

Queensland Family and Child Commission Submission

To: Legal Affairs and Community Safety Committee

Date: 1 February 2016

Topic: Criminal Law (Domestic Violence) Amendment Bill (No. 2) 2015

Submission summary:

This submission aims to provide the Legal Affairs and Community Safety Committee with information and advice in considering how the Criminal Law (Domestic Violence) Amendment Bill (No. 2) 2015 will contribute to the safety and wellbeing of children and young people in Queensland.

Submission recommendations:

The Queensland Family and Child Commission:

- supports the amendment to include domestic and family violence as an aggravating factor on sentencing, subject to the evaluation to be undertaken by the Sentencing Advisory Council
- supports the evaluation of the impact of the amendment to include domestic and family violence as an aggravating factor on sentencing by the Sentencing Advisory Council, as part of its consideration of the impact that maximum penalties has on the commission of domestic violence offences
- recommends that, as part of its consideration, the Sentencing Advisory Council consider the merits of the Special Taskforce on Domestic and Family Violence in Queensland's preferred option of creating a circumstance of aggravation, resulting in higher maximum penalties for criminal offences in a domestic and family violence setting
- supports the proposed specific offence of choking, suffocation or strangulation
- recommends the Sentencing Advisory Council identify implications of the offence in its application for young people (including 17 year olds) and consider any unintended consequences for young people (including 17 year olds), and
- supports the proposal to allow a court to receive a submission for a party to proceedings on what they consider to be the appropriate sentence or sentence range for the court to impose.

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The Queensland Family and Child Commission (QFCC) is pleased to provide a submission to the Legal Affairs and Community Safety Committee (LACSC) regarding the introduction of the Criminal Law (Domestic Violence) Amendment Bill (No. 2) 2015.

The Queensland Family and Child Commission

The QFCC was established on 1 July 2014 to ensure all Queensland children and young people are cared for, protected, safe and able to reach their full potential. In achieving this, the QFCC's functions include, though are not exclusively limited to, the following:

- providing oversight of the Queensland child protection system
- promoting and advocating for the safety and wellbeing of children and young people, particularly those in need of protection or in the youth justice system
- informing and educating the community on the way in which the child protection system operates
- providing leadership and expert advice to relevant agencies about laws, policies, practices and services, and
- analysing and evaluating at a systemic level, policies and practices relevant to the child protection system and the performance of relevant agencies in delivering services¹.

The QFCC generally supports the amendments to the Criminal Code, the *Penalties and Sentences Act 1992* and the *Youth Justice Act 1992*. Further information and recommendations are provided below.

Children and young people experiencing domestic and family violence

Recommendation

The QFCC:

- supports the amendment to include domestic and family violence (DFV) as an aggravating factor on sentencing, subject to the evaluation to be undertaken by the Sentencing Advisory Council
- supports the evaluation of the impact of the amendment to include DFV as an aggravating factor on sentencing by the Sentencing Advisory Council, as part of its consideration of the impact that maximum penalties has on the commission of domestic violence offences, and
- recommends that, as part of its consideration, the Sentencing Advisory Council consider the merits of the Special Taskforce on Domestic and Family Violence in Queensland's (the Taskforce) preferred option of creating a circumstance of aggravation, resulting in higher maximum penalties for criminal offences in a DFV setting.

The QFCC supports the amendment to include DFV as an aggravating factor on sentencing. The QFCC also supports the proposed evaluation of the impact of the amendment to include DFV as an aggravating factor on sentencing by the Sentencing Advisory Council, as part of its consideration of the impact that maximum penalties have on the commission of domestic violence offences, once this Council is reinstated.²

¹ *Family and Child Commission Act 2014* (Qld) s9.

² Queensland, Parliamentary Debates, Legislative Assembly, 2 December 2015, p 3082 (Yvette D'Ath, Attorney General and Minister for Justice and Minister for Training and Skills)

The QFCC notes the Taskforce recommendation to introduce a circumstance of aggravation of DFV to be applied to all criminal offences.³ The QFCC recommends that the Sentencing Advisory Council consider the merits of the Taskforce's preferred option of creating a circumstance of aggravation, resulting in higher maximum penalties for criminal offences in a DFV setting.

DFV has serious implications for the safety and wellbeing of children and young people who are exposed to it. Due to the seriousness of DFV and the need for perpetrators to be held accountable, the Taskforce supported increasing maximum penalties for criminal offences associated with DFV.⁴ This would be achieved by establishing DFV as a specific 'floating' circumstance of aggravation to be applied to offences in the Criminal Code increasing the maximum penalty available to judicial officers.⁵

The Australian Domestic and Family Violence Clearinghouse reports that "more than one million Australian children are affected by domestic violence".⁶ Although it is difficult to assess the extent of children's exposure to domestic and family violence (DFV),⁷ data from Queensland's Child Death Register held by the QFCC indicates that during 2014-2015:

- a history of DFV was known in the lives of five children who suicided
- a history of DFV was known in two families of children who died as a result of fatal assault and neglect, and
- eight families had a known history of DFV in relation to children who died from Sudden Unexpected Death in Infancy.

A child's experience of DFV is defined as "witnessing, exposure to, or seeing domestic violence"⁸. This implies that a child is traumatised by watching an act of DFV as it occurs, however this witnessing incorporates far more than observing a fight between partners. It can also involve:

- hearing violence
- being forced to watch or participate in assaults
- being forced to spy on a parent
- being told they are to blame for the violence because of their behaviour
- being accidentally injured or hurt in utero
- being used as a weapon or hostage, and/or
- defending a parent against or intervening to stop violence.⁹

The impacts on a child's development, and social and emotional wellbeing are significantly greater. Although the absolute magnitude of these impacts is difficult to determine due to the widespread co-occurrence of DFV with other forms of child maltreatment, they can include:

³ Special Taskforce on Domestic and Family Violence (2015) *Not now, not ever – Putting an end to Domestic and Family Violence in Queensland*, p 39.

⁴ Department of Justice and Attorney-General (2015) *Discussion Paper: Circumstance of aggravation and strangulation*, Department of Justice and Attorney General, Queensland. p 7.

⁵ Special Taskforce on Domestic and Family Violence (2015) *Not now, not ever – Putting an end to Domestic and Family Violence in Queensland*, p 304.

⁶ Australian Domestic & Family Violence Clearinghouse (2011) *The Impact of Domestic Violence on Children: A literature review*, University of New South Wales, p 1.

⁷ Special Taskforce on Domestic and Family Violence (2015) *Not now, not ever – Putting an end to Domestic and Family Violence in Queensland*, p 301.

⁸ Campo, M., Kaspiw, R., Moore, S., Tayton, S. (2014) *Children affected by domestic and family violence: A review of domestic and family violence prevention, early intervention and response services*, Australian Institute of Family Studies, p 2.

⁹ Humphreys, C (2007) *Domestic Violence and child protection: Challenging directions for practice*, Issues Paper 13, Australian Domestic & Family Violence Clearinghouse.

- behavioural and emotional problems
- negative effects on social and cognitive development
- blaming themselves for violence
- inappropriate attitudes towards violence, and
- suffering the effects of violence on the parenting capacity of an abused partner.¹⁰¹¹

¹⁰ Hunter, R. (2006) *Narratives of domestic violence*, Sydney Law Review, Volume 28 Issue 4.

¹¹ Campo, M., Kaspiew, R., Moore, S., Tayton, S. (2014) *Children affected by domestic and family violence: A review of domestic and family violence prevention, early intervention and response services*, Australian Institute of Family Studies, p 22-23.

Increasing protection for children and young people from domestic and family violence

Recommendation

The QFCC:

- supports the proposed specific offence of choking, suffocation or strangulation in a domestic setting, and
- recommends the Sentencing Advisory Council identify implications of the offence in its application for young people (including 17 year olds) and consider any unintended consequences for young people (including 17 year olds).

Creating a specific offence of strangulation, choking or suffocation related to DFV in the Criminal Code will help to better identify the risks to victims and appropriate protection measures for them (including children and young people). QFCC supports this amendment as it balances justice for victims of serious acts of domestic violence with the significant challenges of creating an “umbrella criminal offence”¹² for DFV. The QFCC recognises this amendment will also add further protection to children and young people from acts of strangulation, choking or suffocation in its provision for the offence to be “associated domestic violence under the *Domestic and Family Violence Act 2012*”.¹³

While the QFCC is supportive of the amendment, one area of concern to the QFCC is the potential for young people to be exposed to the higher penalties available to perpetrators of strangulation, choking or suffocation. The Criminal Code allows for children over the age of 10 to be found criminally responsible for an offence which will include the proposed offence of strangulation in a domestic setting¹⁴. QFCC is of the view that special considerations for age (particularly 17 year olds given they are sentenced under the adult criminal justice system) be applied when children and young people are found guilty of such an offence.

It continues to be the position of the QFCC that Queensland remains the only jurisdiction in Australia to include 17 year olds in the adult criminal justice system. This is in contravention of the *Convention on the Rights of the Child* and the United Nations Committee on the Rights of the Child has repeatedly made recommendations for the removal of 17 year olds from Queensland’s adult criminal justice system.¹⁵¹⁶ Accordingly, the QFCC would like 17 year olds removed from the adult criminal justice system and transitioned to the youth justice system.

Strangulation, choking or suffocation is a criminal offence currently limited in application under the Queensland Criminal Code to association with an indictable crime. The QFCC agrees this is inadequate considering serious acts of DFV, such as non-fatal strangulation present a significant risk factor for more severe domestic violence incidents or homicide.¹⁷

A recent review of Domestic Violence Order (DVO) cross-applications in Queensland shows that the majority of allegations of strangulation, choking or suffocation are made by women against men. Further, this kind of violence is often not treated differently or more seriously to other types of less

¹² Special Taskforce on Domestic and Family Violence (2015) *Not now, not ever – Putting an end to Domestic and Family Violence in Queensland*, p 301.

¹³ Criminal Law (Domestic Violence) Amendment Bill (No. 2) 2015 (Qld), cl 3.

¹⁴ *Criminal Code* (Qld) s29

¹⁵ Committee on the Rights of the Child (2012) *Consideration of Reports Submitted by State Parties under Article 44 of the Convention – Concluding Observations: Australia*, UN Doc CRC/AUS/CO/4

¹⁶ Committee on the Rights of the Child (2005) *Consideration of Reports Submitted by State Parties under Article 44 of the Convention – Concluding Observations: Australia*, UN Doc CRC/C/15/Add.268

¹⁷ Douglas, H. & Fitzgerald, R. (2014) *Strangulation, Domestic Violence and the Legal Response*, Sydney Law Review, Volume 36 Issue 231, p 249.

serious allegations by police or courts when considering cross-applications for DVOs.^{18,19} This is particularly concerning when considering the intersection of domestic violence law and family law as shared care of children is not appropriate for families experiencing DFV²⁰. Despite existing exceptions to shared care arrangements in cases involving DFV, courts have increasingly mandated them, particularly where DVO cross-applications occur.^{21,22}

¹⁸ Wangmann, J. (2010) *Gender and Intimate Partner Violence: A case study from NSW*, UNSW Law Journal, Volume 33 Issue 3.

¹⁹ Douglas, H. & Fitzgerald, R. (2014) *Strangulation, Domestic Violence and the Legal Response*, Sydney Law Review, Volume 36 Issue 231.

²⁰ Australian Domestic & Family Violence Clearinghouse (2011) *The Impact of Domestic Violence on Children: A literature review*, University of New South Wales, p 11.

²¹ Hunter, R. (2006) *Narratives of domestic violence*, Sydney Law Review, Volume 28 Issue 4.

²² Douglas, H. & Fitzgerald, R. (2013) *Legal Processes and Gendered Violence: Cross-Applications for Domestic Violence Protection Orders*, University of New South Wales Law Journal 56.

Increasing efficiency in sentencing within the youth justice system

Recommendation

The QFCC supports the proposal to allow a court to receive a submission for a party to proceedings on what they consider to be the appropriate sentence or sentence range for the court to impose.

The QFCC promotes and advocates for the safety and wellbeing of children and young people, particularly those in need of protection or in the youth justice system.²³ The QFCC is supportive of the amendments proposed to the *Penalties and Sentences Act 1992* and acknowledges that this would extend to 17 year olds in the adult criminal justice system.

In Queensland between 2011 and 2015 there was an overall increase in the number of young people in unsentenced detention as well as the total number of young people in detention.²⁴ Efficiency in sentencing is crucial to ensuring that the youth justice system achieves timely outcomes for victims and allows offenders to take responsibility for their actions. Allowing parties to proceedings to make submissions on sentencing under the *Youth Justice Act 1992* will ensure that appropriate sentences are given in the most efficient manner.²⁵

Sentencing in the youth justice system is more beneficial to victims, young offenders and the community if it operates on principles of restorative justice, and prevention and early intervention. Restorative justice advocates a constructive rather than punitive approach to sentencing that allows the voices of victims and offenders to be heard.²⁶ Importantly, it has been recognised as an effective justice model for youth justice in Aboriginal and Torres Strait Islander communities.^{27 28} Providing for submissions on sentencing by parties to proceedings supports a restorative justice model.

²³ *Family and Child Commission Act 2014* (Qld) s9.

²⁴ Australian Institute of Health and Welfare (2015) *Youth detention population in Australia 2015*, Bulletin 131 December 2015, Australian Institute of Health and Welfare, Canberra, p 16.

²⁵ Queensland Law Society (2015) *Queensland Law Society welcomes changes to Penalties and Sentences Act and Youth Justice Act*, Media Release (online), Available: http://www.qls.com.au/About_QLS/News_media/News/Headlines/Queensland_Law_Society_welcomes_changes_to_Penalties_and_Sentences_Act_and_Youth_Justice_Act.

²⁶ Daly, K., Hayes, H. & Marchetti, E. (2006) 'New Visions of Justice', in A Goldsmith, M Israel, & K Daly (eds.) *Crime and Justice: A Guide to Criminology (3rd edition.)*, Sydney: Lawbook Company, p 3.

²⁷ Ryan, N., Head, B., Keast, R L. & Brown, K A. (2006) *Engaging Indigenous communities: towards a policy framework for Indigenous community justice programs*, Social Policy and Administration, Volume 40 Issue 3, pp 304-321.

²⁸ Daly, K., Hayes, H. & Marchetti, E. (2006) 'New Visions of Justice', in A Goldsmith, M Israel, & K Daly (eds.) *Crime and Justice: A Guide to Criminology (3rd edition.)*, Sydney: Lawbook Company.

