



Submission from the Central Australian  
Aboriginal Legal Aid Service Inc  
to the Legal Policy unit, Department of the  
Attorney-General and Justice

Response to the *Domestic and Family  
Violence Proposals* Issues Paper

November 2015

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# 1 Introduction and Scope of the Submission

The Central Australian Aboriginal Legal Aid Service Inc (**CAALAS**) prepared this submission in response to the *Domestic and Family Violence Proposals* Issues Paper (**‘the issues paper’**) released by the Legal Policy unit, Department of the Attorney-General and Justice.

CAALAS undertakes a range of work in the area of domestic and family violence (DFV). Aside from providing advice and representation to defendants facing charges relating to DFV, we also assist victims experiencing a range of legal issues that often arise in connection with DFV including housing, victim compensation claims, and care and protection matters. We also undertake community legal education on the topics of domestic violence and Domestic Violence Orders, to raise awareness within the community about these matters and the assistance available.

CAALAS is greatly concerned by the hugely disproportionate rates of domestic and family violence that are experienced in the Aboriginal community. As an organisation CAALAS denounces violence against women and children, and domestic and family violence as a whole. We welcome discussions aimed at achieving meaningful change in this area.

We have not commented on each and every proposal raised in the issues paper, and where we have remained silent this is not intended to express a view either for or against the proposal. In some instances we have not supplied responses to all of the questions regarding a particular proposal, due to our response to the first question making the others non-applicable.

We thank you for the opportunity to comment on these important matters, and would welcome further discussion regarding any of our responses below.

## 2 About CAALAS

Founded in 1973 as the first Aboriginal organisation in Alice Springs, CAALAS provides high quality, culturally appropriate legal advice and representation to Aboriginal and Torres Strait Islander people living in Central Australia in the areas of criminal, civil, family and welfare rights law. The organisation also advocates for the rights of Aboriginal people<sup>1</sup> and improved social justice outcomes. Additionally, CAALAS provides community legal education, support for youth interacting with the justice system and assistance to prisoners, detainees and their families to support reintegration into the community.

CAALAS strives to achieve its vision statement of “Justice, dignity and equal rights and treatment before the law for Aboriginal people in Central Australia” through its service provision across approximately 900,000 square kilometres of the Northern Territory (**NT**).

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<sup>1</sup> In this submission, ‘Aboriginal people’ refers to Aboriginal and Torres Strait Islander people.

CAALAS is led by a Council of elected Aboriginal representatives and is funded by the Commonwealth Attorney-General's Department and the Department of Prime Minister and Cabinet to operate two permanent offices (in Alice Springs and Tennant Creek), conduct a range of outreach trips and clinics, and attend bush court circuits.

### 3 The Domestic and Family Violence Proposals

#### 3.1 Clare's Law

***Do you think that the introduction of a law similar to Clare's Law in the Northern Territory would succeed in its aim of protecting people who are at risk of domestic and family violence from someone with a history of violent behaviour?***

CAALAS has concerns about the proposed Domestic Violence Disclosure Scheme (DVDS), and is doubtful that the introduction of such a scheme in the NT would protect people at risk of DFV from others with a history of DFV behaviour. In raising this proposal reference is made to the UK example of Clare's Law in the UK. We understand that a pilot assessment of Clare's Law did not yield clear results in terms of the effectiveness of that scheme in protecting people at risk of DFV. In our understanding there is no clear evidence base for the implementation of such an approach in the NT.

Our concerns about the DVDS are numerous. We are concerned that such a scheme could impact negatively on persons at risk, and potentially lead to great responsibility being placed on victims and potential 'victim blaming' if a person is aware of their partner's violent history and remains in a relationship with them. Should a person receive information about their partner's violent history and not act on it, we would also be concerned that this could prejudice them in other related legal matters including care and protection proceedings and victims compensation applications.

We also agree with the concerns that have been raised regarding a potential 'false sense of security' that could ensue if a party who believes they are at risk is informed that their partner has no history of abuse.<sup>2</sup> DFV continues to be under reported, and the absence of a criminal record for this behaviour is not a guarantee that a person has not been abusive in the past. We query whether information disclosed will encompass criminal matters from other jurisdictions, and whether there will be uniform mechanisms established for sharing this information between different jurisdictions.

We are also concerned about privacy implications for persons about whom information is disclosed, and the potential for information to be misused. This is particularly so regarding requests for information that might be made by third parties that are concerned about a friend or family member being at risk of DFV. In our view, this approach exposes both parties of the relationship to a risk of having their privacy infringed. At Appendix B of the discussion paper, information is provided about the third party disclosure scheme enabled through

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<sup>2</sup> Women's Legal Service NSW Submission to the NSW Domestic Violence Disclosure Scheme Discussion Paper, accessed at <http://www.wlsnsw.org.au/wp-content/uploads/WLS-NSW-Submission-DVDS.pdf>, p2

Clare's Law. It is indicated that a third party can "make enquiries about the partner of a friend or a member of your family if you are worried that this individual may have been violent or abusive in the past." In our view this is extremely broad, and given the expansive nature of family connections within Aboriginal communities in the NT, would open up the possibility of sensitive information being sought by a large range of people. There is also scope for these privacy implications to be exacerbated in the context of a small community setting.

### **3.2 Domestic violence offender programs and parole**

***Do you think that the ability of the Parole Board to consider rehabilitation measures as well as conditions that should be attached to the parole order provides appropriately for consideration of the completion, or non-completion, of domestic violence offender programs by prisoners?***

Currently we believe there are sufficient avenues for the Parole Board to consider engagement in DFV offender programs, and make assessments as to the risk of reoffending.

CAALAS welcomes discussions around the expansion of domestic violence offender programs both in and out of the custodial setting. We note with concern the current lack of treatment options available at the Alice Springs Correctional Centre regarding behavioural change and violent offender programs. We have expanded on these concerns in greater detail at p8 below. In our view this is critical to reducing the frequency of DFV and needs to be urgently addressed.

We also have reservations about adopting a blanket approach regarding expected program engagement. Whilst domestic violence offender programs are likely to benefit the majority of defendants in such matters, it is possible that violence may occur as an aberration. We do not excuse DFV and agree that one occurrence is too much. However given the limited resources available, it is important that suitability assessments are conducted and that service delivery is directed towards those that need it.

Additionally, should a more formalised approach be adopted regarding the completion or non completion of domestic violence offender programs, it is essential that accessibility issues be considered to avoid prejudicing those that may not have had access to such programs in Central Australia.

### **3.3 Serious Sex Offenders Act for violent offenders**

***Do you think the Sentencing Act provides adequately for the continuing detention of serious violent offenders by providing the Supreme Court with the ability to sentence an offender convicted of a violent offence to an indefinite term of imprisonment?***

The existing provisions in the *Sentencing Act* enable this to occur, and CAALAS does not believe that an expansion of these provisions is necessary.

***Do you think a similar scheme to the serious sex offenders' scheme providing for continued detention or supervision of violent offenders should be implemented in the NT? Why/why not?***

CAALAS would not be supportive of such a scheme being introduced in the NT, noting the concerns that have been raised at an international level regarding post-sentence preventative detention of sex offenders, which in 2010 was held to be in breach of international human rights law by the United Nations Human Rights Committee.<sup>3</sup> In reaching this conclusion, a number of factors were raised including a finding that continued detention would equate to a new term of imprisonment in the absence of a conviction.

Aside from these human rights considerations that in our view apply to all kinds of indefinite detention, there are also particular issues concerning the operation of the serious sex offender's scheme in the NT. Currently s23 of the *Serious Sex Offenders Act* enables the Attorney-General to "apply to the Supreme Court for a final continuing detention order or final supervision order in relation to a qualifying offender." The Criminal Lawyers Association of the Northern Territory (CLANT) has described this as

*the potential politicisation of what are in effect sentencing decisions... [whereby] an elected politician could, in the final days of an offender's lengthy sentence, institute proceedings to prevent the offender being released to the community. This could give rise to a reasonable apprehension that such proceedings had been commenced at least in part for political or electoral reasons.*<sup>4</sup>

These concerns are also applicable to the proposed adoption of such an approach with regard to violent offenders; as are economic arguments about cost to the taxpayer and concerns about the impact of such an approach on an offender's prospect of rehabilitation.

### **3.4 Flash Incarceration**

***Do you think that Community Custody Orders would be more effective if there were clear and predictable sanctions for breaching them?***

CAALAS is of the view that deterrence alone is an ineffective way of reducing the risk of breaches and reoffending, and that punitive measures must be tempered with other therapeutic measures. Anecdotal evidence from our busy criminal law practice indicates that the previous therapeutic jurisprudence approach taken through the SMART Court in Alice Springs - which was abruptly discontinued prior to any formal evaluation taking place - was an effective way of addressing the underlying causes of offending behaviour thus reducing the risk of recidivism. In isolation from other therapeutic supports, we do not believe that clear and predictable sanctions would reduce the likelihood of breach.

***Do you think that 'flash incarceration' would provide an effective deterrent to breaching court orders?***

'Flash incarceration' would amount to mandatory imprisonment, an approach that CAALAS has expressed concerns about on numerous occasions. We do not support mandatory imprisonment as it undermines judicial discretion and the separation of powers. Additionally,

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<sup>3</sup> For further discussion on the human rights implications of post-sentence preventative detention, see McSherry B, The Preventative Detention of 'dangerous people', *Precedent*, Issue 112, September/October 2012, p4.

<sup>4</sup> CLANT submission on the *Serious Sex Offenders Act 2013* (NT), 27 March 2013, accessed on at [http://clant.org.au/images/images/Serious\\_Sex\\_Offenders\\_Act\\_2013.pdf](http://clant.org.au/images/images/Serious_Sex_Offenders_Act_2013.pdf)

mandatory imprisonment is contrary to the recommendations made in 1991 by the Royal Commission into Aboriginal Deaths in Custody, which included a recommendation that imprisonment be treated as a sentencing option of last resort.

CAALAS notes that a breach of an order can be by non-compliance or reoffending. In our view, a breach by violent reoffending should be treated as a more serious breach than one of non compliance that may be related to missed appointments (which could arise due to a range of circumstances, including deaths in the community and associated cultural obligations). It is important that there is flexibility to deal with breaches in a manner commensurate with the breach. In our view, the focus should also be on preventing reoffending rather than preventing a technical breach – not just requiring defendants to comply with technicalities but actually encouraging broader and meaningful behavioural change.

We understand that the HOPE initiative includes a range of other therapeutic measures, and would encourage consideration of the potential application of these other approaches to the NT context; rather than focussing on the reactive measure of ‘flash incarceration’ in isolation. In expressing our concerns about ‘flash incarceration’ we are not disregarding the potential for other aspects of HOPE to have a positive impact on the rates of DFV in the NT.

### **3.5 Electronic monitoring**

#### ***Do you have any comments on the use of electronic monitoring?***

In some cases, electronic monitoring may be of benefit in terms of reducing any risk of flight and generally encouraging strict compliance with bail conditions imposed – particularly as they may relate to association and attending certain premises. The utility of such provisions will depend on the particular case. Whilst discussing electronic monitoring it is important not to lose sight of how crucial bail support and other programs are, in terms of a defendant’s compliance with bail conditions but also longer term efforts to address the underlying causes of offending. It is essential that electronic monitoring not be regarded as a replacement for these therapeutic supports.

### **3.6 Proximity alarms**

#### ***Do you think that the use of alarms would achieve the aim of protecting victims of domestic and family violence and deterring perpetrators from attempting to interact with them?***

CAALAS supports measures designed to empower victims to make contact with police, and overcome the logistical barriers that might restrict this from occurring. In terms of this contact potentially occurring automatically, there are important factors unique to the NT that need to be considered.

Should this technology be trialled, CAALAS would highlight the need for a thorough evaluation following a pilot trial to establish whether such mechanisms are effective. In the

absence of an evidence base, it is difficult to comment on whether this technology would reduce occurrences of DFV.

We note that implementing such an approach in a small remote community may have complications due to the co-existence of residents in very close proximity. Even in a regional centre such as Alice Springs, issues could arise given the limited options available for shopping and other amenities. We further query whether such a system may cause confusion for victims in terms of how to seek police assistance or report a matter, if there was a conception that any activation of the device would be a substitute for requesting police assistance over the phone. It is also unclear whether the consent of the victim would be required to use this technology. We raise this due to the possibility of such technology being considered alongside police-initiated applications for a DVO which may not be in accordance to the wishes of the protected person. In our view the consent of the protected person would be appropriate.

We note that wearing a visible device has the potential to be stigmatising for defendants and obstructive to reintegration to the community and rehabilitation. This is particularly the case for young defendants. It could also make victims feel stigmatised. If implemented, it would be preferable for the device to be as visually discrete as possible.

### **3.7 Additional counselling services to be provided in DV matters**

***Do you have any comments on the proposal to broaden the scope of the Witness Assistance Service to encompass a greater number of victims of domestic violence. In particular, how might this be achieved?***

CAALAS would support the expansion of counselling services to victims of DFV. In our view court support is extremely important in making a victim feel comfortable to engage with the legal process. Given the high rates of violence experienced by members of the Aboriginal community, it would be excellent if culturally appropriate court supports could be expanded.

CAALAS notes that women in the prison system frequently have high levels of trauma in their backgrounds, including experiences of DFV and sexual assault. Whilst this may be outside the ambit of the work undertaken by the Witness Assistance Service, we would like to take this opportunity to highlight the need for more targeted therapeutic support for women grappling with this trauma in a custodial setting.

### **3.8 Streamlining the process for seeking protection orders**

***Should there be a separate specialised list for criminal prosecutions involving domestic violence in the Court of Summary Jurisdictions?***

CAALAS would be very supportive of a specialised DFV list in the Court of Summary Jurisdictions. In Alice Springs we have already participated in such discussions, advocating for this approach to be implemented. In our view this list should include both applications for DVO's and criminal charges that arise in a context of DFV. It is essential that both parties have available legal representation to ensure that the legal process is accessible and



processes and outcomes are clearly understood. The availability of therapeutic support to both parties would also be crucial to the effectiveness of such a specialist list.

***Do you think it would be preferable for a group of specialist prosecutors to conduct criminal prosecutions involving domestic violence and to appear for police in applications for domestic violence orders?***

CAALAS would be supportive of greater specialisation in this area, in terms of all professionals involved.

### **3.9 Increasing bail programs for domestic violence offenders**

***Do you think that expanding behavioural change programs that target domestic and family violence would be beneficial in helping reduce domestic and family violence?***

Yes, CAALAS is firmly of the belief that expansion of targeted programs in this area will have a positive impact in reducing DFV.

***Do you think the expansion of these programs to prisoners on remand would be likely to achieve the aim of reducing domestic and family violence?***

CAALAS firmly believes that the expansion of these programs would be progressive. In Central Australia there are critical issues regarding the availability of behavioural change programs and this is something that needs to be urgently addressed. CAALAS is extremely supportive of the Men's Behavioural Change Program being run by Tangentyere Council, however we understand that this program is currently not resourced to offer service delivery at the Alice Springs Correctional Centre. It is also our understanding that the violent offender program offered to prisoners serving sentence is now only available in Darwin. For meaningful behavioural change to be encouraged and sustained, it is essential that these service gaps are addressed. Such programs should be available to both prisoners on remand and those serving sentence. The availability of these programs at a local level would enhance participants' prospects of rehabilitation and reintegration into the community.

Alongside encouraging prisoners in custody to engage with behavioural change programs, it is essential that defendants coming before the court are also similarly engaged. Contact with the criminal justice system presents an opportunity to address the underlying causes of offending. A more proactive approach should be taken to encourage engagement with behavioural change programs at an early stage, even before a plea is entered. Increased resourcing of men's behavioural change programs would be required to progress this. This is also something that could be facilitated through the establishment of a dedicated DFV court list.

In the 2015 report *Bringing Perpetrators of Family Violence into View*, the Centre for Innovative Justice at RMIT found that:

Attendance at court is a crucial opportunity for a defendant's health or substance abuse issues to be identified and, potentially, for a background of family violence to be identified even where it is not immediately evident. Jurisdictions should therefore consider what additional opportunities lie in using the window of a defendant's first court appearance – whether they are bailed or remanded in

custody - to identify and address issues that may well contribute to further offending down the track.<sup>5</sup>

We agree with this position and submit that defendants should be encouraged from the earliest stage possible to engage with programs to address the underlying causes of their offending.

***Are there any particular programs that you consider are particularly effective in changing violent behaviour?***

Central Australia is a uniquely diverse place in terms of language and culture. It is essential that behavioural change programs are culturally appropriate, developed in consultation with Aboriginal communities, available in remote locations and delivered with the assistance of interpreters where needed.

CAALAS also advocates more broadly for a justice reinvestment approach as a way of preventing criminal offending and increasing community safety. Evidence clearly shows that building strong and healthy communities is the most effective way of preventing crime.<sup>6</sup> In our view this includes the prevention of violent crime. Rather than investing in prisons, which have been shown to be costly and ineffective, it is essential that the driving factors of offending are recognised and that resourcing is directed towards addressing these. These driving factors include experiences of poverty and disadvantage, along with involvement in the child protection system and exposure to domestic and family violence.<sup>7</sup> Resources must be redirected towards addressing these underlying factors, to not only address the causes of crime but potentially prevent it before it occurs.

### **3.10 Mutual recognition of DVOs**

***Do you have any comments on the mutual recognition of domestic violence orders?***

CAALAS is not opposed to a scheme to enable the mutual recognition of DVO's. There are a number of logistical points that would need to be considered prior to adopting such a scheme.

Currently there are many inconsistencies between the domestic and family violence legislation between different states and territories. This can have the effect of an order being made in one jurisdiction, which includes conditions that are not permitted or enforceable elsewhere. One example is the possibility that exists in South Australia of a 'no sunset clause' DVO, which has no expiry date. Currently such a condition is not available through the *Domestic and Family Violence Act* in the NT. The question of how such an order would translate to a jurisdiction that has inconsistent legislation needs to be clarified. Should

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<sup>5</sup> Centre for Innovative Justice, RMIT University, *Opportunities for Early Intervention: Bringing perpetrators of family violence into view* (March 2015), p56

<sup>6</sup> Change the Record: Smarter, Justice, Safer Communities; accessed at <https://changetherecord.org.au/solutions>

<sup>7</sup> Change the Record: Smarter, Justice, Safer Communities; accessed at <https://changetherecord.org.au/solutions>

inconsistencies exist, there need to be clear and user friendly mechanisms to address these inconsistencies and allow for a review of conditions. In our view, the appropriate forum for this would be the location in which subsequent recognition is being sought, as that is where the expertise will exist in terms of how such an order may work locally on the ground in practical terms.

It is possible that the establishment of uniform domestic and family violence legislation may address this, however we understand this will not be a quick process. Should a specialist DFV court be established in Alice Springs, expertise could be developed around the issues of mutual recognition and this would be of great assistance in terms of possible complications that could ensue.

### **3.11 Amendments to the Criminal Code to prescribe offending that occurs ‘in the presence of a child’ or ‘in a domestic or family relationship’ as a circumstance of aggravation for assault**

***Do you have any comments on the proposed amendments to the Criminal Code to prescribe offending that occurs ‘in the presence of a child’ or ‘in a domestic or family relationship’ as a circumstance of aggravation for assault?***

As it stands, s5 of the *Sentencing Act* allows the circumstances of offending to be taken into account by a Judge or Magistrate determining the sentencing outcome. In our experience, these existing provisions enable the impact of the offending on vulnerable witnesses to be considered. There is scope for such impact to be considered an aggravating feature without amending the *Criminal Code* as suggested. An amendment of this kind would also potentially undermine judicial discretion, which in our view would be a further cause for concern. Further, such an amendment could have the risk of exposing child witnesses to a greater risk of cross-examination if the aggravating factor is an element of the offence and is not admitted.

## **4 Conclusion**

CAALAS provides a range of assistance to both defendants and victims of DFV, and commends the Department of Attorney General and Justice for being open to innovative discussions around how progress can be made in this area.

As an organisation CAALAS denounces violence against women and children, and domestic and family violence as a whole. We have a keen interest in this issue and would be pleased to have further discussion regarding any of the points raised in this submission.