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The Honourable Margaret McMurdo AC
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Dear Chair

I write in response to the call for submissions to the Taskforce. Whilst I acknowledge the lateness of this contribution I trust that the observations contained with it, from the prosecution perspective, will be of assistance in the ongoing work of the Taskforce.

It is important to reiterate my position in relation to the contribution of this Office to reviews of this nature. It is for parliament to determine what laws are to be enacted, and with that inevitability comes some degree of policy preference. It is my responsibility, and that of my Office, to prosecute impartially and according to the laws that are enacted, regardless of personal preference. Consequently, I will not enter into policy debates concerning existing or proposed legislation. That is a matter for parliament, and is affected by considerations of partiality at any given time. However, where it is appropriate to do so, and recognising the extensive practical experience of the staff of the Office of the Director of Public Prosecutions, I offer the following observations as to the practical application of existing and potential legislation regardless of the underlying policy issues, in an effort to assist with the provision of the most fair, effective and efficient administration of criminal justice in this State as is possible.

In order to meaningfully assist the Taskforce, I have sought to narrow the focus to offences that concern domestic and sexual violence. It is apparent that female victims are significantly represented in this category of offending although the offence is not gender specific. The intention of the submission is to provide insight as to the current dynamics of the legislative framework and the evidentiary procedures, as it is experienced by those who prosecute the offences.

The area of domestic violence, particularly, has represented an increase in litigation. The introduction of the offence of choking, suffocation and strangulation in May 2016 has seen 3742 proceedings commenced with respect to that charge. Previously, it might have been the case that these types of matters were predominantly categorised as an assault occasioning bodily harm (if an identifiable injury results) or as a common assault (if no injury). Such offences can be dealt with in the Magistrates Court which are much more likely to conclude in an expeditious manner than if the offences are required to proceed on indictment (as they now do).

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It is not uncommon that such matters are contested. Whilst the contest might reflect the dynamics between the participants in a domestically violent relationship generally, the explanation is much more readily derived from the nature of the offence itself. They are offences, not dissimilar to sexual offences, committed privately, *generally* without eyewitnesses and occur in circumstances where a corroborative injury is not always identified. Therefore, the prospects of success of a conviction for offences of this type depend upon the assessment of the victim as a witness of truth and reliability. As such, the victim experience in the criminal justice system is crucial to the prosecution of perpetrators of domestic violence offending.

The responsibility to prosecute offences on behalf of the people of Queensland is an important one. That responsibility is carried by prosecutors and prosecution lawyers who act on behalf of the state, entrusted with the power to charge and prosecute those against whom allegations are made. As noted, offences against women and children represent a significant proportion of that work of the ODPP. The continuing experience of trial advocacy and victim engagement develops the skill necessary to navigate the traumatic experiences that are recounted by the victims. This includes an obligation to comply with the *Charter of Victims' Rights*.[1] Further obligations are imposed under the *Victims of Crime Assistance Act 2009*[2] to advise victims of the continuing procedural stages of a prosecution. That inevitably requires explanations upon the finalisation of a matter; whether a conviction was achieved or the prosecution ended in another way. In other words, the role of a Crown Prosecutor includes managing the expectations of a victim and witness as to the complexities of the criminal law environment.

Victim engagement

It is the experience of prosecutors that a significant hurdle in a prosecution for offences of domestic violence is the reluctance of the complainant to proceed. It is not uncommon for a victim to wish to disengage with the criminal process because they had moved on with their life, separated from the perpetrator and/or had placed the tumultuous period behind them. Concerningly, is is also common that such a view is accompanied by the confirmation that the contents of their disclosures and allegations are true. Such victims can see no personal value in their continued participation in the criminal justice system. From the same perspective, and whilst each case presents its own considerations, it is perhaps undesirable to pursue a perpetrator where the subsequent separation was the preferred remedy from the victim's perspective (and it already having been achieved), although considerations of community safety remain valid. Whilst the risk to that particular victim may be significantly reduced, it might be thought that the risk to the community as a result of the inclination of the perpetrator to act violently in a domestic situation remains. Prosecutors also experience a significant willingness of victims to accept a lesser criminality to secure a plea of guilty rather than have to attend court for the entire agitation of their experience.

In accordance with the obligations under the victim legislation, complainants are routinely informed as to the availability of 'special witness measures' upon application. It is also the experience of prosecutors for a significant uptake in the use of the remote witness room for the giving of evidence when a witness qualifies for the special witness measures. However, whilst the witness may have the opportunity to give evidence remotely, they are aware it is occurring before a jury and subject to the delays of the trial process. These observations highlight that victim disengagement still occurs in circumstances where they are aware of the current measures to assist in the giving of their testimony.

Other commonly encountered explanations for disengagement are that a victim may resile from key allegations and state that their original statement contained parts that were not true or were not entirely reflective of the events (as they are now perceived by the complainant). Adjunct to that experience is the explanation that a sworn police statement was mis-drafted or over emphasised in some particular fact or manner.

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[1] Part 1, Division 1 "Rights of Victims".

Prosecutors also have observed that victims sometimes recognise the challenge to their own reliability as a result of drug or alcohol intoxication. Matters of emphasis or reliability are of course assessments that can be made by others but the volunteering of such concerns by victims might be viewed as a corollary of an attempt to discontinue proceedings by satisfying prosecuting authorities there are difficulties with the case.

Prosecutors recognise the tension between a respectful adherence to a victim's desirability for continuing proceedings yet having to recognise deterrent and protective considerations that focus upon the public interest in reducing these offences by the prosecuting of perpetrators.

The delay in prosecuting such offences can only exacerbate the desire to discontinue proceedings or accept reduced charges. As much is obvious when considering the myriad of other commonly cited difficulties with victim participation: reconciliation with a perpetrator, risk of re-traumatisation through the court process, familial pressure (from perpetrator and others) and emotional and financial detriment once they have separated from the perpetrator.

Prosecutors recognise that delay between charge and prosecution has the additional obvious material impact upon the complainant's memory and ability to adequately particularise the offending when giving evidence in a trial. Further, the delay component appeared to statistically align with the reported reasons by complainants as to their reluctance to proceed (for example, that the incident 'was in the past' or that some parts of the original disclosures were not now true).

These observations perhaps stand to reinforce the need to cast a critical view over a victim's experience as it currently stands and to identify measures that may overcome the concerns. The length of time that a matter will take from complaint to final resolution is a significant consideration and disincentive for formal criminal justice system engagement.

Observations

It is the view of Prosecutors that the victim's first account given to the police is of particular importance, particularly in circumstances where it was electronically recorded. They emphasise that where the credibility of a victim is paramount, an electronically recorded and timely statement would improve the quality and reliability of evidence. What was routinely advanced is that the preservation of the victim's account in their own words, in recorded form, would improve the ability to prosecute these matters fairly. The method by which the information is elicited and provided would be transparent. It is thought that this would provide greater clarity in making the assessment of reliability as to the truth of the facts, and would therefore be the best evidence of the events.

Of course, the interests of justice are served by the most reliable evidence. The introduction of the measures to the *Evidence Act* which allowed children to be pre-recorded (both in disclosure under s 93A and testimony pursuant to s 21AK) was a significant step towards the achievement of that ideal in cases to which the regime applies. Experience has shown that the video recording of testimony of witnesses in the absence of the jury has provided for increased opportunities for reliable evidence to be adduced.[3] The newly introduced amendments regarding intermediaries showcase a further attempt towards enhancing reliability of those vulnerable witnesses.

The right of the accused to a fair trial will not be jeopardised.[4] Indeed, in *Re W*,[5] Lady Hale framed fairness to the accused on the methodology used to elicit reliable evidence;

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[2] *See section 12(a)* particularly.

[3] See also Henning, T *"Obtaining the best evidence from children and witnesses with cognitive impairments – "plus can change" or prospects new?"* (2013) 37 Crim LJ 155 at 167-168.

[4] An experimental study published by the Australian Institute of Criminology in 2005 generally found that the mode of presentation of testimony by victims '*did not impact differentially on juror perceptions of the complainant or the*

> *'The important thing is that the questions which challenge the child's account are fairly put to the child so that she can answer them, not that counsel should be able to question her directly. One possibility is an early video'd cross examination as proposed by Pigot. Another is cross-examination via video-link. But another is putting the required questions to her through an intermediary. This could be the court itself, as would be common in continental Europe and as used to be much more common law it is now in the courts of this country'.*

In Queensland, the vulnerability of children was recognised to require that they fall within this specialised category. The policy underpinning the measures is patently one of enhanced reliability and thereby creates a system of fairness for all participants. Both recent legislative amendments to domestic violence legislation,[6] and indeed anecdotal examples within the experience of prosecutors, have identified victims of domestic violence to also be a particularly vulnerable class of victim requiring special measures to enhance their ability to give believable, reliable and fulsome evidence. Other research establishes that;

> *"...victims of intimate partner violence are generally regarded as a unique victim group requiring tailored criminal justice approaches. This is due to the complexity of their needs, the hidden and intractable nature of the abuse as well as the long-lasting and wide-ranging impact of the abuse on victims, families and their extended social networks."*[7]

With that vulnerability in mind, the reluctance of victims, in the experience by prosecutors, is understandable. If a witness knew they would not have to recite the specific details in court *but for* clarification in cross-examination, could this improve the experience of the victims in the criminal justice system and increase their willingness to proceed with their allegations?

Timeliness is key. A well-structured, contemporaneously-recorded statement is a central constituent of a reliable account. The additional benefit might be that the jury will be able to assess the manner in which the information was elicited in order to properly assess reliability. The complainant might also derive some comfort and confidence knowing that that particular feature of their participation in the process of garnering evidence is finalised. The potentially most reliable account of the alleged facts would be before the jury for their assessment and may reduce the incidence of defendants seeking to exploit a failing memory or inconsistency in the versions given to police and in evidence. A similar approach might be adopted to the pre-recording of cross-examination of child witnesses pursuant to s 21AK of the *Evidence Act*.

It might also be expected that the reduced ability of defendants to exploit a change of heart or a failing memory, or shortcomings in the method of obtaining the evidence might assist in the more timely disposition of matters and lead to court efficiencies in addition to more reliable outcomes. It would generally only require a vulnerable witness to give evidence on one occasion. Whilst some prosecutors feel that the the experience of victims would benefit from a mandatory pre-recorded hearing following a recorded statement, many prosecutors recognise that such a procedure should have a discretionary component to give the victims the power to choose in certain circumstances recognising the potential therapeutic benefit to the victim in giving their testimony within the courtroom environment.

Despite the special witness measures available, some complainants still do not wish to give evidence in a trial. Invariably, this is in circumstances where the complainant has given an account in a written statement

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accused, or guilt of the accused.' (Taylor, N & Joudo, J "*The impact of pre-recorded video and closed circuit television testimony by adult sexual assault complainants on jury decision-making: an experimental study*" (2005) Australian Institute of Criminology, No. 68

[5] *Re W* [2010] UKSC 12 at [28].

[6] As summarised in *R v O'Sullivan; R v Lee* [2019] QCA 300.

[7] Dr. Healy D "*Exploring Victims' Interactions with the Criminal Justice System: A Literature Review*" (2019), Department of Justice and Equality, University College Dublin.

and told their story, and yet the contents of it are not of themselves admissible but rather it is necessary that they give their account again, often months, and sometimes years later, in a courtroom environment.[8]

Further, cultural factors are a recognised hurdle to a successful prosecution. Research has shown that the use of pre-recorded evidence had a positive impact upon the increase in reporting against indigenous women in Central Australia as well as reducing the trauma of giving evidence.[9] This might be a feature of some interest to the Taskforce as it considers matters affecting the experience of diverse women in the community.

Other statistical research in Canada shows that open-ended questions can generate more nuanced answers among vulnerable respondents.[10] This of course, is not necessarily the way in which questions are asked of victims when giving evidence. That research further demonstrated the need for a sympathetic response, having access to information as well as access to support resources.

The legislative framework is not the only matter impacting upon the challenges in prosecuting cases of the type under contemplation. In fact, prosecutors emphasise the benefit of information to prosecutors at an early stage of proceedings. Inadequate, or incomplete police investigations continue to be the experience of prosecutors. The failure to secure supporting evidence (including phone evidence, medical opinion, potential witness statements including children), but also the statement taking process itself, continue to present challenges to a successful prosecution. For example, a large gap of time between the initial complaint to police and when the statement is obtained. Notably, Prosecutors do not report a concern about the degree of particularisation for substantive charges. However, concerns as to the detail of prior contextual conduct such as in the collation of relationship evidence (or prior domestic violence offending that might be admissible pursuant to s 132B of the *Evidence Act 1977*) remain. This may highlight the need for training within police (and prosecution services generally) as to the need for a focus by investigating police on the full history of the relationship and the violence within it, and for investigators to seek out domestic violence occurrence reports prior to an interview in order to appropriately capture that offending within it.

The current legislative framework requires adequate particularisation for specific offending of a domestically violent nature. Often times that is possible, but it is also the experience of prosecutors that offending can sometimes have a continuing nature to it, with no specific offence or offences truly capturing the nature of the domestically violent 'relationship'. Failure to properly particularise will inevitably lead to a conclusion that there are no reasonable prospects of a conviction and the Crown are precluded from pursuing such a charge. Offences of violence do not have a corresponding 'relationship' charge as, for example, the offence of maintaining an unlawful sexual relationship in which inadequate specification of individual charges is no barrier to a prosecution which is focussed on the nature of the relationship rather than a specific offence committed within it.

The offence of torture might have some similar features, but the element of an 'intentional' infliction of pain and suffering as a necessary element of that charge can be challenging to meet with available evidence. Consequently, it is a charge used only where the evidence very compellingly established that element of 'intention'. That a victim would have difficulty particularising historical events or a continuing course of conduct is understandable and explainable by the sheer routine of violence that can exist in domestic violence relationships. Often, police intervention might only arise as a result of the most serious event, or

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[8] This does not include 'girls' who are under 16 (or other more confined circumstances) and whose written statement is admitted statutorily as a 93A statement.

[9] Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council Domestic and Family Violence Service, *Submission FV 117,* 15 June 2010; Central Australian Aboriginal Family Legal Unit and Central Australian Women's Legal Service, *Consultation,* Alice Springs, 28 May 2010.

[10] Saxton, M.D., Oszowy, L., MacGregor, J.C. D., Macquarrie, B. J & Wathen, C. N. 2018. Experiences of intimate partner violence victims with police and the justice system in Canada. *Journal of Interpersonal Violence* [Online]. Available: https://doi.org/10.1177/088626051875830.

greater injury, or at the point of repetition, or occurring in the context where children are in danger. That there was a motivating event that captures what becomes the substantive charge (assault occasioning bodily harm and/or choking, for example) does not ensure the adequacy of the particulars with respect to routine violence in the relationship. Therefore, if a victim upon initial disclosure cannot be sure of prior events it would not form the focus of a police statement. These challenges may be overcome by the creation of an offence of 'continuing family of domestic violence' akin to the offence of maintaining and unlawful sexual relationship with a child[11].

There is some scope under the current framework for leading evidence of prior domestic violence under s132B *Evidence Act 1977* or by reliance on the Common Law for offences falling outside Chapters 28 – 30 (ss.291 - 346) of the *Criminal Code*. The primary test of admissibility is relevance; however, there remains a discretion to exclude the evidence.[12] 'Relationship evidence' is often the subject of contest, at least in part, when it is present in a particular case. The explanation may lie to some extent in the requirement that it be probative of a fact in issue in relation to the specific offence or offences being prosecuted. It is common for a challenge to be made on the basis that the evidence to be led is too prejudicial, or that it is dated, and thus not relevant. Of course, when evidence of prior violent conduct is admitted, it will be for the complainant (mostly) to give evidence of those past acts in oral testimony, thereby increasing the extent of their involvement in the criminal process and exposing them to greater scope for challenge.

Ultimately, this submission seeks to provide insight into the victim experience in the current legislative framework, and the observations are offered only in the context of the Taskforce's enquiry into the introduction of new charges that seek to capture 'domestic violence relationships'.

I have sought only to highlight some of the prominent features that confront prosecutors in the prosecution of cases of the type in contemplation by the Taskforce in the hope that they assist the Taskforce in this important work. I note the assistance already provided by my responses to specific requests from you in relation to particular cases, and relevant ODPP training, and our general discussions relating to the Takforce when we met in person earlier this year. I trust also that the contribution on the Taskforce of senior ODPP and, of course, Deputy Director Philip McCarthy QC has been of considerable assistance to the important work of the Taskforce and of gaining a clear prosecution perspective in the consideration of the issues raised.

These additional observations are intended to provide some further assistance, based on the direct experiences of prosecutors for the benefit of the Taskforce and with any future formulation of policy or otherwise if it so desired.

Yours sincerely

Carl Heaton QC
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[11] S.229B of the *Criminal Code*
[12] Section 130 *Evidence Act 1977*. See also *R v PAB* [2006] QCA 212, *R v SBV* [2011] QCA 330.