



North Australian Aboriginal Justice Agency (NAAJA)

Submission to the

**REVIEW OF THE DOMESTIC AND FAMILY VIOLENCE ACT ISSUES
PAPER**

July 2015

The North Australian Aboriginal Justice Agency (NAAJA) welcomes the opportunity to make a submission to the Northern Territory Government's review of the Domestic and Family Violence Act.

NAAJA was formed in 2006 with the merger of three existing Aboriginal Legal Services: the North Australian Aboriginal Legal Aid Service, established in 1972; the Katherine Regional Aboriginal Legal Aid Service, established in 1985; and the Miwatj Aboriginal Legal Service, established in 1998.

NAAJA has been delivering legal services and access to justice to Indigenous people in remote communities for the past 42 years. NAAJA provides criminal, civil and family law assistance to Aboriginal people across the Top End including in 20 remote communities.

It also delivers a range of innovative justice projects to Aboriginal people, including community legal education and Throughcare support to Aboriginal people exiting prison and juvenile detention.

NAAJA is renowned for delivering innovative, high quality and culturally proficient legal services to Indigenous people and communities in the Top End of the Northern Territory. We have earned a reputation for delivering outcomes for Indigenous people.

NAAJA is now the largest legal practice in the Northern Territory. Over the last 7 years NAAJA has delivered criminal services in remote communities in 21,310 matters. NAAJA has delivered civil and family legal services in remote communities in 7,380 matters.

In 2010, NAAJA was awarded a Human Rights Award in the Law category for its history of protecting and promoting the rights of Aboriginal and Torres Strait Islander people and in 2014 NAAJA was an inaugural winner of a Northern Territory 'Fitzgerald' human rights award in the justice category. NAAJA's Youth Justice Team was a finalist in the 2014 National Children's Law Awards.

Introductory comments

NAAJA has a deep interest in community safety and in measures that will help break the cycle of domestic and family violence in the NT.

Violence to Aboriginal women by Aboriginal men is one of the most pressing and harmful social problems in the Northern Territory. In 2011-2012, 2962 Indigenous females were the victims of a domestic violence assault, as opposed to 293 non-Indigenous females. Aboriginal women and girls are 35 times more likely to be hospitalised due to domestic and family violence related assaults than other Australian women and girls.

By way of background, we attach our February 2015 submission to Northern Territory Government Domestic and Family Violence Strategy.

Submissions

NAAJA makes the following comments in relation to specific recommendations attached to the Issues Paper.

Recommendation 5-1

State and territory family violence legislation should provide that family violence is violent or threatening behaviour, or any other form of behaviour, that coerces or controls a family member or causes that family member to be fearful. Such behaviour may include but is not limited to:

- (a) physical violence;
- (b) sexual assault and other sexually abusive behaviour;
- (c) economic abuse;
- (d) emotional or psychological abuse;
- (e) stalking;
- (f) kidnapping or deprivation of liberty;
- (g) damage to property, irrespective of whether the victim owns the property;
- (h) causing injury or death to an animal irrespective of whether the victim owns the animal;
and;
- (i) behaviour by the person using violence that causes a child to be exposed to the effects of behaviour referred to in (a)–(h) above

NAAJA Comments

Whilst it is important that the definition of family violence includes non-violent coercive and controlling behaviour, there needs to be a caveat relating to the reasonable exercise of parental discipline.

Recommendation 5-3

The definition of family violence in state and territory family violence legislation should not require a person to prove emotional or psychological harm in respect of conduct against the person which, by its nature, could be pursued criminally.

NAAJA Comments

The definition should emphasise that whilst harm does not need to be proven, there must be reasonable grounds to fear. This is the test set out in s 18 of the Domestic and Family Violence Act (DFVA).

Recommendation 7-5

State and territory family violence legislation should adopt the following alternative grounds for obtaining a protection order. That is:

- (a) the person seeking protection has reasonable grounds to fear family violence; or
- (b) the person he or she is seeking protection from has used family violence and is likely to do so again.

NAAJA Comments

We consider that (a) should be modified to make clear that to obtain a protection order on this ground, the person seeking protection must *actually* have a fear, not just have objective grounds for a fear. This is necessary to take account of qualities of the defendant which may not be known by the court. For example if a defendant says ‘I’m going to kill you if you take my car’, a court might consider that the protected person has ‘reasonable grounds’ to fear family violence. This could be despite the fact that the protected person might be aware that the defendant uses those words but does not mean it. The ground could be reworded as follows: ‘the person seeking protection has reasonable grounds to fear family violence and in fact fears such violence’.

Ground (b) should be modified so as to include a time constraint on the court’s considerations of past and future conduct. It is not appropriate that a 20 year old conviction for domestic violence could be considered the basis for a fresh order.

Recommendation 9-1

State and territory family violence legislation that empowers police to issue protection orders should call these orders ‘safety notices’ or ‘notices’ to distinguish them from court orders.

The legislation should provide that police may only issue safety notices where it is not reasonable or practicable for:

- (a) the matter to be immediately heard before a court; or
- (b) police to apply to a judicial officer for an order (by telephone or other electronic medium).

The safety notice should act as an application to the court for a protection order and a summons for the person against whom the notice is issued to appear before the court within a short specified time. The notice should expire when the person to whom it is issued appears in court.

NAAJA Comments

There should be a requirement that the notice, its terms and consequences of breach are explained to the defendant in a language in which they have reasonable proficiency. It should be a defence against a charge of breaching a ‘safety notice’ that the notice was not explained in a language in which the defendant had a reasonable proficiency.

It should be made clear in the legislation that the safety notice expires *not* ‘when the person to whom it is issued appears in court’ but on the first return date, regardless of whether the person appears in court. This avoids the situation where the safety notice would hypothetically continue indefinitely where a defendant did not appear in court in answer to the summons.

Regardless of whether the defendant appears in court on the first return date the 'safety notice' will expire but the court can then make a domestic violence order if it is satisfied that there are grounds to do so.

At the first return date at court, an interim order can be made if necessary for the duration of the court proceedings. This seems to be the practice in other states.

Recommendation 9–2

State and territory family violence legislation and/or police codes of practice should impose a duty on police to:

- (a) investigate family violence where they believe family violence has been, is being, or is likely to be committed; and
- (b) record when they decide not to take further action and their reasons for not taking further action.

NAAJA Comments

Police General Orders should make clear that police must make enquiries regarding living arrangements of the protected person, children and whether there may be any family law orders in place.

Recommendation 9–3

State and territory governments should ensure that support services are in place to assist persons in need of protection to apply for a protection order without involving police. These should include services specifically for:

- (a) Indigenous persons; and
- (b) persons from culturally and linguistically diverse backgrounds.

NAAJA Comments

Services should also be available for defendants as orders may preclude them from seeing children. Defendants may be disadvantaged if they are self-represented and require an interpreter.

Recommendation 10–1

State and territory legislation should not contain presumptions against bail on the grounds only that an alleged crime occurred in a family violence context.

NAAJA Comments

We agree. The present *Bail Act* (NT) has a presumption against bail that should be removed.

Recommendation 10–2

State and territory legislation should provide that, on granting bail, judicial officers should be required to consider whether to impose protective bail conditions, issue or vary a family violence protection order, or do both.

NAAJA Comments

We agree that judicial officers should impose bail conditions that are consistent with any domestic violence orders in force.

Recommendation 10–3

State and territory legislation should impose an obligation on police and prosecutors to inform victims of family violence promptly of:

- (a) decisions to grant or refuse bail; and
- (b) the conditions of release, where bail is granted.

Victims should also be given or sent a copy of the bail conditions. Where there are bail conditions and a protection order, police and prosecutors should explain how they interact.

Police codes of practice or operating procedures, prosecutorial guidelines or policies, and education and training programs should reflect these obligations. These should also note when it would be appropriate to send bail conditions to family violence legal and service providers with whom a victim is known to have regular contact.

NAAJA Comments

Whilst we support the intent of this recommendation, we are concerned about how protected persons might use the information provided to them. For instance many protected persons wish to re-unite with defendants despite ‘full non-contact’ orders. If protected persons are told of the address of the defendant’s bail residence they may seek them out, thus creating a danger of further breaches of domestic violence orders. It is suggested that victims should not be told of the details of the defendant’s residence condition where non-contact bail conditions or a non-contact order is in force.

Recommendation 11–2

State and territory legislation should clarify that in the trial of an accused for an offence arising out of conduct that is the same or substantially similar to that on which a protection order is based, references cannot be made, without the leave of the court, to:

- (a) the making, variation and revocation of protection orders in proceedings under family violence legislation—unless the offence the subject of the trial is breach of a protection order, in which case leave of the court is not necessary;
- (b) the refusal of a court to make, vary or revoke a protection order in proceedings under family violence legislation; and
- (c) the existence of current proceedings for a protection order under family violence legislation against the person the subject of the criminal proceedings.

Evidence given in proceedings under family violence legislation may be admissible by consent of the parties or by leave of the court.

NAAJA Comments

State and Territory legislation should make clear that where there are dual proceedings on foot regarding both the making of a domestic violence order and associated criminal proceedings, the criminal proceedings should take place first in time. This is essential to ensuring that an accused's right to silence and right to a fair trial in criminal proceedings are not negated by his or her being required to give evidence to defend the making of a domestic violence order. This is consistent with the way forfeiture proceedings generally take place after criminal proceedings where to do otherwise would prejudice the defendant. See the recent High Court decision in *Commissioner of the Australian Federal Police v Zhao* [2015] HCA 5.

Recommendation 11–5

State and territory legislation should provide that a court before which a person pleads guilty, or is found guilty of an offence involving family violence, must consider whether any existing protection order obtained under family violence legislation needs to be varied to provide greater protection for the person against whom the offence was committed.

NAAJA Comments

This should occur *after* sentencing as it will require additional material be put before the judicial officer in relation to the context of the relationship apart from the specific offence for which the defendant is pleading guilty or found guilty.

Recommendation 11–9

State and territory family violence legislation should provide that a court should only make an exclusion order when it is necessary to ensure the safety of a victim or affected child. Primary factors relevant to the paramount consideration of safety include the vulnerability of the victim and any affected child having regard to their physical, emotional and psychological needs, and any disability. Secondary factors to be considered include the accommodation needs and options available to the parties, particularly in light of any disability that they may have, and the length of time required for any party to secure alternative accommodation.

NAAJA Comments

There should also be included, as a secondary consideration, the nature of any financial contributions made or to be made in relation to the property by both the defendant and the protected person. This is essential to preventing a situation whereby a protected person continues to reside in a property for which the defendant is financially liable (either through a mortgage or rental agreement).

There should be included words to make clear that exclusionary orders only be made for the minimum period and that where a defendant is being ejected from a home to which s/he has a majority financial or equitable interest, the exclusion can only be for a reasonable time to allow the victim to arrange alternate accommodation.

There should also be included an obligation of police/prosecutors to advise the court of knowledge of any existing family law orders that might have been obtained by officers speaking to the protected person or making other enquiries when deciding to make a police DVO.

Recommendation 11–10

State and territory family violence legislation should require a court to give reasons for declining to make an exclusion order where such order has been sought.

NAAJA Comments

NAAJA agrees, particularly in the defendant or protected person’s absence.

Recommendation 11–11

State and territory family violence legislation should provide that:

- (a) courts have an express discretion to impose conditions on persons against whom protection orders are made requiring them to attend rehabilitation or counselling programs, where such persons have been independently assessed as being suitable and eligible to participate in such programs;
- (b) the relevant considerations in assessing eligibility and suitability to participate in such programs should include: whether the respondent consents to the order; the availability of transport; and the respondent’s work and educational commitments, cultural background and any disability; and
- (c) failure to attend assessment or to complete such a program should not attract a sentence of imprisonment, and the maximum penalty should be a fine capped at a lower amount than the applicable maximum penalty for breaching a protection order.

NAAJA Comments

We disagree with this recommendation. This could result in large numbers of breaches for failing to attend a residential rehabilitation centre. This is an onerous condition imposed upon a defendant. Although the proposed penalty is a fine, this could have a significant impact on persons of limited financial means.

If such a recommendation is to be implemented, it must make clear the link between a person’s alcohol or drug problem and the family violence the subject of the application.

3.6 Breach of Protection Orders

Recommendation 12–4

Police should be trained about the appropriate content of ‘statements of no complaint’ in which victims attest to the fact that they do not wish to pursue criminal action. In particular, police should not encourage victims to attest that no family violence occurred when the evidence clearly points to the contrary.

NAAJA Comments

Police General Orders should clarify police obligations to obtain facts in an objective manner without influencing protected persons.

Recommendation 12–9 Police operational guidelines—reinforced by training—should require police, when preparing witness statements in relation to breach of protection order proceedings, to ask victims about the impact of the breach, and advise them that they may wish to make a victim impact statement and about the use that can be made of such a statement.

NAAJA Comments

Victim impact statements should include a provision allowing the victim to describe whether they wish the relationship to be ongoing, whether they wish the defendant to be part of the children’s lives and any proposed living arrangements.

Recommendation 12–10

State and territory family violence legislation should not impose mandatory minimum penalties or mandatory imprisonment for the offence of breaching a protection order.

NAAJA Comments

This is strongly supported. The present position in the Northern Territory is that in most circumstances there is a mandatory minimum sentence that can be imposed for a breach domestic violence order charge (s 121(2) of the *DFVA*). There is no evidence that mandatory penalties have reduced the incidence of family and domestic violence or breaches of domestic violence orders.

Particular consideration is required as to how a sentence of imprisonment is likely to affect a victim where the relationship is to be ongoing. Often sentences of imprisonment doubly punish the victim who is then required to take sole parental and financial responsibilities for the children and household whilst the defendant is in prison.

Recommendation 16–9

Australian, state and territory governments should collaborate to provide training to practitioners involved in protection order proceedings on state and territory courts’ jurisdiction under the *Family Law Act 1975* (Cth).

NAAJA Comments

We support this recommendation.

Recommendation 19–1

Federal, state and territory governments should, as a matter of priority, make arrangements for child protection agencies to provide investigatory and reporting services to family courts in cases involving children’s safety. Where such services are not already provided by agreement, urgent consideration should be given to establishing specialist sections within child protection agencies to provide those services.

NAAJA comments

We support this recommendation.

Recommendation 19–5

Federal, state and territory governments should ensure the immediate and regular review of protocols between family courts, children’s courts and child protection agencies for the exchange of information to avoid duplication in the hearing of cases, and that a decision is made as early as possible about the appropriate court.

NAAJA comment

We support this recommendation. We have limited resources and unnecessary duplication of work is a burden on our service.

Recommendation 23–10

State and territory child protection agencies and alternative dispute resolution service providers should ensure that child protection staff and alternative dispute resolution practitioners undertake training on:

- (a) the nature and dynamics of family violence; and
- (b) the need for parents, as well as children, who are victims of family violence to have access to appropriate support.

NAAJA comment

NAAJA supports this recommendation. We support the comments made by the National Aboriginal and Torres Strait Islander Legal Services (NATSILS) in their submission to the National Children’s Commissioner examination of children affected by family and domestic violence:

NATSILS submits that government departments and relevant agencies should provide practical solutions to reduce the risk to the both the child and the adult victim. For example, in the absence of alternative safe accommodation, the fear of retribution may strongly discourage the adult victim from seeking a protection order or contacting the police. In the experience of NATSILS a lack of suitable accommodation for people experiencing family and domestic violence is a major issue and further funding needs to be provided to ensure the provision of sufficient accommodation options for Aboriginal and Torres Strait Islander women and children who are victims of family and domestic violence. Conversely, however, where the risk is not so high, it may be more appropriate for the intervention to assist the family in remaining together and to live without violence. NATSILS highlights the detrimental impact of removing a child from one or both of their parents, including loss of connection to

culture, family and community and a strong possibility of future involvement in the justice system.¹

NAAJA further submits that child protection agencies and alternative dispute resolution service providers should receive training that is focused on the experience domestic and family violence in the Northern Territory. Given the disproportionate rates of family violence in Aboriginal communities and experienced by Aboriginal people, child protection agencies and alternative dispute resolution service providers should receive cross cultural training and training on using interpreters.

Recommendation 23–13

The Australian Government Attorney-General’s Department and state and territory governments should collaborate with Family Relationship Services Australia, legal aid commissions and other alternative dispute resolution service providers, to explore the potential of resolving family law parenting and child protection issues relating to the same family in one integrated process

NAAJA comment

We support this recommendation.

Recommendation 25–6 Federal, state and territory sexual assault provisions should provide that it is a defence to the charge of ‘rape’ that the accused held an honest and reasonable belief that the complainant was consenting to the sexual penetration.

NAAJA comment

This defence should apply to all sexual offences.

Recommendation 29–1

The Australian, state and territory governments, in establishing or further developing integrated responses to family violence, should ensure that any such response is based on common principles and objectives, developed in consultation with relevant stakeholders.

NAAJA comment

We support this recommendation.

Recommendation 31–5 The Australian, state and territory governments should collaborate in conducting a national audit of family violence training conducted by government and non-government agencies in order to:
(a) ensure that existing resources are best used;

¹ See NATSILS, Submission for the National Children’s Commissioner examination of children affected by family and domestic violence: June, 2015 at p.12 (5.8):

<http://www.natsils.org.au/portals/natsils/Submission%20on%20Family%20and%20Domestic%20Violence%20and%20Children%20FINAL%20.pdf?ver=2015-07-16-112615-120>

(b) evaluate whether training meets best practice principles; and
(c) promote the development of best practice in training.

NAAJA comment

There is a lack of data available about domestic and family violence programs past and present. NAAJA's central recommendation is to support the rollout of culturally appropriate, community tailored programs.

A transparent, central database would allow communities and government funders to collate evidence about what works, and to learn lessons from what has not worked.

Recommendation 32–1 State and territory governments, in consultation with relevant stakeholders, should establish or further develop specialised family violence courts within existing courts in their jurisdictions.

NAAJA comment

We support this recommendation. Tasmania and the Northern Territory are the only state or territory jurisdictions yet to introduce specialist domestic violence courts ('DVC').² The jurisdiction with the most developed DVC is the Australian Capital Territory, with their Family Violence Intervention Program. This program has evolved since 1998 and has been widely received as successful, despite facing funding shortages as client uptake increases.

The Australian Domestic & Family Violence Clearinghouse reviewed all of the state and territory DVC models and found that one of the reasons the ACT is able to run such a successful program is their size.³ This has allowed for a holistic system that sees connected government and non-government agencies working under the direction of four main aims:

- to work together co-operatively and effectively
- to maximise safety and protection for victims of family violence
- to provide opportunities for offender accountability and rehabilitation
- to seek continual improvement⁴

There is the obvious difference that unlike the ACT, the Northern Territory is large and sparsely populated. The ACT also does not have the same cultural and linguistic diversity as the Northern Territory. These challenges can be overcome by adopting the same open relationship between government and non-government and delivering an adaptive, customisable model on a community by community basis. The cornerstone of any successful DVC is adaptability to community input.⁵

² Note: Tasmania's general court system offers many of the common benefits of a specialised DVC, even so, King's evaluation of the *Safe at Home* program recommended the introduction of a specialised DVC.

³ Julie Stewart, 'Specialist Domestic Violence Courts: What We Know Now – How Far Have Australian Jurisdictions Progressed?' (2011) 20 *Australian Domestic & Family Violence Clearinghouse*, 6.

⁴ *Ibid.*

⁵ *Ibid.*, 2.

DVCs have been found to have benefits including: accelerated case processing, greater intra-agency communication, greater number of referrals to therapy and other rehabilitation services for offenders, greater victim satisfaction, increased feelings of safety in victims and greater numbers of victims referrals to support services.⁶ Studies have been unable to ascertain whether recidivism rates are widely affected by the introduction of DVCs, however, given the substantiated benefits listed above, this is not a reason to deny establishment.

⁶ Ibid, 5; 6.