

## SENTENCING FOR DOMESTIC VIOLENCE OFFENCES AND BREACHES

### MAGISTRATES COURT CONFERENCE – 2 JUNE 2018<sup>1</sup>

- [1] We have been asked to present a paper on sentencing for domestic violence offences and breaches. As you are all aware this is a very topical matter. In this paper we will deal with the following topics:
1. The background to the present legislation.
  2. Recent legislative responses.
  3. Relevant statutory provisions to consider in sentencing.
  4. Statements of principle from the cases.
  5. Relevant comparable decisions.
  6. Relevant comparable decisions for breaches.
  7. Domestic and family violence programs available to offenders.
  8. Civil intervention orders.
  9. Section 42 of the *Domestic and Family Violence Protection Act 2012 (Q)*.

#### **Background**

- [2] On 28 February 2015 the Queensland government received the report of the Special Task Force on domestic and family violence in Queensland.<sup>2</sup> The report noted that in Queensland the number of reported incidents of domestic violence increased from 58,000 in 2011-2012 to 66,000 in 2013-2014.
- [3] The task force made a number of recommendations including the following:
1. The establishment of specialist domestic violence courts (96).
  2. The chief magistrate to ensure magistrates receive intensive and regular professional development on domestic and family violence issues (108).
  3. There be recording of domestic violence related convictions (119).
  4. The government specifically consider creating the offence of strangulation (120).
  5. The government consider the sufficiency of penalties relating to repeated domestic violence contraventions (121).

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<sup>1</sup> Judge P.E. Smith Judge Administrator District Court of Queensland and Magistrate L. Shephard, Magistrates Court Southport

<sup>2</sup> [Not Now, Not Ever report - Department of Communities, Child Safety and Disability Services \(Queensland Government\)](#)

- [4] As a result of the report the government put in place the Domestic and Family Violence Prevention Strategy 2016-2026<sup>3</sup>. This strategy noted that the elimination of domestic and family violence was a priority of the government. It was noted that in 2014-2015, 29 homicides related to domestic and family violence occurred in Queensland and a further 71,775 instances of domestic and family violence were reported to Queensland police in 2014-2015.
- [5] Four action plans were to be implemented namely the first action plan 2015-2016; the second action plan 2016-2017 to 2018-2019; the third action plan 2019-2022, 2021-2022; and the fourth action plan 2022-2023 to 2025-2026<sup>4</sup>.
- [6] The first action plan noted there would be consultation with legal and community stakeholders to identify how to reinforce the nature and seriousness of criminal offences involving domestic and family violence and ensure perpetrators be held to account. It also noted ways to improve the legal system's responses to non-lethal strangulation and to make amendments to ensure patterns of domestic violence are recorded in an offender's criminal history.
- [7] The second action plan includes a continuation of the roll out of specialist domestic violence courts, with a greater number of strategies in order to increase offenders' participation in intervention programs.

### **Legislative response**

- [8] As a result of the report and the government's response a number of statutes have been passed by the Queensland parliament.
- [9] The *Criminal Law (Domestic Violence) Amendment Act 2015 (Q)*<sup>5</sup> was assented to on 22 October 2015. This Act contained a number of important provisions.
- [10] Firstly, it provided for an indictment (and complaint) to aver that an offence is a domestic violence offence.

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<sup>3</sup> [Queensland Government response - Department of Communities, Child Safety and Disability Services \(Queensland Government\)](#)

<sup>4</sup> [DFVP Strategy - Department of Communities, Child Safety and Disability Services \(Queensland Government\)](#)

<sup>5</sup> Act No. 17 of 2015.

- [11] Secondly, the maximum penalty for contraventions of domestic violence orders was increased to 240 penalty units or five years' imprisonment if the respondent had previously been convicted of a domestic violence offence or otherwise a 120 penalty units or three years' imprisonment (s 177 (2)(a) and (b)).
- [12] Thirdly, s 181 of the *Domestic and Family Violence Protection Act 2012* (Q) was amended to provide that breach offences carrying more than three years' imprisonment are indictable offences (s181(2)) but such offences must be heard and decided with summarily (s181(4)).
- [13] However s 181(6) provides:
- “(6) A Magistrates Court must abstain from dealing summarily with a charge for an indictable offence—
    - (a) if satisfied, at any stage, and after hearing any submissions by the prosecution and defence, that because of the nature or seriousness of the offence or any other relevant consideration the defendant, if convicted, may not be adequately punished on summary conviction; or
    - (b) if satisfied, on an application made by the defence, that because of exceptional circumstances the charge should not be heard and decided summarily.
  - (7) If the court abstains from jurisdiction—
    - (a) the court must stop treating the proceeding as a proceeding to hear and decide the charge summarily; and
    - (b) the proceeding for the charge must be conducted as a committal proceeding; and
    - (c) the defendant's plea at the start of the hearing must be disregarded; and
    - (d) the evidence already heard by the court must be taken to be evidence in the committal proceeding.”
- [14] Fourthly, the *Penalties and Sentences Act 1992* (Q) was amended by inserting s 12A which required the court to order that an offence for which a conviction is recorded be recorded as an offence for a domestic violence offence if the complaint or the indictment stated it was a domestic violence offence and the court is satisfied it is a domestic violence offence.
- [15] The *Criminal Law (Domestic Violence) Act 2016* (Q)<sup>6</sup> was assented to on 5 May 2016. This relevantly provided:

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<sup>6</sup> Act No. 16 of 2016.

1. For the new offence of choking/strangulation or suffocation (s 315A of the *Criminal Code* 1899 (Q)).
  2. For the insertion of s 9(10A) of the *Penalties and Sentences Act* 1992 (Q) which provides:
 

“(10A) In determining the appropriate sentence for an offender convicted of a domestic violence offence, the court must treat the fact that it is a domestic violence offence as an aggravating factor, unless the court considers it is not reasonable because of the exceptional circumstances of the case.

*Examples of exceptional circumstances—*

    - 1 the victim of the offence has previously committed an act of serious domestic violence, or several acts of domestic violence, against the offender
    - 2 the offence is manslaughter under the Criminal Code, section 304B”
- [16] Section 9(11) also needs to be noted which provides that “Despite subsection (10) the sentence imposed must not be disproportionate to the gravity of the current offence.”
- [17] It should be noted that the Queensland Court of Appeal has decided that Section 9(10A) is procedural and therefore applies retrospectively.<sup>7</sup>
- [18] Further, the *Victims of Crime Assistance and Other Legislation Amendment Act* 2017 (Q) was assented to on 30 March 2017. This provided by s 179I of the *Penalties and Sentences Act* that victims of crime as defined are permitted to give details of the harm caused to the prosecution and the court must allow the victim to read aloud a victim impact statement unless it is considered inappropriate to do so.
- [19] Finally, in the *Court and Civil Legislation Amendment Act* 2017 (Q) assented to on 5 June 2017, s 12A of the *Penalties and Sentences Act* was amended to provide:
- “12A **Convictions for offences relating to domestic violence**
- (1) Subsections (2) to (4) apply if—
    - (a) a complaint or an indictment for a charge for an offence states the offence is also a domestic violence offence; and
    - (b) the offender is convicted of the offence.
  - (2) If a conviction is recorded in relation to the offence, it must also be recorded as a conviction for a domestic violence offence.
  - (3) If no conviction is recorded in relation to the offence, the offence must be entered in the offender’s criminal history as a domestic violence offence.

<sup>7</sup> *R v Hutchinson* [2018] QCA 29 at [39].

- (4) However, a matter must not be recorded or entered under subsection (2) or (3) in relation to the offence if the court makes an order to the effect it is not satisfied the offence is also a domestic violence offence.

*Note—*

See the *Evidence Act 1977*, section 132C, which provides for the sentencing judge or magistrate in any sentencing procedure in a criminal proceeding to act on allegations of fact.

- (5) If a court convicts an offender of an offence for which a matter must be recorded or entered under subsection (2) or (3) or of an offence against the *Domestic and Family Violence Protection Act 2012*, part 7, the prosecution may apply to the court for an order that an offence, stated in the application, of which the offender has previously been convicted (**a *previous offence***)—
- (a) for a previous offence for which a conviction was recorded—also be recorded as a conviction for a domestic violence offence; or
  - (b) otherwise—be entered in the offender’s criminal history as a domestic violence offence.
- (6) The application—
- (a) may be made in writing or orally; and
  - (b) must include enough information to allow the court to make a decision about whether it is appropriate to make the order.
- (7) The court may ask the prosecutor for further information for it to decide whether to make an order under subsection (8).
- (8) If, after considering the application, the court is satisfied a previous offence is a domestic violence offence, the court must order that the offence—
- (a) for a previous offence for which a conviction was recorded—also be recorded as a conviction for a domestic violence offence; or
  - (b) otherwise—be entered in the offender’s criminal history as a domestic violence offence.
- (9) A person against whom the domestic violence offence was committed is not compellable as a witness in proceedings before the court to decide the application.
- (10) If a court is satisfied an error has been made in recording or entering an offence as a domestic violence offence, the court may, on an application or its own initiative, correct the error.
- (11) For this section, proof that an offence is a domestic violence offence lies on the prosecutor.
- (12) To remove any doubt, it is declared that this section does not require a matter to be recorded or entered in an offender’s traffic history under the *Transport Operations (Road Use Management) Act 1995*.”

### **Relevant statutory provisions to consider in sentencing**

[20] The first important point to recall is that in sentencing an offender for an offence of domestic violence the court must have regard to s 9(10A) of the *Penalties and Sentences Act*.

[21] Further, of course, s 9(2A) and (3) of the *Penalties and Sentences Act* are relevant.

Those sections provide as follows:

“9(2A) However, the principles mentioned in subsection (2)(a) do not apply to the sentencing of an offender for any offence—

- (a) that involved the use of, or counselling or procuring the use of, or attempting or conspiring to use, violence against another person; or
- (b) That resulted in physical harm to another person.

9(3) In sentencing an offender to whom subsection (2A) applies, the court must have regard primarily to the following—

- (a) the risk of physical harm to any members of the community if a custodial sentence were not imposed;
- (b) the need to protect any members of the community from that risk;
- (c) the personal circumstances of any victim of the offence;
- (d) the circumstances of the offence, including the death of or any injury to a member of the public or any loss or damage resulting from the offence;
- (e) the nature or extent of the violence used, or intended to be used, in the commission of the offence;
- (f) any disregard by the offender for the interests of public Safety;
- (g) the past record of the offender, including any attempted rehabilitation and the number of previous offences of any type committed;
- (h) the antecedents, age and character of the offender;
- (i) any remorse or lack of remorse of the offender;
- (j) any medical, psychiatric, prison or other relevant report in relation to the offender;
- (k) anything else about the safety of members of the community that the sentencing court considers relevant.

As can be seen where an offence of violence has occurred the principle that a sentence of imprisonment is one of last resort is not applicable.

### **Relevant principles under the common law**

[22] The courts have always regarded the fact that an offence is one of domestic violence as an aggravating feature.

[23] In as early as 1994 in *R v Wood*<sup>8</sup> the Queensland Court of Appeal noted at page 5:

“Domestic violence orders imposing restraints of the kind involved here are practically speaking the only available means of curbing in advance conduct in the domestic context that is violent or likely to lead to violence. Unless breaches of such orders are, and are well known to be, visited with appropriate severity, they will quickly lose their value in the minds both of those who obtain them and of those who are subject to them. Apart from orders of that kind, the ordinary criminal law, operating as it does only after the event, arrives too late to be an effective deterrent. The wrongdoer is liable to prosecution and punishment, but only after the injury has, sometimes with fatal consequences, already been inflicted.”

[24] In *R v Fairbrother Ex Parte Attorney-General*<sup>9</sup> the parties had been together for five years. The male respondent was drunk, they argued, the complainant was pushed to the floor and the respondent struck the complainant in the head with cans of beer. He was arrested and granted bail with a no contact condition. He breached this by going to the address where there was a scuffle and the complainant (not deliberately) was scalded with boiling water. McMurdo P noted at [23]:

“Domestic violence is an insidious, prevalent and serious problem in our society.”

[25] In *R v Mallie Ex Parte Attorney-General*<sup>10</sup> McMurdo P at [32] noted:

“If, as Mr Moynihan contends, the judge treated as mitigating the fact that Mallie committed the offence because he was in emotional turmoil after realising the complainant would not resume their relationship, then that was an error. When one party to a broken relationship intentionally commits serious violence against the party who seeks to end the relationship, this is not a mitigating feature. It is seriously anti-social conduct warranting a condign sentence to appropriately reflect society’s disapprobation and the need for general and specific deterrence.”

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<sup>8</sup> [1994] QCA 297.

<sup>9</sup> [2005] QCA 105.

<sup>10</sup> [2009] QCA 109.

[26] Further in *R v Major Ex Parte Attorney General*<sup>11</sup> the offender pleaded guilty to seven counts of assault occasioning bodily harm; one count of threatening violence at night; one count of wounding and one count of assault occasioning bodily harm whilst armed. He also pleaded guilty to four summary offences including two breaches of domestic violence orders. At [53] McMurdo P noted:

“The dreadful effects of prolonged episodes of domestic violence are notorious. They are consistent with those outlined in the complainant’s victim impact statement, relevant parts of which were cited in the prosecutor’s written submissions at sentence which defence counsel adopted. Deterrence, both personal and general, is an important factor in sentencing in domestic violence cases. So too is denunciation. The community through the courts seeks sentences which show the public disapprobation of such conduct. The effects of domestic violence go beyond the trauma suffered by victims, survivors and their children to their extended families, and friends. Domestic violence also detrimentally affects the wider community, causing lost economic productivity and added financial strain to community funded social security and health systems.”

### **Sentencing examples – indictable offences**

[27] It may be thought there is a toughening of approach by the Court of Appeal in these matters.

[28] In 1998 in *R v Ward*<sup>12</sup> the applicant who was 49 with no previous convictions assaulted his de facto partner by slapping her and aggravating a back condition from which she suffered. He pleaded guilty on the second day of the trial. He was sentenced to nine months’ imprisonment suspended after three months with an operational period of three years. The sentence was fully suspended on appeal.

[29] In 2001 in *R v Pierpoint*<sup>13</sup> the parties had been living in a de facto relationship for about 10 years but had separated. The female partner had taken out a restraining order about two weeks prior. There was an argument. The female struck the defendant who retaliated by throwing her to the floor and punching her and attempting to cover

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<sup>11</sup> [2011] QCA 2010.

<sup>12</sup> [1998] QCA 329.

<sup>13</sup> [2001] QCA 493.

her face with a pillow. The assault ended when the police arrived. He pleaded guilty and was sentenced to 18 months' imprisonment with a recommendation for eligibility for parole after six months. On appeal the sentence was reduced to 12 months immediately suspended. The appellant had served about three months.

- [30] In 2002 in *R v Johnson*<sup>14</sup> the applicant was sentenced to two years' imprisonment suspended after eight months with an operational period of three years with respect to two assaults occasioning bodily harm upon a female with whom he had a relationship and one offence of wilful damage. He grabbed her around the throat and threw her to the ground. In a second assault he grabbed her, shook and pushed her. It was a timely plea. He had an extensive criminal history including convictions for breaches of DVO's and another conviction for assault occasioning bodily harm. The judges observed that whilst the two year head sentence was heavy the previous criminal history and the repeated nature of the offending meant the sentence was not outside of the range.
- [31] In 2003 in *R v Denham Ex Parte Attorney-General*<sup>15</sup> the offender was sentenced to a 12 month intensive corrections order. He assaulted his ex-partner's elderly father in a domestic situation. It was held that a custodial range of up to two years was within the sentencing range but ultimately the appeal was dismissed.
- [32] We have already referred to the 2005 case of *R v Fairbrother*.<sup>16</sup> In that case the respondent who had entered a guilty plea on the second day of his trial was sentenced to two and a half years imprisonment fully suspended for four years. In light of the fact he had not deliberately poured hot water on the complainant the appeal was dismissed.
- [33] In 2006 in *R v George*<sup>17</sup> the parties had been married for some 20 years. They separated in 2004 but the male applicant returned home, hit the female complainant in the face and body and held her to the floor covering her mouth with his hand. He had taken a knife and rope to the home. She suffered fractures to the cheekbone and a rib and was hospitalised for a week. The assault occurred shortly after one of the applicant's grand-daughter's complained of sexual abuse. He was acquitted of the

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<sup>14</sup> [2002] QCA 283.

<sup>15</sup> [2003] QCA 74.

<sup>16</sup> [2005] QCA 105.

<sup>17</sup> [2006] QCA 1.

abuse charge but pleaded guilty to the assault. He was sentenced to two and half years' imprisonment. He had no prior criminal history. The application for leave to appeal was refused.

[34] In 2006 in *R v King*<sup>18</sup> the applicant and the complainant lived together for about three years. The complainant had obtained a DVO against the applicant. They argued, he chased her out of the house, grabbed her by the hair and threw her against a fence. That happened in December 2003. In March 2004 he grabbed her by the hair, dragged her across the street and threw her onto the ground and punched her repeatedly in the face and on the back of the head. He also pleaded guilty to wilful damage and three counts of unlawful use of a motor vehicle. He was sentenced to two years' imprisonment in respect of the assaults suspended after nine months with an operational period of three years. It was held that the sentence was within the range. An application for leave to appeal was refused.

[35] In 2007 in *R v Eastwell*<sup>19</sup> the applicant assaulted his estranged wife after they had been separated for about a year. He punched her in the face at least three times. There had been an earlier assault for which he had been sentenced to 12 months' imprisonment fully suspended for three years. He was sentenced to a further 12 months cumulative upon the 12 months activated with a parole release date a year later. It was held that because the offending occurred in the face of an earlier DVO and in breach of the suspended sentence these were significant factors. The sentence was "clearly within the range".

[36] In 2009 in *R v Roach*<sup>20</sup> the applicant and complainant had a relationship of an intermittent nature. He punched her on the face and arms with a closed fist and then a further eight times. The matter went to trial. There was background evidence of frequent assaults over two years. He was 54 with two previous similar convictions which were dated. The sentence of 18 months with parole after eight months was said to be at the high end of the appropriate sentencing range but not outside it having regard to the previous convictions.

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<sup>18</sup> [2006] QCA 466.

<sup>19</sup> [2007] QCA 272.

<sup>20</sup> [2009] QCA 360.

[37] Also in 2009 was the case of *R v Kowearpta*<sup>21</sup>. In that matter the applicant pleaded guilty to three counts of assaults occasioning bodily harm whilst armed, one count of deprivation of liberty and two summary offences. He received an effective sentence of three and a half years' imprisonment together with an activated suspended sentence of 10 months. His parole eligibility date was at the half way point. He punched the complainant in the face causing her to fall to the ground. He threatened her with a fork. He then bit her arm. On that occasion she had a bruised and swollen left eye, a swollen and bloody nose and a bite mark to the left forearm. In a second assault he punched her in the face and then kicked her in the stomach, back and ribs a number of times. He then choked her and then stabbed her with a pair of scissors. There was a puncture wound left from the stabbing. She suffered swelling and bruising. Then in a third incident he threatened her with a knife as she was walking home. It was an early plea. The offender had a bad criminal history including for offences of violence. The appeal was dismissed. It was noted at page 6 that the sentence was not to be lessened because this was a domestic dispute.

[38] Moving forward then to 2014 in *RAP*<sup>22</sup> the offender pleaded guilty to one count of assault occasioning bodily harm and one count of wilful damage. He was a research fellow at a university. He had no previous convictions. He and the complainant separated after 22 years of marriage. The separation was acrimonious. He struck her on both sides of the head, punched her and dragged her by the hair and said "you're fucking dead". He then kicked and punched her again. She suffered three facial fractures. He was sentenced to two years' imprisonment suspended after eight months. His appeal was dismissed. Wilson J noted:

"[57] Unsurprisingly these cases [the comparable decisions] show that sentences for incidents of serious domestic violence will reflect the nature and severity of the assault the injuries caused, the surrounding circumstances and, in some cases, the defendant's criminal history.

[58] What *Johnson, George and King* indicate is that, in the case of a serious assault in a domestic setting, a sentence of imprisonment for two years or more is plainly within the proper sentencing range. Mr RAP's attack upon his estranged wife was vicious and sustained, and only interrupted by the intervention of their 16 year old son; involved repeated threats to kill, and had been terrifying for both the complainant, and the son; and, had caused the complainant

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<sup>21</sup> [2009] QCA 48.

<sup>22</sup> [2014] QCA 228.

significant injuries with both physical and emotional consequences. Two years was, in those circumstances, far from excessive.

[59] Suspension of the term of imprisonment after eight months also reflected a proper balancing of mitigating factors (including a timely plea, the applicant's otherwise unblemished criminal history, the effects the conviction had already had (and would have) upon his personal, family and professional life, and prospects of rehabilitation) against the vicious and sustained nature of the attack and the threats to kill which accompanied it, and the injuries and consequences for the complainant.

[60] While suspension at an earlier time might have been contemplated, the serious and prolonged nature of the assault meant that actual imprisonment was strongly called for, for reasons of both general and specific deterrence. It cannot be said that, in fixing the suspension at one-third, the learned sentencing judge's discretion miscarried. The application for leave to appeal should be refused."

[39] A case which was decided recently by the Queensland Court of Appeal however set aside a sentence of three months imprisonment to serve one month. In *R v Kelley*<sup>23</sup> the Appellant who was subject to a Domestic Violence Order went to the complainant's house and punched her to the face causing bruising and swore at her. He pleaded guilty to Assault Occasioning Bodily harm. The Appellant was 25 with a limited history. The Court said at [35] that a substantial factor in the exercise of the sentencing discretion was the breach of the court order. But it was held the sentence was manifestly excessive and instead the appellant was imprisoned with the sentence suspended forthwith.

[40] *Kelley* was considered in the District Court decision of *Bye v Commissioner of Police*<sup>24</sup>. In that case the appellant had pleaded guilty to four charges of common assault, one count of deprivation of liberty and one breach of bail condition. He was sentenced to three months imprisonment followed by two years' probation on the substantive counts and three months with a parole release date fixed on the last day for the breach of bail. The appellant was in a relationship with the complainant (not sexual). He was 22 and she was 18. She did not want to go to school one day. The appellant grabbed the complainant around the neck after she swore at him, put a rope across her mouth and tied her so she could not move. He also later pushed her into a wall and punched her when she phoned her mother. The appellant had a deprived

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<sup>23</sup> [2018] QCA 18.

<sup>24</sup> [2018] QDC 74.

upbringing in Burma (having lived in a refugee camp), had no previous convictions and had not offended whilst on bail. A psychologist assessed him as a low risk of re-offending. The judge held that the three months for the breach of bail condition was excessive and that insufficient weight was given to the psychological report. At [26] Judge McGill said that he considered a sentence not involving actual imprisonment may have been within the range but that a sentence involving actual imprisonment was within the range. His Honour took into account the two months already served and placed him on two years' probation. His Honour noted at [25] that *Kelley* is not authority for the proposition that a young first offender could never face actual imprisonment.

### **Breaches of domestic violence orders**

- [41] Unsurprisingly, there are limited occasions on which offences of breaches of domestic violence go before the Court of Appeal.
- [42] There is one case, but this was before the increase in penalties.
- [43] In *R v James*<sup>25</sup> the appellant was sentenced to nine months imprisonment for breaching a DVO, by punching the complainant in the face a day after the service of the domestic violence order. The parole release date was set after serving four months. The appellant had a criminal history for breaching protection orders in the past (six times) and had previously received six and nine months imprisonment. He had other convictions for offences of violence. The appeal was dismissed.
- [44] There are some District Court decisions to which we will refer.
- [45] The first is *Head v Palmer*<sup>26</sup>. In that case Judge McGill SC dismissed a sentence appeal. The offender had pleaded guilty to stalking and four breaches of a protection order. He was sentenced to 90 days imprisonment suspended after serving 48 days. His Honour took into account the principle referred to in *R v Wood*<sup>27</sup> in reaching his decision.
- [46] In *PMB v Kelly*<sup>28</sup> the appellant was convicted of one charge of contravening a domestic violence offence (aggravated). The appeal against a sentence of 12 months'

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<sup>25</sup> [2012] QCA 256.

<sup>26</sup> [2002] QDC 331.

<sup>27</sup> [1994] QCA 297.

<sup>28</sup> [2014] QDC 301.

imprisonment with release after three months was allowed to the extent that a new parole release date was fixed to take into account the time in custody. Otherwise the sentence was not disturbed on appeal. On 2 August 2015 the appellant arrived home. He stayed up drinking red wine in the lounge-room. The complainant stayed away from him in her bedroom. At 9.30 am on 3 August 2014 she asked him to fix a washing machine. He opened and slammed the lid until it snapped off and banged the lid against the machine. He threw a can of Pepsi against the kitchen wall causing it to spray the kitchen and he grabbed a steak knife and held it in a threatening manner towards Ms A. He then stabbed a loaf of bread and threw the knife across the kitchen. He grabbed Ms A and threw her onto the lounge. He tried to take the phone from her but she refused. He placed his hands around her neck and started choking her. She couldn't breathe and bit him on the forearm. He threw her onto the lounge-room floor and punched her with a closed fist to the top of the head about four times. He then slammed her to the tiled floor twice. He put her in a headlock. She bit him. She ran out of the house and called the police. She had a swollen and bruised eye, a bloody upper lip and scratches on the arm. That case was decided of course before the amendments to the maximum penalty.

- [47] In *IFM v Queensland Police Service*<sup>29</sup> the complainant was the appellant's partner and they had been in a relationship for about a year. The appellant pleaded guilty to two counts of contravention of domestic violence orders, two counts of breaches of bail conditions and one offence of contravening requirements. He was sentenced to an effective term of 15 months' imprisonment with a parole release date after seven and a half months. In that particular case the appellant pushed the complainant over and punched her to the jaw. That offence occurred on 18 March 2015. No physical injury was alleged. The appellant was granted bail. On 30 May 2015, in breach of bail, he grabbed her by the throat, hit her and knocked her to the ground. He kicked her body and dragged her by her feet and verbally abused her. He dragged her to a park, knocked her onto the ground, she hit her head, and then he picked her up and dragged her with him. Both of them ran away once the police were called. No physical injury was alleged. Judge Durward did not consider the sentence manifestly excessive and the appeal was dismissed. Again this case was before the amendments.

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<sup>29</sup> [2016] QDC 140.

[48] In *Smith v QPS*<sup>30</sup> the appellant had a lengthy history including for convictions of violence. He had no previous convictions for breach of a domestic violence order. There were 11 offences including six contraventions of domestic violence orders and breaches of bail. On one occasion there was a verbal argument and the appellant punched the aggrieved and grabbed her by the throat. A child was present. He then threatened a witness. Nine months imprisonment with lesser concurrent terms was imposed with a parole release date after three months. It should be borne in mind though the maximum penalty was two years imprisonment at the time of sentence.

[49] In *LJS v Sweeney*<sup>31</sup> the appellant on appeal received two years' imprisonment with a parole release date after eight months. The appellant pleaded guilty to two counts of contravening domestic violence orders; receiving tainted property; three counts of fraud; possessing dangerous drugs and assaulting or obstructing police. He had previous convictions for breaching domestic violence orders. As to the facts of the offence the aggrieved was his ex-partner. There was a protection order issued against the appellant in her favour on 27 June 2014 which prevented contact. On 27 March 2016 she was at home asleep. She awoke to find him in the dwelling. She told him to "fuck off". She saw her phone in his pocket. An argument ensued and he punched her causing her to fall over and then left the dwelling with a mobile phone and \$30.00 belonging to her. He was arrested on 23 June 2016 and declined an interview. As to the breach of the domestic violence order on 30 April 2016 the aggrieved was at an address and visiting her mother. He was also present. He asked her to stay when she went to walk away and she said she was leaving, he grabbed her by the arm and tried to walk her back into the house. She tried to pull away and he grabbed her by the back of the head and pushed her head into the fence and kicked her in the back. She called the police and reported the matter. He made a number of calls and sent text messages to her. No serious injury was alleged. The court noted that the penalty had increased from three years to five years' imprisonment but there was an absence of comparable sentencing decisions since the increase of the maximum. It was held at [26]:

“At first blush I would have considered a 3 year head sentence high, but within the sentencing range, but having considered the comparable decisions and noting the crown's concession, it would appear that a

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<sup>30</sup> [2015] QDC 152.

<sup>31</sup> [2017] QDC 18.

head sentence of 3 years' imprisonment was excessive despite the applicant's previous convictions. It seems to me that the parties' concessions that are 2 to 2 and a half years head sentence is within sentencing range in this matter is accurate and as such I should exercise the sentencing discretion afresh."

Ultimately, the court considered that the appropriate penalty was one of two years' imprisonment to serve eight months. This was a case where the offences occurred after the amendments.

[50] In *SAE v Commissioner of Police*<sup>32</sup> the appellant was sentenced to nine months imprisonment for contravening a domestic violence order committed whilst subject to a suspended six month sentence imposed for assault occasioning bodily harm whilst armed (in a domestic context). The contravention was committed two days after the imposition of the suspended sentence and involved physical assaults, abusive language, threats to kill and wilful damage of a mobile phone. Understandably the appeal was dismissed.

[51] In *DAY v Commissioner of Police*<sup>33</sup> the appellant pleaded guilty to nine breaches of DVO conditions and nine breaches of bail based on the same facts. The facts were that in breach of a temporary order the appellant contacted his ex-wife numerous times. On one occasion they spent the day together and had sexual intercourse. The last couple of occasions involved the appellant calling and abusing her on the phone. It seemed clear though the appellant and the aggrieved maintained a sexual relationship and indeed numerous explicit videos and images were shared. The appellant had previous minor convictions but no similar previous. There were no allegations of physical violence. The appeal was allowed and the appellant was sentenced to six months' imprisonment on one domestic violence order breach and two months' imprisonment on the others to be served concurrently. He was convicted and not further punished on the breaches of bail. The sentence was suspended after serving 42 days which was declared.

[52] Finally in *ETB v Commissioner of Police*<sup>34</sup> the appellant pleaded guilty to two counts of breaching a DVO; one count of common assault; breaching a seven day suspended

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<sup>32</sup> [2017] QDC 254.

<sup>33</sup> [2018] QDC 3.

<sup>34</sup> [2018] QDC 26.

sentence. He was sentenced to nine months' imprisonment cumulative on the activated seven days. A parole release date was fixed after about two months. The facts were that on the first occasion the appellant called the complainant derogatory names and threatened to get a knife and slice his own throat. On the second occasion the intoxicated appellant returned home and abused the complainant. The complainant slapped the appellant across the ear. He then punched her in the left wrist and twice in the ear. The appellant had previously been convicted of breaching the DVO involving the same complainant. None of the previous involved actual assaults. The crown conceded the sentence with respect to the second incident was excessive. The Judge also found that Magistrate erred in failing to take into account the complainant's slap to the appellant. The appellant was instead sentenced to a total of six months' imprisonment.

### **Domestic and family violence programs available to offenders**

- [53] Whilst there is a gap in the actual data from 2015-2016, *The Queensland Parole System Review* (2016) reported that as at the end of September 2016, 2,361 prisoners self-reported as having a current domestic violence order, while 5,996 of offenders under supervision self-reported with having such current orders. Further, 1,451 prisoners were in custody with domestic violence related breach offences.<sup>35</sup>
- [54] Queensland Corrective Services contracts external providers to deliver a range of domestic and family violence support services across the seven Probation and Parole regions (**Attachment 1**). These services include counselling and individual domestic and family violence support, psychologists and peer support programs.

### **Male offenders**

- [55] The primary domestic and family violence program available for offenders supervised by Queensland Corrective Services is the Men's Domestic Violence Education and Intervention Program (MDVEIP) which is facilitated by the Domestic Violence Prevention Center Inc (DVPC). The MDVEIP is available in the South Coast Probation and Parole region (made up of District offices from Burleigh, Southport, Beenleigh and Logan).

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<sup>35</sup> Walter Sofronoff, *The Queensland Parole System Review*, (2016), at Page 229.

- [56] The MDVEIP has been delivered by DVPC since 1999. The program runs for 50 weeks each year. Each participant must satisfactorily complete a minimum of 27 weeks before being considered for exiting the program. The program runs on Tuesdays, Wednesdays and Thursdays from 6-8pm in Southport and with a weekly session delivered at Logan. DVPC advises that during 2017, 168 men participated in the program delivered by DVPC at Southport and at Logan. Queensland Corrective Services advises that in 2016-17, 44 offenders completed this program.
- [57] The MDVEIP employs the Duluth Model of *Creating a Process of Change for Men Who Batter*. This program commenced in Duluth Minnesota (United States) 38 years ago and according to DVPC, has consistently been assessed across the globe as the most effective intervention for addressing the criminogenic needs of domestic violence offenders.
- [58] The participants are given the opportunity to learn new strategies to assist them in addressing their domestic violence through the nine themes presented in the program which include:
- Using Intimidation
  - Using Emotional Abuse
  - Using Isolation
  - Minimising, Denying, and Blaming
  - Responsible Parenting
  - Shared Responsibility
  - Using Economic Abuse
  - Sexual Respect
  - Using Coercion and Threats (includes Sexual Respect)
- [59] The Positive Futures Program is delivered in both custody and on probation and parole. This program is not considered a domestic and family violence specific offender program but does employ a culturally safe and strengths based approach to addressing substance abuse and domestic and family violence. The program uses various practically based activities focusing on the main topics of identity, connection, motivation and change, anger and violence, alcohol and drug use, power

and control, jealousy, trust and fear, family and community, and parenting. During 2016-17, 253 prisoners and offenders completed this program.

- [60] Queensland Corrective Services advises that pursuant to recommendation 81 of the *Not Now, Not Ever* Specialist Taskforce Report, Queensland Corrective Services has revised the eligibility criteria for prisoners (including those held on remand) serving less than 12 months imprisonment for domestic violence related offences. Since December 2015, such prisoners have been able to access therapeutic intervention programs regardless of sentence length, provided they have sufficient time in custody to complete the program. Offenders with a domestic violence history are a priority for program placement.
- [61] Queensland Corrective Services' suite of re-entry services provide information and referral services to prisoners approaching release, including release on parole. Domestic violence offenders are referred to programs and counselling services facilitated by specialist domestic and family violence service providers to address domestic violence offending behavior.
- [62] The DVPC advise that it has identified a gap within the male correctional facilities for programs specifically addressing domestic violence and as such are in discussions with Queensland Corrective Services regarding delivering the MDVEIP in correctional centres. Queensland Corrective Services has confirmed that it is exploring opportunities for introducing domestic and family violence perpetrator programs for offenders and remandees.

### **Female offenders**

- [63] Women under supervision of Queensland Corrective Services can be referred to the DVPC for the Turning Points program if they are identified as respondents in domestic violence orders.

The 16 week Turning Points curriculum includes:

- Defining domestic violence
- Power, families, and violence
- The Impact of coercive control
- Living with anger
- Living without equality

- Reacting when partners cross the line
- Beliefs and expectations about relationships

[64] If women are experiencing domestic violence they can be referred to DVPC's 10 week Reflections program or ongoing one-on-one counselling. The 10 week Reflections program covers the dynamics of domestic violence, impact of trauma, self-esteem, the cycle of violence, boundary setting, anger and shame.

[65] DVPC delivers weekly program sessions to female prisoners at Brisbane Correctional Centre and Numinbah Correctional Centre as up to 94% of women in prison have experienced domestic violence. Groups sessions and one-on-one counselling is available.

### **Civil intervention orders**

[66] The *Domestic and Family Violence Protection Act 2012 (Q)* provides that a court when making or varying a protection order may also, with the consent of the respondent, make an intervention order. The intervention order will require the respondent to attend an approved program provider and comply with every reasonable direction of that provider. The respondent is subsequently assessed as to their eligibility to participate in the program, including:

- Character, personal history and language skills;
- Any disabilities, psychological or psychiatric conditions including drug, alcohol or substance abuse issues; and
- Any other relevant matter.

[67] If a respondent contravenes the intervention order, the service provider must provide a Notice to the Court and Commissioner of Police stating the respondent has contravened the order, the nature of the contravention and the date of the contravention. There is no criminal sanction for contravening an intervention order.

[68] In the South Coast region the Centacare Catholic Family and Community Services are the local approved service provider of the Men's Perpetrator Behaviour Change Program.

[69] The program is a 16 week program aimed at men who use violence and/or abuse in their relationships. The program assists men to stop engaging in abuse and violence and to develop and maintain non-violent and respectful relationships. Topics include:

- understanding domestic violence and the use of power and control in relationships
- understanding attitudes, thoughts and feelings
- time-out strategy
- understanding and respecting boundaries
- understanding thoughts and emotions
- impact and consequences of abusive behaviour on families
- developing constructive communication
- understanding the cycle and processes of abuse/violence
- being accountable for actions
- maintaining the change process to establish and maintain respectful, caring and non-violent relationships.

### **Section 42 of the Domestic Violence and Family Protection Act**

[70] It should also be borne in mind that when a court is dealing with an offender for a domestic violence offence, the court must consider making a protection order or amendments to such an order.

[71] Section 42 of the Act provides:

- “42 When court on its own initiative can make or vary order against offender
- (1) This section applies if a court convicts a person (the *offender*) of a domestic violence offence.
  - (2) The court may, on its own initiative, make a protection order against the offender if the court is satisfied that, under section 37, a protection order could be made against the offender.
  - (3) If a domestic violence order is already in force against the offender, the court—
    - (a) must consider the order and whether, in the circumstances, the order needs to be varied, including, for example, by varying the date the order ends; and
    - (b) may, on its own initiative, vary the order.
  - (4) However, the court may not make a protection order under subsection (2) or vary a domestic violence order under subsection (3) unless the following persons have

been given a reasonable opportunity to present evidence and to prepare and make submissions about the making or variation of the order—

- (a) the offender;
  - (b) the prosecuting authority for the offence;
  - (c) if reasonably practicable, the person who is or would be named as the aggrieved in the order.
- (5) A court exercising jurisdiction under this section—
- (a) may make the protection order, or vary the domestic violence order, before the offender is discharged by the court or otherwise leaves the court; or
  - (b) may adjourn the matter of making the protection order, or varying the domestic violence order, to a later fixed time and day and may, in the meantime, make a temporary protection order under division 2.
- (6) If the court adjourns the matter under subsection (5)(b), the court—
- (a) must inform the offender that if the offender does not appear in court at the later time and day to which the matter has been adjourned—
    - (i) a protection order may be made, or a domestic violence order varied, in the offender’s absence; and
    - (ii) the court may issue a warrant for the respondent to be taken into custody by a police officer if the court believes that it is necessary for the respondent to be heard; and
  - (b) may issue any direction that it considers necessary.
- (7) If the offender fails to appear at the later time and day to which the matter is adjourned, the court may—
- (a) make a protection order against the offender, or vary a domestic violence order against the offender, in the offender’s absence; or
  - (b) adjourn the matter further and may, in the meantime, make a temporary protection order under division 2; or
  - (c) subject to section 156(1), order the issue of a warrant for the offender to be taken into custody by a police officer and brought before the court.
- (8) Despite section 158, a proceeding to make or vary a protection order under this section must be held by the court in open court, other than when the court orders the court be closed.
- (9) This section does not limit the power of the court to make any other order against the offender.

- (10) To remove any doubt, it is declared that section 145 applies to a proceeding to make or vary a protection order under this section.”

It is important as a sentencing tribunal that regard be had to this section when sentencing for offences of domestic violence.

### **Conclusion**

- [72] In conclusion it may be seen that courts place great weight upon the fact that offences occur in the domestic violence setting not as a mitigating feature, but as an aggravating feature of the offending. Indeed there is statutory recognition for this principle in section 9(10A) of the *Penalties and Sentences Act 1992 (Q)*.
- [73] It is important that you as sentencing magistrates be aware of the relevant statutory provisions and the relevant principles which apply to such cases.

## Domestic and Family Violence (DFV) Programs - Probation and Parole Regions

### Brisbane Region

Service Provider	Service Type
Brisbane Domestic Violence Services	Delivers a perpetrator program and provides a victim advocacy service.
Working Against Violence Support Services	Provides victim support.
Youth and Family Services	Delivers the Responsible Men Program.
Anglicare	Delivers the Living Without Violence Program for perpetrators (partners with Centrecare for victim advocacy).
DV Connect	Provides a 24 hour service for perpetrators and victims.
Men's Information and Support Association (MISA)	Provides counselling for individuals and/or couples, a group anger management and a parenting program for men. Cost for counselling is \$55 or for low income, and there is a concession cost of \$30.
Domestic Violence Perpetrator Program	The program includes victim support.
Brisbane High Risk Team	Brisbane Domestic Violence Advocacy Service and Anglicare are core members.
Brisbane Domestic Violence Advocacy Service	Services include advocacy, outreach, information and referral.

### Southern Region

Service Provider	Service Type
Domestic Violence Action Centre	Provides support to victims of DFV.
Uniting Care Communities	Provides a variety of counselling and individual DFV support, including a men's perpetrator program.
DVConnect	A phone support service is available for those affected by DFV.
Brisbane Domestic Violence Service (BDVS)	Provides support for victims and perpetrators. QCS and BDVS have a MOU in place regarding facilitation of a DFV perpetrators program.
Family Support Centre for DV Support, Chinchilla	Counsellors are available for victims. They also provide services for perpetrators but they try to refer them out to places like Lifeline for phone counselling.
Graham House	Provides individual counselling and a behaviour change program for perpetrators of violence called 'Stop the Cycle' for men 17 and over.
CatholicCare	Provides counselling for perpetrators and a support service for victims.
Far West Indigenous Family Violence Service	Provides support and counselling to victims only in the Charleville and Cunnamulla regions.
Social and Emotional Wellbeing Counsellor from Goondir Health	A social worker is available as part of this service, however does not provide any specialist treatment.
Domestic Violence Assist Centre (DVAC)	The Centre is fully funded and operational in the area of victim support.

## Far Northern Region

Service Provider	Service Type
QCS Programs	Positive Futures Program.
Relationship Australia	Rolling program for low risk offenders, and also a closed program for high risk offenders.
Wuchopperen Health Service	Provides one on one and group sessions for males who identify as Aboriginal and Torres Strait Islander.
Royal Flying Doctors	Provides one on one counselling support.
Pormpuraaw Paanth	Provides one on one counselling support.
AODS	Provides one on one counselling support.
QLD Mental Health	Provides one on one counselling support.
Cooktown District Community Care	Provides one on one counselling support.
Cape York Family Centre	Residential rehabilitation and outreach service.
Relationship Australia	A group program is available as part of this service.
Community Services Tablelands	Provides one on one counselling support.
Mulungu health service	Men's group and women's program.
Mamu Health Service	Provides a group program and one on one counselling.
Relationship Australia	Provides a group program.
Innisfail Community Support Centre	Generalist counselling addressing anger, not specifically domestic violence.
Tully Support Centre	Generalist counselling addressing anger not specifically domestic violence.
Gindaja Mens Group/Drop In Centre	Both anger management and domestic violence counselling.
Gurriny Yealamucka Mens Group	Both anger management and domestic violence counselling.
Mura Kosker counselling service	Group program and one on one counselling support.
Relationship Australia	Group program and one on one counselling support.
Thursday Island ATODS	Group program and one on one counselling support.
NPA family and Community Services Aboriginal and Torres Strait Islander Corporation	Group program and one on one counselling support.
Bamaga ATODS	Group program and one on one counselling.
Royal Flying Doctor Service	Provides one on one counselling support.
Apunipima – Wellbeing Centre	Provides one on one counselling support.

## Central Region

Service Provider	Service Type
Uniting Care Community - Men Choosing Change	Delivers a perpetrator program.
Psychologists	Provides individual counselling.
Relationships Australia	Provides individual counselling and sometimes provides group programs.
Uniting Care Community	Provides individual counselling and delivers a perpetrator program.
Helem Yumba	Provides individual counselling and delivers a perpetrator program.
Rockhampton Women's Health Centre	Provides individual counselling.
Psychologist - Edward Mosby	Provides individual counselling.
Psychologists	Provides individual counselling.
DV Connect (Men's Services)	Provides individual counselling.
MDSS (Moranbah District Support Services)	Provides individual counselling.
Relationships Australia	Provides individual counselling.
Partners in recovery	Provides individual counselling.
Longreach Relationship Australia	Provides individual counselling.
Gladstone Women's Health	Provides individual counselling for victims.
Banana Shire Support Centre	Provides individual counselling for victims.
Psychologists	Provides individual counselling.
Uniting Care Community	Provides individual counselling.
EDON Place	Provides individual counselling and delivers a DV perpetrator course.
Psychologists	Provides individual counselling.
Relationships Australia	Provides individual counselling.

## Northern Region

Service Provider	Service Type
The Recovery Centre for Women and Men	Provides rehabilitation services and a DFV program.
The Royal Flying Doctors	There are two counsellors available, funded by the Department of Communities.
North West Remote Health	Provides counselling support.
Junkari Laka Justice Group	Provides DFV peer support program for men and women, perpetrators and victims.
Mission Australia as a Women's Shelter	Provides assistance for female victims.
AODS	A nurse and health worker available with a primary focus on rehabilitation.
Save the Children	Family wellbeing worker is available.
NQDVRS	Provides support for victims and perpetrators.
Uncle Alfred's Men's Group	Delivers a perpetrator program.
Relationships Australia	Counselling support for victims.
Hinchinbrook Community Hub	DFV support for victims and substance abuse is available.
Ferdy's Haven	Provides rehabilitation services.
Prospect Community Services in Charters Towers	DFV support for victims and substance abuse is available.
Lives Lived Well	Substance abuse support is available.
Headspace	Provides counselling support.
TAIHS	A psychologist for DFV intervention is available.
DVRS	Provides support for victims.
Uniting Care Choosing Change	Delivers a male perpetrator program.
Lives Lived Well	Drug and alcohol support is available.
Anglicare	Delivers the Family Counselling and Alternatives to Anger Program (not DFV-specific).
Whitsunday Counselling and Crisis Centre	Family counselling and support are available as part of this service.
Bowen Neighbourhood Centre	Family counselling and support are available as part of this service.
Family Relationship Centre	Family counselling and support are available as part of this service.

### South Coast Region

Service Provider	Service Type
Men's Domestic Violence Education and Intervention Program (MDVEIP). The program operates on a tri-weekly basis and is run out of the Southport District Probation and Parole Office. The MDVEIP is coordinated and run in concert with the Domestic Violence Prevention Centre (DVPC).	A 27 week intervention program for domestic violence perpetrators who are subject to community based supervision, based on the Duluth model.
Centacare	Delivers the Men's Behavioural Change Program.
Turning Points Program	Delivers a psycho-educational program for perpetrators who need to improve their readiness to change.
Youth and Family Services (YFS)	Delivers the Responsible Men's Program. Facilitates multiple concurrent programs for domestic violence perpetrators, either voluntarily or directed by the Courts, or those subject to community based supervision. The program is 16 weeks in length, currently under review to expand to the 26 weeks.
Working Against Violence Support Service (WAVSS)	Delivers the Responsible Men's Program. This is an intervention program for male domestic violence perpetrators, either voluntarily, by Court order, or at the direction of a government agency, and is a partnership between YFS and WAVSS.

### North Coast Region

Service Provider	Service Type
Uniting Care Community	Delivers the Men Choosing Change program.
Centacare SCOPE	Sunshine Coast Outreach, Prevention and Education.
DV Connect	A crisis hotline for men and women for victims of violence and sexual assault is available. DV Connect can also provide practical assistance including counselling, intervention, transport and emergency accommodation.
Mercy Community Services	Delivers the Caring Dads Program.
Rebecca Geddes, Psychologist	Provides individual counselling.
Centre Against Domestic Abuse (CADA)	Provides individual counselling for adults and children, crisis support and court assistance.
Intensive Family Support Services (IFSS)	A DFV specialist worker – Referral through Child Safety or Family and Child Connect (FaCC).
Family and Child Connect	A DFV worker funded by CADA is available as part of this service.

Encircle Lawnton

A specialist DVF counsellor is available as part of this service.