14 April 2022

The Honourable Margaret McMurdo AC
Chair
Women's Safety and Justice Taskforce
GPO Box 149
Brisbane QLD 4000

By online submission

Dear Chair

Discussion Paper 3: Women and girls' experiences across the criminal justice system as victims-survivors of sexual violence and also as accused persons and offenders

The Bar Association of Queensland welcomes the opportunity to respond to the Women's Safety and Justice Taskforce's Discussion Paper 3 "*Women and girls' experiences across the criminal justice system as victims-survivors of sexual violence and also as accused persons and offenders*" (**the Discussion Paper**). The Discussion Paper has been considered by, and this response prepared with the assistance of, the Association's Criminal Law Committee.

The Discussion Paper invites submissions in respect of a number of discussion questions posed throughout its text. The Association has considered each of the discussion questions and, in this submission, responds in respect of those questions that are most relevant to its members' experience.

Questions 7 & 8 – Recognising and responding to trauma

The Association has considered the recommendations made by the Taskforce in its report "*Hear her voice – Report 1: Addressing coercive control and domestic and family violence in Queensland*", and intends to implement recommendations 44 and 45 of that report. The Association intends to include training within its CPD program which is designed to inform members of the ethical issues which may arise when a client reports to them, in the course of their practice, the occurrence of domestic and family violence and, as well, to increase members' awareness of services and support options to which a barrister might be able to refer such clients.

Regarding questions 7 and 8, the Association notes there is presently an absence of training available across the legal profession in relation to recognising and responding to the impacts of trauma, as well as vicarious trauma and compassion fatigue amongst lawyers.

Some of the Association's members who are members of the employed Bar (i.e. those employed at the DPP, Legal Aid, etc.) may receive workplace specific training on these topics. However, in the experience of the Association's members,

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this does not seem to be common or widely available, and awareness of these issues does not appear to be widespread.

Question 25 – Non-consensual sharing of intimate images

The Association does not have any criticism of the current approach to the non-consensual sharing of intimate images. It appears that charges in relation to such conduct are being appropriately laid by the relevant authorities. The Association is not aware of any particular difficulties or issues with the current approach and does not consider there to be a need for further investigation or amendment.

Questions 32-36 – Public reporting on sexual offending and domestic and family violence

The Association does not support an amendment to the restrictions in relation to publication of information about complainants and/or accused persons relating to domestic violence matters, sexual offences and youth justice.

Reporting of Domestic Violence Matters

It is a necessary and accepted function of the *Domestic and Family Violence Protection Act* 2012 (**DFVP**) that a protection order is not difficult to obtain; it is granted to a person in a relevant relationship who has been a victim of domestic violence where it is 'necessary or desirable' to protect the person from domestic violence. Domestic violence proceedings are held in closed court and information that identifies, or is likely to identify, a party or witness is prohibited from publication.

If restrictions on publication were relaxed in respect of domestic violence proceedings, this would attract public and media scrutiny of applications, making parties to a proceeding into fodder for the tabloid media. The prospect of such publicity may deter some people in need of protection from making an application. Similarly, it might encourage others to make malicious or frivolous applications that are intended to cause reputational harm to the respondent.

In members' experience, a respondent to an application for a protection order may consent to it being made in order to avoid the expense of trial. If the making of an order became a matter of public record, respondents are likely to become much more inclined to contest an application than to consent to an order with agreed conditions. An increase in contested applications for protection orders is, in the Association's view, most undesirable.

A protection order may also be made on a temporary basis before the application is served on the respondent. If the making of a temporary protection order were made publicly available, it would be undesirable for the respondent to that order to become aware of the order by a means other than the court or police.

The Association does not foresee any benefit were the restrictions on reporting in respect of domestic violence were relaxed.

However, the Association appreciates that many victims and survivors of domestic violence want their voices heard and considers the law ought to allow for that to occur. In that regard, the Association would be happy to consider the terms of any proposed amendment to the DFVP which might allow an aggrieved person to voluntarily disclose their identity at the conclusion of a proceeding under the Act.

Reporting of Sexual Violence Matters

Section 6 of the *Criminal Law (Sexual Offences) Act 1978* (Qld) contains a discretion to depart from the general rule and allows a Court to permit publication for "good and sufficient reasons". Further, section 10(2) of the Act allows a complainant to give written authorisation for a person to disclose their own identity (though does not allow them to disclose details which may lead to the identification of the offender).

In the Association's view, this strikes an appropriate balance between ensuring that a complainant's identity is protected whilst allowing the complainant the opportunity to have their voice heard.

Reporting of Youth Justice Matters

The Association notes that the *Youth Justice Act* 1992 (Qld) already provides for a discretion to allow for identification of a child offender in certain circumstances, namely, where it would be in the interests of justice to allow the publication, having regard to the need to protect the community, the safety or wellbeing of a person other than the child, the impact of publication on the child's rehabilitation and any other relevant matter.[1] The Association does not consider that an expansion of the existing power is needed or warranted.

Questions 50-53 – Consent and Mistake of Fact

In relation to questions 50-53, the Association notes the recent consideration and amendments recommended by the QLRC on this topic. Given the contemporaneous and thorough consideration of this issue, the Association does not support re-consideration of consent at this time. This is especially in light of the fact that the impact of the amendments recommended by the QLRC are yet to be properly evaluated.

The Association, in its response to the Taskforce's Discussion Paper 2 "*Women and girls' experience in the criminal justice system*", did not support the Taskforce re-visiting the provisions of the Criminal Code regarding consent and mistake of fact. Whilst the Association notes the Taskforce's comments in the Discussion Paper regarding the QLRC's use of a study by Professor Cheryl Thomas,[2] it does not consider that critiques of Thomas' study necessitates a review of the same work conducted by the QLRC, which informed itself and its report from a range of sources.

In relation to the commentary at page 37 of the Discussion Paper, regarding rape myths and public misconceptions as to consent, it is the Association's view that these misconceptions are not confined to sexual offences. Public misconceptions as to the law occur across many areas in both civil and criminal law. The role of the trial judge is to direct the jury as to the law and correct any misconceptions. The Association notes that prescriptive approaches to criminal matters are unhelpful as each matter turns upon its own facts. The trial judge is best placed to put before the jury circumstances applicable to the facts of the trial where consent can or cannot exist.

Question 54 – Introducing an offence criminalising "stealthing"

The Association does not support a stand-alone offence or an amendment to the definition of consent to provide explicitly for "stealthing". The Association's view is that an act of

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[1] *Youth Justice Act* 1992 (Qld), s 234.
[2] Cheryl Thomas, 'The 21st Century Jury: Contempt, Bias and the Impact of Jury Service' (2020) Criminal Law Review 11, 987-1011, 1004.

stealthing would already be covered and criminalised under the existing law. It is the experience of the Association's members that this type of offending is not commonly brought before the court but, in any event, is conduct that would vitiate consent and, therefore, amount to rape.

Question 58 – Video-Recorded Evidence

As noted in the Discussion Paper, the use of video captured by police using body-worn cameras is presently the subject of a pilot program which follows the amendments proposed in the *Evidence and Other Legislation Amendment Bill* 2021.

The Association has previously made submissions on the Bill to the Queensland Parliament's Legal Affairs and Safety Committee, expressing its concerns that use of body-worn camera footage as evidence in chief may impede the efficient administration of justice, is not required in the interest of justice and has the potential to prejudice an accused and their ability to obtain a fair trial.[3]

Question 61 – Similar Fact & Propensity Evidence

The state of the law in Queensland with respect to similar fact and propensity evidence is, at present, very permissive. In members' experience, similar fact and propensity evidence is frequently admitted into evidence.

When considering the potential for amendments which relate to the admission of similar fact and propensity evidence, the Association does not consider the interests of the public to be a significant factor when considering the admissibility of evidence whilst maintaining a fair trial for the accused.

Question 64 – Expert Evidence

In members' experience, expert evidence that is relevant and admissible at trial is already routinely admitted. In the Association's view, it is appropriate that evidence that does not meet the required criteria ought not be admitted. If an exemption allowed a party to adduce expert evidence which was not otherwise relevant and/or admissible, it may have the unintended consequence of diminishing the probative value of ordinarily admitted expert evidence. Additionally, it may be said that expert evidence which could not be admitted without a proposed amendment allowing its admission, is evidence that is not sufficiently relevant, otherwise, to allow its admission. The Association does not consider that there is scope for expert evidence to otherwise be admitted.

Question 65 – Preliminary Complaint Evidence

The Association does not support the extension of the use of preliminary complaint evidence. Preliminary complaint evidence is an exception to the hearsay rule and was originally fashioned when there was an expectation that, if the sexual assault was genuine, an individual would complain. It is now infrequently used, depending upon the consistency of the complaint made or otherwise, to assess the reliability and credibility of the complainant. There is no purpose in extending the admission of preliminary complaint evidence beyond sexual offences.

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[3] Submission to the Legal Affairs and Safety Committee, Queensland Parliament on the *Evidence and Other Legislation Amendment Bill 2021* (Qld) (9 December 2021).

Question 66 – Protected Counselling Communications

The Association does not consider that legislation surrounding protected counselling communications is presently operating effectively. The Association understands there is judicial commentary regarding protected counselling communications and how and when they may be used by a party in a criminal proceeding.

The Association holds significant and extensive concerns regarding the operation of the *Evidence Act 1977* (Qld) relevant to protected counselling communications, which should be the subject of a comprehensive review.

Question 71 – Specialist Sexual Violence Court

The Association does not support the establishment of a separate specialist sexual violence court. The District Court, which deals with the vast majority of sexual violence related offending in Queensland, is already specialised to some extent in that the Judges of that Court regularly deal with offending of that nature.

Establishing a separate specialist court risks focusing training and resources in that area in circumstances where issues of trauma are regularly experienced, and sometimes experienced to a very significant degree, in relation to offending falling outside the area of sexual violence. Judges should therefore be well equipped to deal with the issues presented in these matters across the broader range of criminal offending falling within that Court's jurisdiction.

Questions 81-82 – Sentencing Women Offenders

The factors listed in section 9 of the *Penalties and Sentences Act* 1992 (Qld) are non-exhaustive. Therefore, in addition to those factors set out therein, other factors, including those particular to women and girls, are able to be taken into account to the extent that they are relevant. For example, an offender being a victim of domestic violence is often relevant in mitigation and can be taken into account by the Court in sentencing.[4]

In respect of particular supports available to women and girls in the criminal justice system, the Association notes the general lack of community based supervised orders, short of jail, available; the inadequate support offered to those on parole; and the difficulties experienced by women in custody who are mothers to children or babies.

Separate Legal Representation - Discussion at page 57 of Discussion Paper

Finally, whilst it is not specifically raised in a discussion question, the Association notes the discussion on page 57 of the Discussion Paper regarding separate legal representation for complainants in sexual matters. The Association does not support such a change.

Division 4C of *Evidence Act 1977* (Qld) has recently introduced a 2 year pilot program[5] allowing for the use of intermediaries for witnesses in child sexual offences. The effectiveness of this program is yet to be properly evaluated. Additionally, the *Evidence Act 1977* (Qld), already, has significant protective measures for vulnerable witnesses in relation to sexual and domestic violence offences pursuant to the Act's "special witness" measures.[6]

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[4] See for example *R v McLean* [2021] QCA 70.
[5] In Brisbane and Cairns commencing July 2021.
[6] See section 21A.

For those reasons, as well as the significant upheaval of the adversarial process of a criminal law trial to which the Discussion Paper refers, the Association does not support the introduction of separate legal representation for victims.

Thank you for the opportunity to provide feedback and comment. The Association would be pleased to provide further comment or answer any specific questions you may have.

Yours faithfully

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President