



JUSTICE BEHIND BARS

16 July 2021

Women's Safety and Justice Taskforce
GPO Box 149
BRISBANE QLD 4001

Dear Taskforce

Re: Submissions in response to Discussion Paper 1

Thank you for issuing the invitation for submissions about options for legislating against coercive control and the creation of a standalone domestic violence offence. PLS is grateful for the opportunity to provide our perspective on this complex issue.

We recognise the harmful and devastating effects of coercive control and domestic and family violence (DFV) in our community. We call for solutions to ending DFV that are based on increasing safety and reducing violence, rather than simply mandating punitive responses.

PLS opposes the introduction of any additional legislation around domestic violence related behaviours, including coercive control. In this submission, we aim to illustrate why prison does not offer a solution to this problem and how the creation of additional offences will likely increase the harms associated with DFV by contributing to rising imprisonment rates, particularly of First Nations people and people with disability.

About PLS

PLS is a community legal centre that has operated in Queensland for over thirty years. We provide legal advice and representation to people in prison about matters arising from imprisonment. PLS has significant expertise about the impact of incarceration on the most vulnerable members of our society.

PLS has run a number of successful projects aimed at reducing incarceration and recidivism, including helping disadvantaged people in prison draft parole applications and a financial counselling program for people in prison and their families.

PLS conducts prison visits, operates a telephone advice line, and responds to mail from people in prison across the state. PLS also provides legal representation to people in prison, which focuses on assisting people who experiencing particular disadvantage.

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PLS respectfully acknowledges Aboriginal and Torres Strait Islander people as the traditional owners and custodians of this land and acknowledges Elders, past, present and emerging.

In 2020-21, of the clients who received PLS' legal representation:

- 63% identified as First Nations people
- 77% were people experiencing disability
- 23% were women

Terms of reference

This submission will not provide responses to the specific questions identified in the Terms of Reference (ToR). Rather, these submissions will respond to the broad themes raised in the ToR and discuss why the creation of additional offences is not an appropriate solution to DFV.

We support the joint critique made by Sisters Inside and the Institute for Collaborative Race Research published on 17 May 2021. We share their concerns that the ToR pre-suppose a carceral solution as the best response to coercive control and ignores the reality that First Nations women, and indeed many other vulnerable people, have a violent relationship with the criminal justice system itself. Alternative measures outside of the criminal justice framework should be explored to address this problem.

Characteristics of people in prison

First Nations people

As recognised in the discussion paper, First Nations people are chronically over-represented in the criminal justice system. Queensland Corrective Services data shows that First Nations people currently make up 34.8% of the prison population in Queensland.¹

Expansion of DFV legislation over recent years has contributed to this increasing figure. First Nations people are disproportionately named on domestic violence orders (DVOs), charged with contraventions of DVOs and are significantly more likely to receive sentences of imprisonment for DVO contraventions.² Evidence from previous efforts to criminalise violence against women in Canada³ demonstrates that the over-representation of First Nations people in prison will continue to increase should coercive control be criminalised and a standalone domestic violence offence be established.

PLS does not attempt to speak on behalf of First Nations people. We can only share the information we have received from our clients, including First Nations people who are identified as victims, perpetrators and both victims and perpetrators.

We are regularly contacted by people in prison who are both victims and perpetrators of DFV. We are also regularly contacted by victims living in the community seeking assistance with enabling them to have contact with their imprisoned loved ones, who are perpetrators of DFV.

¹ Queensland Government, 'Custodial Offender Snapshot April 2021', *Open Data Portal* (Web Page, 28 May 2021 <<https://www.data.qld.gov.au/dataset/custodial-offender-snapshot-statewide/resource/41520b1e-ed41-49a7-9443-2286d1526ba0>>).

² Heather Douglas and Robin Fitzgerald, 'The domestic violence protection order system as entry to the criminal justice system for Aboriginal and Torres Strait Islander people' (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 41.

³ Laureen Snider, 'Criminalising violence against women: solution or dead end?' (2008) 74 *Criminal Justice Matters* 39.

Not one First Nations person has ever expressed the view to PLS that the state can offer a solution to the problem of DFV. To the contrary, our First Nations clients and their families will often describe state interference and the use of imprisonment as problems in themselves.

As identified by Sisters Inside and the Institute for Collaborative Race Research, First Nations women and survivors of DFV have solutions to coercive control beyond the criminal justice system. We support their position that further legislative reform will only result in further structural disempowerment of First Nations people.

People with disability

PLS is concerned about the high numbers of people with disability in Queensland's prisons. There is increasing evidence that the criminal justice system is being used as a tool to manage disability related behaviours and responses to life circumstances.⁴ The vast majority of our clients who are involved in the DFV system experience disability that has often not been appropriately diagnosed, treated or supported.

Of particular concern is the issue of undiagnosed cognitive impairment within the prison population, particularly 'invisible disabilities' such as acquired brain injury (ABI) and Foetal Alcohol Spectrum Disorder (FASD). In 2018, the Australian Institute of Health and Welfare reported that:

- The prevalence of ABIs amongst people in prison is between 40-90%.⁵
- Several studies have found that 25-30% of people in prison have borderline intellectual disability.⁶
- 29% of prison entrants reported a chronic condition or disability.
 - 46% of First Nations prison entrants rated their disability as severe (meaning they always or sometimes need help or supervision).
 - 33% of First Nations prison entrants rated their disability as severe.⁷

These figures are lower than actual disability rates because disability identification in prison relies heavily on self-reporting, which is inadequate because many people are not aware of their disability; do not identify as having one (especially First Nations people when there is no equivalent word in traditional languages); have never been diagnosed; or hesitate to disclose a disability for fear of stigma or loss of autonomy.⁸

Offending and challenging behaviour by people with cognitive disability is likely to be directly related to a disability.⁹ For example, an ABI can lead to DFV because of damage to the area of the brain used in reasoning, problem solving and controlling basic impulses and emotions, such as anger.¹⁰ The

⁴ Eileen Baldry, 'Disability at the margins: limits of the law' (2014) 23(3) *Griffith Law Review* 370, 376.

⁵ Australian Institute of Health and Welfare, 'The health of Australia's prisoners 2018', (Report, 30 May 2019) [106-107] <<https://www.aihw.gov.au/reports/prisoners/health-australia-prisoners-2018/summary>>.

⁶ *Ibid*, 77-78.

⁷ *Ibid*.

⁸ Human Rights Watch, 'I Needed Help, Instead I Was Punished: Abuse and Neglect of Prisoners with Disabilities in Australia' (Report, 2018) [1-3].

⁹ Rowe, et al. 'The provision of services under the NDIS for people with disabilities who are in contact with the criminal justice system: Submission to Joint Standing Committee on the NDIS' (March 2017), 5.

¹⁰ Synapse, 'The Facts: The practical guide to understanding and responding to acquired brain injury' (Sixth ed 2021), 67.

criminal justice system is not equipped to meet disability-related complex needs and incarceration is a risk factor for elevating particular behavioural problems.¹¹

Realities of imprisonment

The prison system in Queensland is in crisis. The prison population has been steadily increasing over the past decade and continues to reach unprecedented numbers. As of 30 April 2021, there were 9907 people in prison.¹² The various legislative reforms introduced in Queensland around the treatment of DFV have been identified as a likely contributor to the increasing rates of imprisonment.¹³

The consequence of a prison system in crisis is that many of the purposes for which imprisonment is ordered cannot be achieved.

Prison environment

Prison is a violent, hierarchical environment. Violence in prison is chronically under-reported. Serious violent and sexual assaults are common. People in prison do not report these experiences because doing so places their safety at risk. As described by Legal Aid Queensland in a 2018 submission to the Crime and Corruption Commission:

The overcrowded nature of correctional facilities facilitates the development of a control hierarchy among prisoners, which are dominated by the more aggressive, often longer term, prisoners who intimidate the less aggressive, often short term, prisoners. Prisoners may be too scared of other prisoners who perpetrate violence on them to report it. Our lawyers have advised that they are aware of prisoner clients who will not report the perpetrators of violence against them because they have several years left to serve in prison with the perpetrator.¹⁴

Many people in prison are victims of institutional and sexual abuse from childhood.¹⁵ Available research suggests that the majority of First Nations women in prison have experienced physical or sexual abuse.¹⁶ Their experience in prison exacerbates the trauma from those experiences.

Solitary confinement is increasingly used to manage vulnerable people who cannot be kept safe, either due to their own self-harming behaviours or the risk they face from others in prison.¹⁷

Health care is chronically underfunded and there are numerous barriers to accessing timely and appropriate health services for people in prison.¹⁸

¹¹ Rowe (n 9), 13.

¹² Queensland Government (n 1).

¹³ Queensland Productivity Commission, 'Inquiry into imprisonment and recidivism' (Report, 01 August 2019).

¹⁴ Legal Aid Queensland, 'Task Force Flaxton – Corruption Risks in Queensland Corrective Services Facilities' (Submission to Taskforce Flaxton, 11 April 2018) <<https://www.ccc.qld.gov.au/sites/default/files/2019-08/Public%20Hearings/Flaxton/Submission/Taskforce-Flaxton-Submission-13-Legal-Aid-Queensland-2018.pdf>>.

¹⁵ Butler, et al., 'Childhood sexual abuse among Australian prisoners' (2001) *Venereology* Vol 14(3).

¹⁶ Lorana Bartels, 'Painting the Picture of Indigenous Women in Custody in Australia' (2012) 12(2) *Queensland University of Technology Law and Justice Journal* 1, 15.

¹⁷ Tamara Walsh et al., 'Legal perspectives on solitary confinement in Queensland' (Report, 18 May 2020).

¹⁸ Department of Health, Clinical Excellence Division, 'Offender Health Services Review – Final Report' (Report, October 2018) [xi].

People with disabilities face particular barriers accessing specialised services due to lack of proper diagnosis, long waiting lists, negative staff attitudes and lack of resources.¹⁹ In 2018, Human Rights Watch reported a psychiatrist working in prisons who said:

*I haven't seen anyone with an intellectual disability who hasn't gotten worse in prison. They are often punished [by staff] when struggling to communicate or seeking help. The staff don't get that people with intellectual disabilities don't understand what's happening. Staff take things personally and then act out against the prisoner.*²⁰

Placing both victims and perpetrators of DFV into this environment does nothing to help end the cycle of abuse. At best, it creates temporary incapacitation of perpetrators in an environment that is likely to exacerbate the underlying causes of their controlling or violent behaviour.

Access to rehabilitation

Access to rehabilitation in prison is limited. For more than a decade, PLS has observed significant numbers of people failing to receive access to recommended rehabilitation programs prior to becoming eligible for parole.²¹ In PLS' experience, people with disability are often not able to participate in group based programs because they do not accommodate their needs.

Queensland Corrective Services have run a trial family violence program at three correctional centres in Queensland, however this was only available to sentenced prisoners. Unsented prisoners are generally not offered access to rehabilitation programs because participation requires an admission of guilt.

The median prison term in Queensland is 3.9 months.²² Given the majority of perpetrators receive short sentences for DVO breaches, few will gain access to any programs aimed at addressing violence while they are in prison.²³

The consequence of these shortcomings is that many people are released from prison without having access to any form of rehabilitation.

Introducing additional rehabilitation programs in prison for DFV is not the appropriate solution to this problem because:

- Past experience informs PLS that meaningful investment in rehabilitation for perpetrators in prison is unlikely to occur.²⁴
- DFV programs that involve participation of both victims and perpetrators who wish to work together to maintain the relationship cannot take place in custody.
- Prisons are not effective at rehabilitation and can increase the likelihood of offending.²⁵

¹⁹ Human Rights Watch (n 8), 66.

²⁰ Ibid, 72.

²¹ For example, see *Gough v Southern Queensland Regional Parole Board* [2008] QSC 222, [54]-[78].

²² Queensland Productivity Commission (n 13), x.

²³ Australia's National Research Organisation for Women's Safety, 'Landscapes – Perpetrator interventions in Australia: Part two – Perpetrator pathways and mapping' (Report, November 2015). <<https://20ian81kynqg38bl3l3eh8bf-wpengine.netdna-ssl.com/wp-content/uploads/2019/02/Landscapes-Perpetrators-Part-TWO-RevEd2016.pdf>>.

²⁴ Walter Sofronoff QC recommended this in the Queensland Parole System Review but there continue to be significant waitlists for program access four years after this recommendation was made. See Walter Sofronoff QC, 'Queensland Parole System Review' (Final Report, November 2016).

Access to DFV programs in the community are also limited with extensive waitlists. PLS has worked with many clients to assist them with obtaining a place on the waitlist, however many are returned to custody for parole suspensions while awaiting access to programs in the community.

Parole suspensions

Parole suspensions are a significant contributor to the increasing prison population in Queensland. PLS is concerned about numbers of people being incarcerated for short periods due to decisions made by the Parole Board Queensland (PBQ) to suspend or cancel parole orders. An increasing number of these decisions relate to concerns about the existence of DFV. Immediate and short-term incarceration is being relied on as the solution to those concerns.

In 2017, legislative reform was introduced aimed at reducing the number of parole suspensions in Queensland. These changes were implemented following recommendations made by the Queensland Parole System Review which found that suspensions were placing significant pressure on the prison system and destabilising the lives of parolees, which was increasing rather than reducing their risk to the community.²⁶ However parole suspension numbers have been steadily increasing, with a growth of 28% since the reforms were implemented.²⁷ In 2019-20, a total of 4621 parole orders were suspended.²⁸

The PBQ have broad powers to suspend a parole order, including where a person on parole has:

- Failed to comply with the parole order;
- Poses a serious risk of harm to someone else; and
- Poses an unacceptable risk of committing an offence.²⁹

While there is an obvious need for government agencies to have preventative powers aimed at protecting community safety, few parole suspensions are issued because a person is considered to pose a serious risk of harm to someone else. For example, in 2018/19, a total of 4015 parole orders were suspended. 1016 of these parole suspensions were issued because a person failed to comply with a condition of their parole order. Only nine parole suspensions were issued because a person posed a serious and immediate risk of harm to another.³⁰

PLS understands that between January and April 2020, approximately 40% of applications for parole suspensions related to DFV. PLS is aware of numerous cases where a person on parole has been incarcerated on a parole suspension because an application for a protection order has been made against them. PLS is concerned that a blanket approach to DFV is being taken. High numbers of people are being incarcerated on parole suspensions for short periods only to be released back onto parole or discharged at the expiration of their sentence with little change to their circumstances.

²⁵ Queensland Productivity Commission (n 13).

²⁶ Walter Sofronoff QC, (n 24).

²⁷ Prisoners' Legal Service, 'Annual Report 2019-20' (Annual Report, 2020) [6].

²⁸ Parole Board Queensland, 'Annual Report 2019-20' (Annual Report, 2020) [30].

²⁹ *Corrective Services Act 2006* (Qld), s205(2)(a).

³⁰ An additional 803 parole suspensions were made for 'multiple reasons'. Parole Board Queensland, 'Queensland Sentencing Advisory Council: Intermediate Sentencing Options and Parole', *Queensland Sentencing and Advisory Council* (Submission to Queensland Sentencing Advisory Council, 31 May 2019) [6].

PLS case studies

The case studies below are based on the stories of PLS clients who have received our legal representation for parole decisions. While these are individual's stories, they illustrate common scenarios seen by PLS which involve vulnerable people who are enmeshed in the criminal justice system due to the criminalisation of DFV, where incarceration has served no purpose in helping to address their offending behaviour.

Tabitha – parole cancellation

Tabitha is an Aboriginal woman in her early sixties from North Queensland. She has mental health conditions, limited literacy, chronic health conditions and a background of complex trauma stemming from her childhood experiences.

Tabitha was serving a two year sentence on court-ordered parole for an offence involving violence that was a domestic violence offence. While on parole, she was charged with acts of domestic violence and was granted bail. The PBQ suspended her court ordered parole because she had been charged with acts of domestic violence and she had provided an alcohol-positive breath sample to her parole officer. The PBQ identified there was a link between her alcohol use and previous offending and considered she posed an unacceptable risk to the community.

Six weeks after Tabitha was arrested for her parole suspension, she received a sentence of nine months' probation for the contravention of a domestic violence order offence. Two months after she was sentenced, the PBQ cancelled her parole order because she had been convicted of an offence committed while on parole, in breach of her parole conditions.

After sentencing, another woman in prison helped Tabitha to make submissions to the PBQ requesting her parole cancellation be lifted. The PBQ declined to lift her parole cancellation. Tabitha subsequently lodged a new application for parole.

Five months after Tabitha had been arrested, another woman in prison contacted PLS and asked us to help Tabitha due to concerns about her poor health in prison. PLS made submissions to the PBQ requesting her application for parole be expedited on the basis that she did not pose an unacceptable risk to the community and there were significant health concerns about her remaining in custody. Shortly after PLS made submissions, the PBQ released Tabitha on parole.

Tabitha spent over six months in prison. There was no change in her risk factors between when her parole was suspended and when she was released from prison.

James – parole suspension

James is an Aboriginal man in his thirties with a background of complex trauma and mental health conditions stemming from sexual abuse he experienced as a child. James was serving a four year sentence with a parole eligibility date for drug related offences and has a history of domestic violence offences. During his incarceration, James was raped and violently assaulted. He was also regularly 'stood over' by others in prison. As a result, he was detained in prolonged solitary confinement in prison for his own safety.

James was released on parole several months after his parole eligibility date to live with his mother. Shortly after release he had sourced employment. Three months after his release on parole, James was returned to custody for a parole suspension. The PBQ suspended his parole order because they believed he posed an unacceptable risk of committing an offence as he had been named as a respondent in a non-contact, temporary DVO and he had missed an appointment with his psychologist. Confidential information was also relied on to conclude that he posed an unacceptable risk to the community. Shortly after his arrest for the parole suspension, James was placed back into solitary confinement for his own safety.

One month after his arrest, James agreed to the imposition of a non-contact DVO without admission.

Two months after his arrest, James' mental health began to deteriorate significantly. He would regularly hear other people in prison calling out threats to him and his prolonged placement in solitary confinement was impacting his well-being. He was placed on observations due to his assessed suicide risk.

PLS made submissions to the PBQ on behalf of James explaining why he had missed the appointment with his psychologist and advocating for his release from custody. He had stable accommodation with his mother and his employer confirmed that he would give James his job back once released. The PB lifted James' parole suspension and he was released back into the community to the same address and employment. He spent approximately three months in prison.

Jess – parole suspension

Jess is an Aboriginal woman in her early forties from North Queensland. She is the mother of four children and has a chronic health condition. Jess was serving a two year sentence on court-ordered parole for an offence involving violence that was a domestic violence offence. While on parole, Jess failed to attend a support service for intervention to address her substance abuse, provided a positive breath test for alcohol and presented as intoxicated to QPS.

The PBQ suspended her parole order because she failed to comply with the condition of her parole order to abstain from alcohol use. The PBQ considered she posed an unacceptable risk of committing an offence because alcohol use is linked to her offending behaviour.

One month after she was arrested, Jess received a notice containing the reasons for the PBQ's decision which invited her to make submissions in response and submit information about her proposed address in the community. Jess promptly made submissions and lodged an address for consideration.

Six months after her arrest, an external agency referred Jess to PLS for help with her parole because she had not received a response from the PBQ to her submissions. PLS made submissions to the PBQ providing context around Jess failing to engage with authorities and drinking alcohol. Jess was in fact a victim of severe domestic violence had not contacted authorities to ask for help because of lack of trust in authority figures. PLS also provided the PBQ with detail of community based supports that had been put in place for Jess.

One month after PLS made submissions, the PBQ lifted Jess' parole suspension and she was released back onto parole with additional conditions. Jess spent over seven months in custody on her parole suspension and was released six weeks prior to the expiration of her sentence.

Arthur – the cycle of imprisonment

Arthur is an Aboriginal man in his mid-thirties from North Queensland. As a teenager, Arthur was the passenger in a car accident which placed him in a coma for a number of weeks. Following his discharged from hospital, he left school, began drinking alcohol and using illicit substances. Arthur never completed school and has limited literacy.

Arthur has an extensive criminal history, consisting of drug possession, property offences, assaults, and domestic violence offences. He has been in and out of prison for almost twenty years.

Arthur has been in a relationship with his partner for almost a decade. Seven years ago, he was convicted of a serious violent offence against her, which he committed while intoxicated. Since that time, various DVOs have been taken out by the Queensland Police Service (QPS) prohibiting contact between Arthur and his partner. Arthur and his partner have two young children.

PLS started working with Arthur three years ago to help him obtain release on parole. When initially released, Arthur's parole conditions prohibited him from having contact with his partner, despite there being no DVO in

place at that time. With the assistance of PLS, his parole conditions were amended so that he was permitted to have contact with his partner.

PLS arranged for Arthur to receive a culturally appropriate disability assessment in the community while he was on parole. This was the first time Arthur had received a disability assessment. It identified that Arthur had a traumatic brain injury which had resulted in a chronic cognitive impairment. It was also considered likely that he has FASD. These disabilities mean he has difficulties with memory, speech, reduced attention, limited concentration, language loss, impaired visual-perception, disinhibition and impulsivity. The assessment concluded that because authorities and Arthur's family do not understand the extent of his brain injury and how it presents (chronic cognitive impairment and aggression) there is a great risk he will reoffend due to lack of understanding or adherence to requests and conditions. Recommendations were made that he be provided psychotherapy and cognitive behavioural therapy through an NDIS package. Arthur was reluctant to apply for NDIS due to mistrust of government agencies and his concerns that NDIS staff would take away his autonomy.

Arthur was returned to prison six months after his release from custody because he breached a condition of his parole order. He was released from custody at the expiration of his sentence seven months later with no parole conditions or supervision.

Three months later, a DVO was taken out against Arthur by the QPS that prohibited him from having contact with his partner. Several months later he was charged with contravention of this DVO. He was sentenced to two months imprisonment to be released on court ordered parole. The day before his release on court ordered parole, the PBQ suspended his parole order because they had received information that Arthur had breached his DVO by having contact with his partner while in prison via the prison telephone system. Several months later, he was charged with breach of DVO.

While he was awaiting sentencing, Arthur's partner successfully applied to have the DVO amended to permit contact between them. He was later sentenced to three months imprisonment for the contravention of DVO with an immediate parole eligibility date. Arthur was unable to find suitable accommodation in the community for his parole application. He released from custody at the expiration of his sentence with no parole conditions or supervision.

Alternatives

In 2019, the Queensland Productivity Commission's Inquiry into Imprisonment and Recidivism (QPC report) found that over 50% of people released from prison back into the community will reoffend and return to prison within two years. It concluded the increase in imprisonment has primarily been driven by policy and system changes and a focus on short term risk, not crime rates. This detailed report makes the case for narrowing the scope of criminal offences, not expanding them.³¹

PLS is concerned the focus on criminalising DFV will replicate mistakes made in the Queensland government's response to tacking illicit drugs, which has been ineffective and created significant costs and unintended harms.³²

The QPC has identified the State Government's current approach to DFV may force individuals into contact with the criminal justice system where there are few benefits to the victims or perpetrators. Further criminalisation of DFV will result in more people going to prison, including disproportionate numbers of First Nations people and people with disability. Incarceration will undermine efforts to address the underlying causes of behaviours associated with DFV and as a result, will not increase the safety of victims.

³¹ Queensland Productivity Commission (n 13), x.

³² Ibid, xlii.

Alternatives to the criminal justice system should be explored if this problem is to be meaningfully addressed without continuing the trajectory of temporary incarceration of some of the most vulnerable members of our society. The QPC Report provides a comprehensive overview of alternatives measures to imprisonment that could be implemented to tackle the incidence of DFV.

For example, the Maranguka Justice Reinvestment project, which was initiated in Bourke by a coalition of local Aboriginal leaders and state-wide organisations, reported a 23% reduction in police recorded incidence of domestic violence over a 12 month period.³³ Indeed, a range of non-carceral solutions exist which involve increasing funding and promotion of solutions that address the underlying factors that lead to DFV. Some of these include:

- public health prevention programs;
- education, job training and assistance in finding work for those who use DFV; and
- adopting non-violent first responses to DFV, such as violence interrupters.³⁴

We submit that the most effective way to address DFV without causing additional harm is to support communities, health services and non-government organisations by enabling them to design and implement responses to DFV at a grassroots level.

Thank you for considering this submission.

Yours faithfully



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³³ Queensland Productivity Commission (n 13), 139-140.

³⁴ Leigh Goodmark, 'Reimagining VAWA: Why Criminalization Is a Failed Policy and What a Non-Carceral VAWA Could Look Like' (2021) 27(1) *Violence Against Women* 84, 93.