

# Women and the Criminal Code Introduction

## Background to the Taskforce

The Taskforce on Women and the Criminal Code was established by the Minister for Justice and Attorney-General Matt Foley MLA and the Minister for Women's Policy Judy Spence MLA in November 1998. The Taskforce was required to report and make recommendations to the Ministers on the operation of the Criminal Code as it impacts on women. This is the Report of the Taskforce.

Its establishment arose out of the Government's pre-election commitment to -

Establish a broad based consultative Taskforce to consult widely on the Queensland Criminal Code in relation to its impact upon women. The Taskforce will include sexual assault workers, Aboriginal and Torres Strait Islander women, women from non-English speaking backgrounds, disability workers, legal practitioners and police.

This was recognition of the fact that issues of specific concern to women had not been an integral part of reform processes which were undertaken throughout the earlier part of the 1990s. To the best of our knowledge this is a unique exercise and the Taskforce hopes that its work will be useful to a wider audience than Queensland, although the women of this State have been the focus of and drive behind the Report.

The Taskforce was a broad-based consultative committee and comprised members of government departments and women of diverse backgrounds drawn from the Queensland community. The membership included lawyers, women who provided perspectives from Indigenous, rural and non-English speaking background communities and women who provided expertise on disability, domestic violence and sexual violence. The full membership of the Taskforce is included at the end of this introduction. The members of the Taskforce brought a variety of skills, expertise and life experiences to the review.

## Scope of the Review

The Terms of Reference of the Taskforce were broad and required it to report on the three general subject areas of Women as Accused, Women as Victims and Court Practices and Procedures. The Taskforce had less than 12 months to complete its work, and so the major area on which it focused was violence against women as this was considered to be the matter of greatest concern to women. The Taskforce examined specific legal issues such as the defences of provocation and self-defence and how they apply in the context of the experience of women, particularly battered women who kill. It examined Queensland's rape and sexual assault laws and the special rules of evidence which apply to trials of those offences, and analysed their appropriateness in contemporary Australia society.

As well as the "black letter law", the Taskforce gave detailed examination to the issues which surround the criminal justice system. It discovered that if women are to be true participants in the criminal justice system, it is vital that services and ii

processes provide appropriate support and information and treat women with dignity and fairness. Unfortunately, our consultations revealed that women's experiences of the criminal justice system, whether as victims or accused persons, were generally negative and alienating.

Determined to take a broad view of the system as well as the law, the Taskforce inquired into:

- the nature and culture of the legal system;
- processes and procedures used in the criminal justice system;
- services and support for people involved in the system (in any capacity); and
- community education and prevention strategies.

At our first meeting the members noted that our discussions kept returning to "The Big Picture" as we questioned and contemplated the fundamental precepts of our legal system. To demonstrate the breadth of issues we traversed, we have included a chapter on the Big Picture. It draws on international information, the personal knowledge of Taskforce members and everything we have learned in our year of discovery.

### **Consultation**

The Taskforce consulted widely with key interest groups and the general public. It used a number of consultation tools in the course of its work. The Taskforce distributed six Issues Papers, copies of which are attached in Annexure 1. The topics for the Issues Papers were:-

1. Background to the Taskforce;
2. Crimes of Violence Against the Person;
3. Sexual Violence;
4. Sentencing, the Defence of Duress, Economic Crime, Drugs and other Addictions;
5. Police Powers and Bail; and
6. Abortion and Surrogacy.

The Taskforce engaged in extensive personal consultations throughout the State. Members visited Thursday Island, Kowanyama, Mt Isa, Roma, Cairns, Townsville, Mackay, Rockhampton, Nambour, Maryborough, Gold Coast, Toowoomba, Ipswich and Brisbane. The Taskforce embraced the technology of the Queensland Open Learning Network to engage in consultations with the communities of Emerald, Charleville and Longreach.

In the course of these consultations, participants were asked for their views on the legal issues being addressed by the Taskforce, as well as the non-legal issues surrounding the criminal justice system. Participants were invited to express their views at the consultations or to forward written submissions at a later date. Forms which identified issues and provided room for responses were used to assist people to make a submission to the Taskforce and to participate in the consultations.

Focus groups were hosted by the Taskforce in Brisbane seeking input from lesbian, bisexual and transgender women and men, older women, women from non-English speaking backgrounds, Indigenous women, young women, women prisoners (conducted at the Brisbane Women's Prison), and women with disabilities.

Where appropriate, members of the Taskforce spoke about our work at conferences and invited comment from conference participants. This included conferences of domestic violence workers on Magnetic Island and at Emerald, law students at Brisbane based universities, and the annual conference of the Country Women's Association in Rockhampton. The Issues Papers were distributed at various forums where people who worked in the area of women and justice were gathered.

The Taskforce received well over 250 submissions - from members of the community, service providers, lawyers, survivors of the criminal justice system and others with an interest in women and the law.

Consultation culminated in the release of the Taskforce Discussion Paper in September 1999. The Discussion Paper canvassed the legal issues which had been considered by the Taskforce and which were included in its terms of reference. Although aimed primarily at lawyers, the Discussion Paper was distributed to all interested groups.

Following the release of the Discussion Paper, the Taskforce hosted a legal forum (attended by over 100). The forum was facilitated by a panel of criminal law experts, comprising Ms Julie Dick SC, Parliamentary Criminal Justice Commissioner, Mr Michael Byrne QC, Deputy Director of Public Prosecutions, Mr Brian Devereaux, the then Acting Public Defender and Mr Patrick Murphy, a legal practitioner with many years experience in criminal law. The Forum generated discussion around the options put forward in the Discussion Paper and provided valuable feedback for the Taskforce.

### **Constraints on the Process**

This Report is the culmination of almost a year of consultation, research and discussion. It is based on submissions and consultations, reported and unreported cases, the broad knowledge of the Taskforce membership and research results from other Australian and overseas jurisdictions.

The state-wide consultations and Issues Paper responses have provided us with a reasonably comprehensive picture of the views of ordinary Queenslanders, and service providers on women's experiences of the criminal justice system. However, the Taskforce considers that it is essential to record the limitations to our work brought about by the short time frame and the lack of dedicated research staff and facilities.

### **Resources**

We were fortunate enough to be able to employ a research assistant for a period of 10 weeks, and she undertook the difficult task of collating and analysing the results of the community consultation, as well as some legal research. However, there were no other researchers employed so the Taskforce members were required to engage in the complex and time-consuming work of socio-legal research

while attending to other Taskforce activities and meeting the demands of their usual jobs.

As a result of a request from the Attorney-General, the Research and Prevention Division of the Criminal Justice Commission prepared a Report for the Taskforce on Reported Sexual Offences in Queensland. The findings generally confirm the information we had received. In particular it decried the lack of primary research material available in Queensland and the paucity and ineffectiveness of our current data collection systems. This Report has been separately published by the CJC.

The Taskforce was disappointed by the lack of primary research material available on the operation of the criminal justice system in Queensland. Data is collected by the major agencies in the justice system (for example, Police, the courts, the Director of Public Prosecutions, Legal Aid Queensland) for their own purposes but not with a view to social policy development. This severely limited the ability of the Taskforce to empirically observe the progress of women through the system.

Some individual agencies are taking steps to improve their data collection techniques but there is no plan, as far as we are aware, to develop a co-ordinated approach to data collection and analysis in a way which would inform policy formulation. What is required is the collection of data separated by gender and race at least, with some ability to track individual cases to facilitate a more qualitative analysis of the legal system in operation.

It is clear that there is much more work to be done regarding women in the criminal justice system. While our Report contains proposals which recommend immediate legislative and structural change, there are many more issues which require further investigation and reform.

### **Time**

The Taskforce was only able to allow four weeks for consultation on the Discussion Paper. This has impacted both on the number of submissions received and their quality. Key players in the legal system were unable to respond in the time available. Many respondents expressed their frustration at being unable to address all of the issues raised, acknowledging the importance of the work done by the Taskforce. As one respondent said -

Could we urge those who have responsibility for the legislative timetable to allow for mature reflection. The importance of this task is diminished by not allowing necessary time for proper consideration.

A participant at the legal forum expressed the wish that further forums should be held to discuss some of the many issues canvassed by the Taskforce.

The Taskforce encourages the Government to engage in further consultation on the detail of any proposed reform.

### **What is excluded?**

Although the Taskforce consulted on the issues of drugs and other addictions and economic crime, we have not had sufficient time to research and report on these matters. The Taskforce chose to consult on them because these are offences with which women are often charged. As

the chapter on Sentencing reveals, a significant proportion of women prisoners are incarcerated for drug offences and economic crime. These issues require dedicated research with a view to education and prevention. It is noted that the Government is already developing alternative models, such as drug courts and other diversionary measures.

The Taskforce did not deal with prostitution because a comprehensive law reform process was already being conducted on that matter.

We have also been mindful of the work of two other Taskforces - the Crime Prevention Taskforce and the Aboriginal and Torres Strait Islander Women's Taskforce on Violence. The areas of investigation clearly overlap but we have endeavoured to avoid duplication by a process of informal liaison.

### **Structure of the Report**

To some extent the structure of the Report is reflective of our consultative process. The initial information provided under a topic is drawn from research and our community consultations - through the Issues Papers and public forums. In the "legal" chapters we have inserted the feedback obtained on the Discussion Paper at the end of the original information and finally we have described the tenor of the discussions of the Taskforce.

Although it may be unusual we have also recorded the general voting patterns of the Taskforce on each recommendation. We have done this because of the extent to which the members debated and agonised over their decisions. Again time was against us. We would have preferred to have reached consensus on more issues but we were faced with a plethora of subtle ideas about a vast range of issues critical to women. We consider that an open and transparent discussion of our voting is useful to both the Government and the community in understanding our final position.

### **Where to from Here?**

#### **Primary Research**

The Taskforce believes that it would be extremely useful for the future if research were conducted about some of the issues that have been examined. Quantitative and qualitative information about what is happening in our criminal courts is essential data for informing social and legal policy in Queensland.

Some examples of the questions that should be addressed are as follows:

#### **Sexual Violence**

1. What percentage of rape complaints to police go to committal, trial, end in convictions?
2. How does this compare with other offences?
3. In what percentage of cases is the complainant declared a special witness under the Evidence Act 1977?
4. In what percentage of cases are special facilities used - screens, CCTV?

5. How often is the special section for prosecuting sexual violence against an "intellectually impaired" person used?
6. How often is sexual history raised in cross-examination of complainants?

Answering these questions could require the development of new data bases and careful examination of the transcripts of sexual violence cases - at committal and trial. It could also involve interviews with all key players including the police, medical practitioners, service providers and counsellors, the survivors (and their families where appropriate), defence lawyers, prosecutors, magistrates, judges, court staff etc. This would allow a much greater depth of understanding of what really happens in our legal system.

### **Domestic Violence**

1. How often are men charged with substantive criminal offences for assaulting or otherwise injuring their female partners?
2. When women are charged with offences of violence against their partners do they raise defences of self-defence, provocation and diminished responsibility?
3. Are there women in prison for such offences of violence who had a self-defence argument which was not run or which failed because the relevant evidence was not led?
4. What percentage of men who kill their female partners successfully argue partial defences and receive manslaughter verdicts where domestic violence was endemic within the relationship?

Answering these questions involves access to police records, court transcripts and other material associated with these cases in Queensland over a period of time. As with sexual violence research, ideally it would also include speaking to the people involved in the cases.

### **Evaluation**

One advantage of undertaking some of this research now is that it would pave the way for future evaluations of the implementation of the Taskforce recommendations. The more that is accurately known about the present situation, the better the quality of any evaluation. It should be possible to measure the impact of any changes and not have to rely on yet more anecdotal information.

The Taskforce encourages the Government to invest in research as part of its investment in women.

### **Publication**

Finally, the Taskforce wishes to record that it is proud of its work and what we have been able to accomplish in the limited time. We thank the Ministers for providing the opportunity for this work to be done. We believe that the Report is reflective of the diversity and the wide ranging knowledge and depth of understanding of women's experiences which our members provided. A publicly released version of this report will be a valuable resource, not only for Queensland, but throughout Australia and other countries which operate under a similar legal system.

## **TASKFORCE ON WOMEN AND THE CRIMINAL CODE MEMBERSHIP**

- Virginia Sturgess - Chair Department of Justice and Attorney-General
- Zoe Rathus - Deputy Chair Lawyer

## **MEMBERS**

- Josephine Akee - Providing expertise on issues faced by Torres Strait Islander women
- Dr Lesley Chenoweth - Providing expertise on issues faced by women with disabilities
- Susan Currie - Legal Academic
- Joy Deguara - Providing expertise on issues faced by rural women
- Donna Justo - Providing expertise on domestic violence
- Isabella Kearsley - Country Women's Association
- Nitra Kidson - Providing expertise on issues faced by women from Non-English Speaking Backgrounds
- Di Macleod - Providing expertise on issues faced by survivors of sexual violence
- Dr Margaret Mobbs - Clinician working with women who have experienced sexual violence
- Netta Tyson - Providing expertise on issues faced by Aboriginal women
- Stephanie Belfrage, Office of Women's Policy - Department of Equity and Fair Trading
- Leanne Clare - Director of Public Prosecutions
- Monique Dawson - Department of Premier and Cabinet
- Catherine Dineen - Department of Justice and Attorney-General
- Snr Sgt Kay Halford - Queensland Police Service
- Katie Holm, Office of Women's Policy - Department of Equity and Fair Trading
- Catherine McCahon - Department of Justice and Attorney-General
- Heather Nancarrow, Domestic Violence Prevention Unit - Department of Families, Youth and Community Care
- Louise Shephard - Legal Aid Queensland

## **RESEARCHER**

- Emily Warner

## **TERMS OF REFERENCE**

1. It is the policy of the Queensland government to establish a broad based consultative taskforce to consult widely on the Queensland Criminal Code in relation to its impact on women. The Taskforce on Women and the Criminal Code has been appointed to undertake this assignment. The taskforce is to be comprised of sexual assault workers, women from non-English speaking backgrounds, Aboriginal and Torres Strait Islander women, disability workers, domestic violence workers, legal practitioners, police and representatives from government departments.

2. The Department of Justice and Attorney-General is to take overall responsibility for consultation and co-ordination, and a representative of that department will chair the taskforce.

3. The taskforce is to report and make recommendations to the Attorney-General and the Minister for Women's Policy in relation to the impact of the Criminal Code on women. The taskforce should have regard to the following broad subject areas: -

#### **WOMEN AS ACCUSED**

##### **Defences and Criminal Responsibility**

- Provocation
- Self Defence
- Diminished Responsibility
- Criminal Responsibility

##### **Economic Crime**

##### **Sentencing Options**

#### **WOMEN AS VICTIMS**

- Rape and Sexual Offences
- Fatal and Non-fatal offences against the person ("domestic violence")
- Criminal Responsibility and Defences

#### **COURT PRACTICES AND PROCEDURES**

##### **Judicial Education, Court Design, Layout and Security**

##### **Women as witnesses**

4. Whilst the taskforce should largely confine its recommendations to matters arising under the Criminal Code, it may make recommendations in relation to other statutes which may have an impact on matters coming within the operation of the Code, such as the Penalties and Sentences Act 1992, the Domestic Violence (Family Protection) Act 1989, the Bail Act 1980, the Criminal Law (Sexual Offences) Act 1978 and the Evidence Act 1977.

5. The taskforce may also make recommendations in relation to possible improvements to the criminal law and any other matters which may be included at the discretion of the taskforce.

6. In preparing its report, the taskforce is to consult with key interest groups and affected parties, and may consult with experts where relevant or necessary.

Addendum: Since these Terms of Reference were approved by the Queensland Cabinet, the Taskforce, in the exercise of its discretion under paragraph 5 added the issue of Women and Reproduction to its terms of reference.

## **ABBREVIATIONS**

ABS - Australian Bureau of Statistics  
ADCQ - Anti-Discrimination Commission of Queensland  
ADR Branch - Alternative Dispute Resolution Branch  
AIC - Australian Institute of Criminology  
ALRC - Australian Law Reform Commission  
ATSIWLAS - Aboriginal and Torres Strait Islander Women's Legal and Advocacy Service  
BEA - Bureau of Ethnic Affairs (now Multicultural Affairs Queensland)  
BWS - Battered Women's Syndrome  
CEDAW - Convention on the Elimination of all forms of Discrimination against Women  
CJC - Criminal Justice Commission  
DCS - Department of Corrective Services  
DEVAW - Declaration on the Elimination of All Forms of Discrimination Against Women  
DFYCC - Department of Families, Youth and Community Care  
DPP - Director of Public Prosecutions  
FPC - Family Planning Queensland  
JAG - Department of Justice and Attorney-General  
LDP - Legal Discussion Paper  
LRCV - Law Reform Commission Victoria  
MCCOC - Model Criminal Code Committee  
NESB - Non- English-Speaking Background  
NSWLRC - New South Wales Law Reform Commission  
OPM - Operational Procedures Manual (Queensland Police)  
PSA - Penalties and Sentences Act 1992  
QAILS - Queensland Aboriginal and Islander Legal Service  
QDVC - Queensland Domestic Violence Council  
QDVT - Queensland Domestic Violence Taskforce  
QH - Queensland Health  
QHGGT - Queensland Health General Grants Team  
QLRC - Queensland Law Reform Commission  
QLS - Queensland Law Society  
QPS - Queensland Police Service  
QUT - Queensland University of Technology  
UNSW - University of New South Wales  
VSS - Victim Support Service  
WLA - Women's Legal Aid  
WWILD-SVP - Women with an Intellectual Disability - Sexual Violence Prevention.  
YMYW - Young Mothers for Young Women