The Honourable Margaret McMurdo AC
Chair
Women's Safety and Justice Taskforce
GPO Box 149
BRISBANE QLD 4001

29th July 2021

Dear Chair,

RE: RESPONSE TO DP2

Thank you for the opportunity to provide feedback on the Taskforce's work in the second phase of its work.

My name is Angela Lynch the current CEO of Women's Legal Service QLD (WLSQ). As I am currently on a period of extended personal leave, I am making this submission in my personal capacity, but it is informed by my 27 years working at WLSQ and my time as a member of the Queensland Domestic and Family Violence Death Review and Advisory Board (QDFVDRAB) and as a member of the Queensland Sexual Violence Prevention Council.

I support all the ideas proposed in the Discussion Paper 2 and I make a make the following suggestions for your consideration.

A. In relation to the issues set out in the Discussion Paper please see comments below:

Sexual Violence

DP Question: Is it appropriate for the Taskforce to consider the adequacy of Queensland's current sexual offences including provisions about consent and the operation of the excuse of honest and reasonable mistake of fact in the prosecution of sexual offences? If not, why?

Yes, despite the issue being considered recently by the Queensland Law Reform Commission it requires reconsideration. The Attorney General also made it clear to the Queensland community in media statements that these issues would be considered by the Taskforce. In addition, there has been the March 4 Justice (women's marches) in March 2021 providing clear public demonstration that current sexual violence laws are out of step with community expectations and community sentiment.

In relation to the QLRC, their review took a narrow view of the legal framework and was conservative in its approach to interpretation and analysis and importantly failed to 'hear' and accommodate into the reform agenda, the issues, and concerns of victims.

This Taskforce review provides an opportunity to adopt a different approach.

Positive consent and reasonable steps – the Tasmanian Model

The Taskforce should take this opportunity to appropriately critique other jurisdictions where a changed approach is well settled, the Tasmanian model (which includes positive consent and reasonable steps) which has been in place since 2004 with no controversy. The Tasmanian model was itself based on the Canadian model that introduced the need for "reasonable steps" in 1992 again with no controversy or evidence of 'unjust outcomes'.

The QLRC summarised the Canadian and Tasmanian laws but did not examine their approaches, nor therefore undertake any critical analysis of the evidence that exists in these jurisdictions.

Of course, reform to blackletter law is not the only reform required to improve justice for sexual violence victims, however it is a baseline requirement to 'get right', so we can build other reforms that create a more equitable and safer process.

Recommendation 1

That the Taskforce consider other legislative models including the positive consent and reasonable steps approach currently enacted in Tasmania.

There was a clear missed opportunity by the QLRC to make consent laws clear and easily understood by ordinary people. The law has an educative impact and should provide very clear guidance about acceptable and unacceptable behaviour, especially for young people who are about to engage in their first sexual relationships. Even some of their recommendations for change that were ultimately legislated were extremely difficult to understand.

Reckless disregard

I believe that Queensland law, similarly to that in New South Wales should include "reckless disregard" in the definition as negating consent. The QLRC reject this approach saying the current law on this topic is expansive enough to include 'reckless disregard' and therefore there is no reason for change. At paragraph 71, the Commission advises its explicit inclusion might cause complications, without expanding on this or providing examples of what complications might arise.

Recommendation 2

That the Taskforce consider the inclusion of reckless disregard similar to NSW.

Agreement

The words 'agree', or 'agreement' appear in the definition of consent in Victoria, NSW, Tasmania, and South Australia. Again, the QLRC rejected the inclusion of the word agreement in the definition arguing that the current definition already encompassed this notion (page 91). At paragraph 5.75 of the Commission report they argue the introduction of a new term like 'agreement' would not substantially change the operation of the law and may create uncertainty in interpretation. Again, the concerns about uncertainty are not elaborated upon, nor the fact that four other jurisdictions already operate in Australia with the inclusion of 'agreement' in the definition, with no evident concern or uncertainty.

There was also broad support at the "survivor forum" organised by the Commission for the inclusion of "agreement". There is also academic work supporting the use of this term to its implications of specificity in relation to the nature of the act, time of the act etcetera (See Vandervort, 2012, Burgin, 2019).

Inclusion of agreement sends a message to the community about both parties consenting to the sexual activity and is more consistent of a modern view of women, being active participants and not docile or silent bystanders.

Recommendation 3

That the Taskforce consider the inclusion of the word "agreement" in the definition of consent.

Domestic violence

One of the most disappointing aspects of the QLRC report was its failure to adequately address a history of domestic violence, where there is intimate sexual violence.

At paragraph 6.99, the Commission itself says that sexual offences involving ongoing domestic violence and that involve a cumulative effect of a violent relationship (rather than a specific threat or incident) appear to have a varied treatment in Queensland.

The Commission then goes onto analyse this varied approach in the case law but concludes that amendment to the law is not necessary (paragraph 6.224) as the current law does permit the reception of evidence of domestic violence in a relationship where it is relevant.

Unfortunately, the Commission did not address the concern that it itself concluded, that is there is variability about the application of the law. There is clearly inconsistency in the court's responses and approaches to this issue on the Commission's own evidence.

This concern is highly relevant and requires intervention to ensure clarity and consistency of the law's application.

Consistency could be achieved by making amendments to how domestic violence evidence should be addressed in cases of intimate partner sexual violence. This failure is a concerning flaw in the Commission's approach, especially given the importance to the Queensland community of improving responses to domestic violence.

At 6.226, the Commission advises that consideration of Section 132 B of the Evidence Act (that specifically provides for the provision of domestic violence evidence into some criminal law matters but not to rape and sexual violence matters) was outside its terms of reference. This is something that the Taskforce could specifically address.

Recommendation 4

That the Taskforce consider how to best ensure a history of domestic violence is considered in intimate sexual violence matters (especially around determining consent) to ensure just and safe outcomes and one that promotes a consistent application of the laws.

Mistake of Fact

Of interest, the QLRC's own case data on the mistake of fact excuse was itself evidence for the need for reform. When the excuse was enlivened the QLRC data showed it was very successful for the defendant. The Commission interpreted this as 'justice being done' but alternatively and from a victim's perspective, these same results could be interpreted as concerning and backing up calls for reform.

Recommendation 5

That the Mistake of Fact excuse be considered by the Taskforce.

Specialist sexual violence courts

There are examples of specialist sexual violence courts internationally over the last few decades however, recently New Zealand successfully piloted these courts which were independently evaluated. These courts provide greater case management, more trauma informed processes, tighter time frames and agreements about cross examination.

Recommendation 6

That the Taskforce consider the need for specialist sexual violence courts.

Victim's lawyers

I think one of the reforms that would have the most impact on improving the experience of victims of sexual violence through the criminal justice system, is having their own lawyer in the court to protect them from unreasonable cross examination, questions about their prior sexual history and/or any other privacy concerns.

Questioning of sexual assault victims during trials 'worse' than in the 1950s, criminologist finds - ABC News

Sexual assault victims can easily be re-traumatised going to court — here's one way to stop this (theconversation.com)

Recommendation 7

That the Taskforce consider independent legal advocates for victims in sexual violence matters.

B. Set out below are some additional issues that the Taskforce should consider:

1. <u>Stalking laws</u>

Never reviewed

The stalking laws were introduced in the late 1990s and have not been subject to a review or been updated since this time. Since this time there has been a substantial change in our society and the way that perpetrators engage in harassment of victims through the use of technology, and we are now aware that stalking is a high-risk activity associated with lethality.

Technology-facilitated abuse is creating 'terror' in women, and it's on the rise in Australia - ABC News

Technology facilitated abuse

I would recommend a review of this laws to ensure they adequately cover current technology facilitated harassment, abuse, and intimidation.

I note the New South Wales parliament recently amended their unlawful stalking provisions to make it clear that stalking in that State involves:

Contacting or otherwise approaching a person using the internet or any other technologically assisted means.

In addition, the definition of unlawful stalking should carefully consider the use of drones or surveillance devices that do not involve contacting a person or approaching or directing other people to do so to ensure the definition of harassment or intimidation covers their use. For example, the legislation should ensure the definition of stalking covers a perpetrator posting an advertisement on social media saying she is a prostitute and directing men to her house.

Is the need for the behaviour to be 'protracted' still appropriate?

We note also that the current definition in Queensland does allow for conduct on one occasion to be considered unlawful stalking if the incident is "protracted".

Section 359 1 (b) engaged in on any 1 occasion if the conduct is protracted or on more than 1 occasion;

Often technology facilitated abuse is extremely harmful and in a short period of time maximum damage could be inflicted. It is important therefore to ensure that the meaning of protracted in the unlawful stalking offence is broad enough to cover the instant but extreme damage caused by technology abuse.

Stalking outside of domestic violence relationships and the need for "stalking intervention and protection orders"

In addition, although stalking is very common in domestic violence situations it also occurs outside of these relationships. Consideration should also be given to whether a "stalking intervention and protection orders" scheme should be developed in Queensland, to provide at least a level of civil protection for those relationships that do not meet the relationship status required under the domestic violence legislation.

As you may be aware, the Victorian Law Reform Commission is currently undertaking a review of their stalking laws after the murder of Celeste Manno in 2020. A work colleague who was not in a relationship with Ms Manno was charged with her murder.

Justice system lashed for failing to protect Melbourne woman allegedly killed by 'stalker' | Sunrise (7news.com.au)

Stalking victims asked to speak up: 'He created a jail inside my head' (ampproject.org)

Stalking: Terms of Reference - Victorian Law Reform Commission

Recommendation 9

That the stalking laws be fully reviewed.

2. Petrol Dousing

Anecdotally, there has been an increase in this activity in the last 5 years but has increased after the murder of Hannah Clark and her children in February 2019. There is a concern that the police do not take the threat seriously though women describe being extremely traumatised and suffer PTSD. They describe believing they would die. A standalone offence may increase the chance of the police responding appropriately and with necessary seriousness. Please see an attached article by the University of Queensland on the issue asking if a specific offence should be created as the current threat offences do not encompass the impact of the crime on victims. This paper built on the work of the University of Queensland Pro Bono Centre, whom WLSQ commissioned to consider the issue of a stand-alone offence of "dousing". The University recently obtained further funding and is currently

undertaking field work about the extent of the threat of petrol dousing amongst the clients of domestic violence services, in Southeast Queensland.

Recommendation 10

That Queensland consider a standalone offence of 'dousing' and threat of dousing.

3. Breaches of domestic violence protection orders

There is continued concern from domestic violence service providers about getting the support of police to breach domestic violence orders. They are a primary way that women obtain safety, but women can have considerable difficulty in getting the police to take action and there can be considerable time delays between when a criminal offence is charged and the court outcome. They should be considered in more detail and an understanding gained about what is happening for victims.

Recommendation 11

That breaches of domestic violence orders be reviewed.

4. Strangulation

This provision continues to be problematic, especially because of the incorporation of "consent" into the definition. The US definitions do not include consent.

Recommendation 12

That the strangulation offence be reviewed.

5. Defences and partial defences to murder

These require careful consideration and if women who have killed their abuser in the face of life-threatening domestic violence can access these provisions. Particular attention needs to be given to whether they are excluding Aboriginal and Torres Strait Islander women. It would be useful to undertake research into the partial defence of Section 304B killing in an abusive relationship and how it is being utilised especially by Aboriginal and Torres Strait Islander women. It has been over 10 years since this partial defence was introduced but it has never been reviewed. It is a peculiar provision that requires the defendant to establish they were acting in self-defence to be able to access a partial defence to murder.

Recommendation 13

That defences to murder and partial defences be considered by the Taskforce and the accessibility of these legal provisions for women who kill in response to life threatening domestic violence, considering, in particular the experiences of Aboriginal and Torres Strait Islander women.

Human Rights Act

The rights of victims of crime in criminal proceedings, including child victims are not recognised by the Human Rights Act Queensland. This is hugely significant as it means it is only the rights of criminal defendants that are specifically upheld by the Act. Section 48 (1) of the Act sets out matters of interpretation and courts in Queensland (including the criminal courts) are directed to interpret matters in a way that is compatible with human rights. This will result over time in defendant's rights being given precedence in interpretation of criminal laws over victim's rights because victim's rights are not clearly and specifically protected.

Recommendation 14

That amendment to the Human Rights Act be considered to include the protection and upholding of the human rights of victims of crime, including child victims in the criminal justice system.

6. The purpose of the criminal justice system in Queensland

The Royal Commission Report into Institutional Child Sexual Abuse report into the criminal justice system response made the following first recommendation:

> *The first recommendation in our criminal justice report provides: In relation to child sexual abuse, including institutional child sexual abuse, the criminal justice system should be reformed to ensure that the following objectives are met:*
>
> *a. the criminal justice system operates in the interests of seeking justice for society, including the complainant and the accused*
>
> *b. criminal justice responses are available for victims and survivors*
>
> *c. victims and survivors are supported in seeking criminal justice responses.*
>
> Factsheet - Criminal Justice report: Outline of recommendations (childabuseroyalcommission.gov.au)

I believe these objectives could be adapted and expanded to the whole criminal justice system and it would be very helpful if they were incorporated into a relevant piece of legislation to make its objectives clear for the whole community.

Recommendation 15

That clear objectives for the Queensland criminal justice system be developed for inclusion in relevant legislation.

7. Police process concerning a criminal justice response in domestic violence cases

There is a need for clear and transparent guidelines and practices about the police response to domestic violence vis a vis the criminal justice system.

In what circumstances do the police take out a domestic violence order on behalf of a victim and when don't they?; when do they investigate and take criminal action and when do they only take out a civil protection order. When do the police take breach action and charge with a criminal offence? Often women in domestic violence are not told or do not even know about the possibility of taking criminal action.

Recommendation 16

The Taskforce consider the need for clear public guidelines for police that set out when police pursue a criminal justice response in domestic violence matters.