



**North Australian Aboriginal Justice Agency**

**North Australian Aboriginal Justice Agency  
Response to the**

**Department of the Attorney-General and  
Justice**

**Issues Paper: September 2015**

***Domestic and Family Violence Proposals***

**November 2015**

---

The North Australian Aboriginal Justice Agency (NAAJA) welcomes the opportunity to respond to the *Domestic and Family Violence Proposals* Issues Paper.

### About NAAJA

NAAJA is the largest law practice in the Northern Territory with offices in Darwin and Katherine. Our criminal lawyers appear in the Magistrates Court in Darwin, Katherine and Nhulunbuy, and represent the vast majority of clients in 20 circuit courts in remote communities across these regions. We also appear in the Supreme Court and the Court of Criminal Appeal. Our civil lawyers represent clients experiencing a range of legal issues that often arise in connection with DFV including housing, victim compensation, and care and protection matters. They travel to 21 remote communities and appear in a range of courts and tribunals in Darwin, Katherine and Nhulunbuy.

We also undertake community legal education on topics including family and domestic violence and Domestic Violence Orders, and work in partnership with government and non-government organisations to raise awareness within the community about these matters and the assistance available.

NAAJA is greatly concerned by the hugely disproportionate rates of domestic and family violence that are experienced in the Aboriginal community. As an organisation, NAAJA 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 proposal in the Issues Paper. Where we have not commented on a particular proposal, this should not be interpreted as NAAJA expressing a view either for or against the proposal.

### Response to Proposals

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

NAAJA considers it unlikely that the Domestic Violence Disclosure Scheme (DVDS) in NT would succeed in its aim of protecting people who are at risk of family and domestic violence from people with a history of violent behaviour.

We note that there is no evaluation yet as to the outcomes of Claire's Law in the UK. In the absence of a clear evidence base, we are not in a position to make informed comment as to its possible implementation in the NT.

We are concerned, however that the DVDS could lead to potential 'victim blaming.' This might occur if a person is aware of their partner's violent history and remains in a relationship with them. Also, should a person receive information about their partner's violent history and not act on it, this could prejudice them in other related legal matters (ie care and protection proceedings and victims compensation applications).

We agree with the concern that 'nothing to disclose' may raise a false sense of security in light of the fact that a great deal of family and domestic violence is undisclosed and or not prosecuted.<sup>1</sup> We are unaware as to whether information disclosed will include criminal matters from other jurisdictions, and whether there will be uniform mechanisms established for sharing this information between jurisdictions.

Appendix B of the Issues Paper provides information about the third party disclosure scheme enabled through Clare's Law. We are concerned that the ability of a third party to make enquiries about the partner of a friend, or a member of their family, is extremely broad. This has clear privacy implications and has potential for misuse. The UK third party disclosure scheme may not be appropriate in the unique Northern Territory context. This is particularly given the expansive nature of family connections in Aboriginal communities, and the possibility of sensitive information being obtained in small remote communities.

We also agree with Northern Territory Legal Aid Commission that

- In a small jurisdiction such as the NT the limited resources available could be better spent in other areas, including specialist domestic violence services and agencies including legal services, specialist police and more shelters.
- There is a real risk that policies such as this will create another disincentive to respondents to consent to domestic violence orders (for fear of breach) or plead guilty to DFV charges (for fear of having a criminal record that will follow them into personal relationships).

**4. 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 considerations of the completion, or non-completion, of domestic violence offenders by prisoners?**

NAAJA welcomes discussions around the expansion of domestic violence offender programs both in and out of the custodial setting. In our view this is critical to reducing the frequency of family and domestic violence and needs to be urgently addressed.

There are currently not enough family and domestic violence programs in prison. We are aware that Alice Springs prisoners must attend Darwin Correctional Centre to undertake programs. Poor access to programs, including large wait lists, significantly inhibits access to parole for our clients.

We have reservations about adopting a blanket approach regarding expected program engagement as part of parole orders. Our experience in the custodial context is that many parole clients want to be able to undertake programs, but are not run frequently enough, or they are not run using interpreters.

---

<sup>1</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

Similarly, there are not enough community-based, family and domestic violence programs. We commend the Family Violence Program but its limited resourcing means it only has limited reach across the Northern Territory's vast regional and remote expanse. Mandating participation in family and domestic violence programs would be problematic in the absence of fully accessible, community-based programs.

Parole Board considerations around family and domestic violence and domestic violence orders can also be improved. NAAJA encounters situations where the Parole Board imposes conditions (for example, prohibiting all contact between a defendant and a protected person) where it is doing so without a full knowledge of DVO's currently in place (which might allow contact in limited circumstances).

**5. If you think a more direct link should be made between the completion of domestic violence programs and parole, what methods would best achieve this?**

We strongly support efforts to increase the completion by Aboriginal prisoners of family violence programs. As above, there needs to be greater access to family and domestic violence programs in the custodial context.

We are strongly of the view that any effort to increase the completion by Aboriginal prisoners of family violence programs must have two components:

1. They must be undertaken in partnership with Aboriginal community-controlled organisations. In the Darwin region, for example, Danila Dilba is a community-controlled primary health care service which in 2014-15 provided almost 60,000 episodes of primary health care to over 15,000 Indigenous people residing in the Greater Darwin region.
2. They must be trauma-informed and culturally strengthening. The impact of unremitting trauma upon the physical, social and emotional wellbeing of generations of Aboriginal and Torres Strait Islander people, families and communities is well documented. This issue is explored in detail in "Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice" (Dudgeon, Milroy, & Walker, 2014).

There is a dire shortage of culturally-relevant, trauma-informed educational programs available to our clients in the area of family and domestic violence. With a partnership approach and additional funding support, Danila Dilba would be ideally placed to deliver family violence prevention education to Aboriginal people in Darwin Correctional Centre.

In the context of parole, Aboriginal people already face enormous difficulties to access parole for reasons such as not having appropriate post-release accommodation. Many Aboriginal people already are refused parole, or have their applications deferred because they have not undertaken rehabilitation programs in custody. As noted above, in many instances, this is because programs are unavailable, and is entirely beyond the control of our clients.

It is also imperative that treatment clinicians conduct suitability assessments and that service delivery is directed towards those that need it. Those deemed unsuitable

(particularly in the current context where interpreters are not used in programs and those requiring interpreters are sometimes deemed not suitable), should not be punished by being declined parole.

**6. Do you think that 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 NAAJA does not believe that an expansion of these provisions is necessary.

We agree with NT Legal Aid Commission that the Court of Criminal Appeal has given consideration to these provisions,<sup>2</sup> and made clear that they are not in need of reform.

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

NAAJA does not support 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>

We agree with NT Legal Aid Commission that the principles of the *Sentencing Act*, coupled with judicial discretion and the role of the Parole Board, provide sufficient checks and balances.

Section 23 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 apply equally in relation to violent offenders.

---

<sup>2</sup> For example, *Murray v R* [2006] NTCCA 9

<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)

Expanding the operation of such provisions would also provide an additional incentive for defendants to contest matters to avoid the risk of indefinite incarceration.

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

The current provisions are clear and predictable. Section 48L(2) of the *Sentencing Act* provides that the court “must” impose imprisonment if a Community Custody Order (CCO) is breached, unless it would be unjust to do so because of exceptional circumstances which have arisen since the order was imposed.

In NAAJA’s experience, CCO’s are not accessible for Aboriginal people. We urge the Government to consider allowing CCO’s to be utilised by courts for violent offending. CCO’s can provide an opportunity to break the cycle of offending and make our community safer.

In Victoria, the Wulgunggo Ngalu Learning Place was established to increase access to CCO’s for Aboriginal people and to make CCO’s a viable alternative to prison for Aboriginal people.

Aboriginal men reside at Wulgunggo Ngalu to complete their CCO. As well as treatment programs, participants also undertake cultural activities, education, training, cooking, and life skills. Evaluations have shown this to be highly successful in terms of order completion – the completion rate of CCO’s at Wulgunggo Ngalu is excellent, at around 76% instead of 54% in the mainstream justice system.<sup>5</sup> This is the type of facility we very much need in the NT.

Similarly, the NT urgently needs therapeutic jurisprudence approaches such as the SMART Court to be reinstated. The SMART Court was discontinued after only 18 months without any evidenced based evaluation. It is well established that therapeutic jurisprudence are an effective way of addressing the underlying causes of offending behaviour and reducing recidivism.

**9. Do you think that ‘flash incarceration’ would provide an effective deterrent to breaching court orders?**

NAAJA has consistently been on the record as opposing ‘flash incarceration’ and mandatory sentencing. In circumstances where so many Aboriginal people are being sentenced to imprisonment for short, sharp sentences, we are unconvinced that flash incarceration represents the fundamentally different approach that the Northern Territory so urgently needs to break the cycle of offending.

---

<sup>5</sup> Shuard, D, Department of Justice Data Report to the November 2012 Aboriginal Justice Forum. Echuca, 2012.

The Northern Territory's incarceration rate is 904 per 100,000 adult population.<sup>6</sup> This is not only by far the highest daily imprisonment rate in the country, but alarmingly, between the 2014 and 2015 June quarters, the Northern Territory recorded the largest increase in the average daily imprisonment rate.<sup>7</sup> (from 850 to 904).<sup>8</sup>

The Northern Territory has the highest proportion of prisoners serving short sentences. This is problematic because it suggests that some in the Northern Territory who would not be at a sentence of last resort in other jurisdictions are prematurely or excessively being sentenced to imprisonment in the Northern Territory. In 2013-14, the Northern Territory had:

- the highest proportion of defendants sentenced for 'Acts intended to cause injury' (26% or 3,296 defendants);
- the highest proportion of defendants sentenced to imprisonment (30% or 3,393 defendants); and
- the highest proportion of defendants sentenced to imprisonment with a sentence length less than 6 months (77% or 2,621 defendants).<sup>9</sup>

It is imperative that any model that proposes to lock more people up is properly costed. Incarceration is expensive and it is too often the case that the opportunity cost is not considered. How much would be spent locking people up that could be spent on providing programs for rehabilitation and early intervention that might prevent crime?

**10. Do you think that there are particular modifications to the HOPE model that would be required for the NT context in order for it to be effective?**

NAAJA has not been provided with any consultation or briefing by Government in relation to the HOPE model. We are therefore not in a position to make any comment as to the particular model being proposed, or any modifications that would be required.

We urge the NT Government to undertake a full and robust consultation process with legal stakeholders in relation to the HOPE Court before any decision is made to implement it. It is particularly important that any program takes into account the circumstances of Aboriginal people in the NT.

---

<sup>6</sup> Australian Bureau of Statistics, *Corrective Services Australia June Quarter 2015*, Cat, 4512.0, latest issue 10 September 2015, viewed 6<sup>th</sup> November 2015, <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4512.0>, para 7.

<sup>7</sup> Ibid, para 8.

<sup>8</sup> Ibid, para 9.

<sup>9</sup> Australian Bureau of Statistics, *Criminal Courts, Australia 2013-14*, Cat, 4513.0, latest issue 5 March 2015, viewed 28 November 2015, <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4513.0main+features100022013-14>

**11. Do you have any comments about the use of electronic monitoring?**

In our view, electronic monitoring is a option that ought to be considered by courts in the circumstances of a particular case.

However, we are concerned at the 'net widening' potential of electronic monitoring. For example, in the parole system, NAAJA is now seeing electronic monitoring being routinely used for all parolees. Given the serious consequences that arise when a person breaches a condition pertaining to electronic monitoring, we are concerned that its overuse will see even more Aboriginal people being returned to custody for conditional breaches that do not necessarily impinge community safety.

Although electronic monitoring has a role, it is important not to lose sight of the importance of bail support and other therapeutic programs. It is essential that electronic monitoring not be regarded as a replacement for these therapeutic supports.

**12. 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?**

NAAJA supports measures designed to empower victims to make contact with police. If this includes the use of alarms, we are supportive of this. However, this should only occur with the consent of the victim, and it is important that a thorough evaluation follow any trial of alarms (for example, to consider possible unintended consequences such as victim stigmatisation).

Consideration must be given as to the close proximity of residents in small remote communities and ensuring appropriate pathways exist for victims to access police assistance.

**14. Are there other methods that you consider would be more effective in achieving the aims of protecting victims of domestic and family violence and deterring perpetrators?**

NAAJA urges consideration of restorative justice to protect victims of domestic and family violence and to deter perpetrators. Victims regularly call for restorative justice approaches given the fundamental failure of the adversarial system to give victims a voice in court proceedings.

Restorative justice is only to be utilised with the consent of the victim, and where appropriate safety mechanisms (such as a victim support worker and police officer being present) are in place.



**15. 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?**

NAAJA supports the expansion of the Witness Assistance Service to victims of family and domestic violence. This must be culturally appropriate given the overwhelming number of Aboriginal people who are victims of family and domestic violence.

NAAJA also highlights the need for more targeted therapeutic support for women grappling with trauma due to experiences of family and domestic violence and sexual assault.

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

NAAJA urges expedited hearings for family and domestic violence matters, and particularly those for defendants who are in custody.

NAAJA is aware of a trial in Alice Springs in relation to a specialised list for criminal prosecutions involving domestic violence.

We welcome a formal consultation in relation to this trial and its potential application outside Alice Springs, but are not in a position to make any comment beyond reiterating the urgent need for culturally strengthening, trauma-informed therapeutic supports to defendants and victims.

**17. 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?**

NAAJA supports greater specialisation in prosecutors of domestic violence related offending.

**18. Do you think that expending behavioral change programs that target domestic and family violence would be beneficial in helping reduce domestic and family violence?**

NAAJA strongly supports the expansion of targeted behavioural change programs that to reduce the incidence of family and domestic violence.

As mentioned above, there is a dire shortage of culturally-relevant, trauma-informed educational programs available to our clients in the area of family and domestic violence. We also note the overwhelming evidence that the devastating impact of unremitting

trauma upon the physical, social and emotional wellbeing of generations of Aboriginal and Torres Strait Islander people, families and communities is continuing to be felt.

We agree with NT Legal Aid Commission that as a matter of urgency, investment is needed in best practice family and domestic violence behavioural change program such as the Men's Behaviour Change program run by Tangentyere Council.

In the Top End, we urge the Government to partner with expert Aboriginal community-controlled organisations such as Danila Dilba who are ideally placed to develop and deliver family violence behavioural change program to Aboriginal people in this region.

**19. 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?**

NAAJA would welcome an expansion of programs in relation to domestic and family violence to prisoners on remand. The availability of these programs would enhance participants' prospects of rehabilitation and reintegration into the community. However we agree with NT Legal Aid Commission who note in their submission that prisoners on remand are far less likely to change their behaviour than defendants on bail who engage in such programs in the community.

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.

We note and agree with CAALAS who in their submission point to the Centre for Innovative Justice's 2015 report, *Bringing Perpetrators of Family Violence into View*:

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>10</sup>

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

As noted above, we commend culturally strengthening, trauma-informed programs such as the Men's Behaviour Change program run by Tangentyere Council.

We also support the Family Violence Program being run by Northern Territory Department of Correctional Services, and urge that additional resources be provided to increase its reach.

---

<sup>10</sup> Centre for Innovative Justice, RMIT University, *Opportunities for Early Intervention: Bringing perpetrators of family violence into view* (March 2015), p56

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

NAAJA is not opposed to a scheme to enable the mutual recognition of DVO's. It would, however be important to note that there are inconsistencies between domestic and family violence legislation between different states and territories, and this can have the effect of an order being made in one jurisdiction, which includes conditions that are not permitted or enforceable elsewhere.

**22. Do you have any comments of the prescribed amendments to the Criminal Code?**

We agree with NT Legal Aid Commission that the proposed amendments are unnecessary and unlikely to confer any benefit given that almost every charge of assault is already accompanied by a circumstance of aggravation. The law is entirely clear on this point and does not need to be changed.