or if one person helps another under a commercial arrangement.

128. Is it appropriate that the amendments apply to bail decisions and applications made after commencement, irrespective of whether the conduct constituting the alleged offence occurred before commencement?

Chapter 3.6 – Sentencing women and girls

Recommendation 126: to progress amendments to section 9(2) of the *Penalties and Sentencing Act 1992*

Taskforce Findings and Recommendation

Chapters 3.1 and 3.2 of the second report note that adverse childhood events, victimisation and trauma history, poverty and homelessness, mental health issues, poor health or disability, substance misuse, racism, inequality, and intergenerational trauma are common experiences of women and girls and are common drivers of offending behaviour and contact with the criminal justice system.

The Taskforce outlined significant concerns raised by women and girls about how their circumstances or experiences were considered, or ignored, at sentencing. Some women felt that their gender or status as a mother negatively impacted their sentence, and that they were judged more harshly as 'bad' mothers. The Taskforce also heard that some women felt that imprisonment was not being used as a last resort and that courts did not consider the impact that a custodial sentence would have on their children.

The Taskforce noted that the factors that a sentencing court can take into consideration are non-exhaustive and that courts can, and often do, consider many factors relevant to women and girls at sentencing. The Taskforce also acknowledged that any amendments to sentencing legislation risks further complicating the considerable task for judicial officers in weighing up all relevant factors in sentencing and may even lengthen the sentencing process. However, the Taskforce was concerned by what it heard from women and stakeholders about relevant factors not being presented to sentencing courts, or not being adequately considered, and therefore recommended to progress amendments to section 9(2) of the *Penalties and Sentences Act 1992* (the PSA) to:

- require the court to consider the hardship that any sentence would impose on the offender in consideration of an offender's characteristics, including gender, sex, sexuality, age, race, religion, parental status, and disability;
- require the court to consider, if relevant, the offender's history of abuse or victimisation;
- require the court to consider the probable effect that a sentence or order under consideration would have on any of the person's family or dependants, whether or not the circumstances are 'exceptional'; and
- expand subsection 9(2)(p) to clarify that cultural considerations include the impact of systemic disadvantage and intergenerational trauma on the offender.

The Taskforce noted that the PSA currently makes no provisions for considering sex and gender, though the court may consider these factors in relation to hardship of the offender. At common law, hardship 'may be relevant where an offender will be required to serve their sentence under additionally onerous or burdensome conditions'. In regard to considering family and dependants, the second report identifies that under the *Crimes Act 1914* (Cth), all Australian courts sentencing offenders for federal criminal offences must take into account 'the probable effect that any sentence or order under consideration would have on

any of the person's family or dependants'. The Australian Capital Territory is the only State or Territory to have replicated this provision in sentencing legislation. In its 2006 review of federal sentencing law, the Australian Law Reform Commission found that courts had been 'reading down' the provision and instead applying the 'exceptional circumstances' principle.

The Taskforce was of the preliminary view that equivalent amendments to the *Youth Justice Act 1992* (YJ Act) may not be required because section 150 of the YJ Act provides that a court sentencing a child under the Act must have regard, subject to the Act, to the general principles that apply to the sentencing of all persons.

The Queensland Government response supported this recommendation and stated that the Government will progress amendments to the PSA to provide that Queensland sentencing courts give appropriate consideration to the attributes identified by the Taskforce in this recommendation.

Proposed Approach

To give effect to this recommendation, it is proposed that section 9(2) of the PSA could be amended to:

- add a new subsection that requires the court to consider the hardship that any sentence would impose on the offender in consideration of the offender's characteristics, including gender identity, sex, sex characteristics, sexuality, age, race, religion, parental status and disability;
- add a new subsection that requires the court to consider, if relevant, the offender's history of abuse or victimisation;
- add a new subsection that requires the court to consider the probable effect that any sentence or order under consideration would have on any of the offender's family or dependants -
    - this would be drafted broadly enough to apply to future dependants, including babies that would be born in prison if a woman receives a custodial sentence;
    - this subsection would override the 'exceptional circumstances' test; and
    - family and dependants would be given definitions that are culturally inclusive, including to recognise Aboriginal and Torres Strait Islander kinship;
- amend section 9(2)(p)(ii) of the PSA to include clarification that 'cultural considerations' include the impact of systemic disadvantage and intergenerational trauma on the offender.

The amendments to the PSA could apply to sentencing decisions made after commencement, irrespective of whether the conduct constituting the alleged offence occurred before commencement.

Questions for Consultation

129. The Taskforce intended that the proposed amendments apply to child offenders but was of the preliminary view that equivalent amendments may not be required to the YJ Act because a court sentencing a child under the YJ Act must have regard to the general principles applying to the sentencing of all persons. However, feedback provided during consultation on Recommendation 66 of the first Taskforce report (to create a mitigating factor) indicated there was a strong preference for similar amendments to be made to the YJ Act and therefore that was the approach taken in the Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Bill 2022 (Qld). Do you think it appropriate for equivalent amendments to be made to the YJ Act in this instance?

130. Should the definition of "dependants" be defined broadly enough to include those in an "informal care relationship"? An "informal care relationship" is defined in section 20 of the DFVP Act as existing between two people if one of them is dependent on the other person for help in an activity of daily living but does not exist between a child and their parent or if one person helps another under a commercial arrangement.

131. The Taskforce recommended that the definitions of family and dependants be culturally inclusive, including to recognise Aboriginal and Torres Strait Islander kinship. Some examples of the definition of family in other Acts are:

    a) Section 16A(4) of the *Crimes Act 1914* (Cth) outlines that the members of a person's family are taken to include (without limitation), (a) a de facto partner of the person, (b) someone who is the child of the person, or of whom the person is the child, and (c) anyone else who would be a member of the person's family if someone mentioned in paragraph (a) or (b) is taken to be a member of the person's family;

    b) Section 19 of the DFVP Act defines a "family relationship" existing between two people if one of them is a "relative" of the other. "Relative" is defined as someone who is ordinarily understood to be or to have been connected to the person by blood or marriage. Marriage is clarified as being any two people who are or were spouses of each other, which includes de facto relationships. Subsection 19(4) of the DFVP Act clarifies that the definition of "relative" is wide enough to encompass people who regard themselves as relative, acknowledging that some people, including Aboriginal and Torres Strait Islander people, members of certain communities with non-English speaking backgrounds and people with particular religious beliefs, have a wider concept of relative; and

    c) Section 77C(4)(a) of the *Criminal Code Act 1899* (Qld) defines a "close family member" as meaning a spouse; someone with whom the person shares parental responsibility for a child; a parent or step-parent; a child; a grandparent or step-grandparent; a grandchild or step-grandchild; a brother, sister, stepbrother or stepsister; an aunt or uncle; a niece or nephew; a first cousin; or a brother-in-law, sister-in-law, parent-in-law, son-in-law or daughter-in-law of the person. Section 77C(4)(b) states that a close family member for an Aboriginal and/or Torres Strait Islander person includes a person who, under Aboriginal and Torres Strait Islander tradition, is regarded as a person mentioned in paragraph (a).

    Are any of these definitions sufficient or should there be explicit reference to "family group" or "kin" such as there is in the *Child Protection Act 1999* (Qld)?

132. The Taskforce recommended that section 9(2)(p)(ii) be amended to clarify that "cultural considerations" include the impact of systemic disadvantage and intergenerational trauma on the offender. Please provide feedback on whether the wording "any cultural considerations, including the impact of systemic disadvantage and intergenerational trauma" is appropriate? If not, do you have any suggested wording?

133. Is it appropriate that the amendments apply to all sentencing decisions made after commencement, irrespective of whether the conduct constituting the alleged offence occurred before commencement?

How can I provide feedback?

Please email feedback on technical or operational issues with the recommendations and/or proposed approach to implementing the recommendations to:

WSJ-Taskforce-Legislation@justice.qld.gov.au

Due date: Wednesday, 1 February 2023