DEPARTMENT OF THE
ATTORNEY – GENERAL AND JUSTICE

Report on Consultation

Review of the *Domestic and Family Violence Act*

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NORTHERN TERRITORY GOVERNMENT

TABLE OF CONTENTS

1 BACKGROUND TO CONSULTATION 5
2 CONSULTATION 5
2.1 Stakeholders consulted 6
2.2 Submissions received 8
3 REPORT ON CONSULTATION 10
3.1 Report 10
3.2 Purpose 10
4 BACKGROUND TO *DOMESTIC AND FAMILY VIOLENCE ACT* 11
5 SUGGESTED IMPROVEMENTS TO THE *DOMESTIC AND FAMILY VIOLENCE ACT* AND REGULATIONS 13
5.1 Act's short title 13
5.2 Preamble 13
5.3 Section 3 – Objects of Act and their achievement 16
5.4 Section 4 – Definitions – 'harm' 18
5.5 Section 5 – Domestic violence 20
5.6 Section 6 – Intimidation 24
5.7 Section 7 – Stalking 24
5.8 Section 8 – Economic abuse 25
5.9 Section 9 – Domestic relationship 26
5.10 Section 10 – Family relationship 30
5.11 Section 11 – Intimate personal relationship 30
5.12 Section 14 - Defendant 31
5.13 Section 16 – Objects of Chapter 2 'Domestic violence orders' 32
5.14 Section 17 – When person taken to have committed domestic violence 32
5.15 Section 18 – When DVO may be made 32
5.16 Section 19 – Matters to be considered in making DVO 33
5.17 Sections 20 and 22 – Premises access orders and presumption in favour of protected person with child remaining at home 36
5.18 Section 21 – What DVO may provide 38
5.19 Section 23 – Order for replacement tenancy agreement 40
5.20 Sections 24, 121 and 122 – Order for rehabilitation program 41
5.21 Sections 26, 123 and 124 – Prohibition on publication of personal details 43
5.22 Section 27 – Duration of DVO 45

5.23 Section 30 – How application is made ... 47
5.24 Section 31 – Notice of hearing of application ... 48
5.25 Section 38 – When consent DVO may be made ... 49
5.26 Sections 36, 40, 46 and 83 – Notice of DVO ... 50
5.27 Section 41 – When authorised police officer may make DVO ... 51
5.28 Sections 43 and 89 – Explanation of Police and Court DVOs ... 53
5.29 Section 45 – Power of court if person guilty of related offence ... 56
5.30 Section 48 – Who may apply for variation or revocation ... 58
5.31 Section 57 – Referral of application to court ... 59
5.32 Section 81 – Appearing at Hearing ... 59
5.33 Section 82 – Decision at hearing ... 60
5.34 Section 85 – Retrieval of defendant's personal property ... 62
5.35 Section 90 – Family law orders ... 64
5.36 Chapter 3, sections 92 to 97 – External DVOs ... 65
5.37 Section 104 – Part 4.1 Definitions ... 66
5.38 Section 105 – Application of Part 4.1 ... 68
5.39 Section 106 – When Court to be closed ... 69
5.40 Section 110 – How evidence of vulnerable witness given ... 70
5.41 Section 114 – Cross-examination by unrepresented defendant ... 71
5.42 Section 115 – Procedural directions ... 73
5.43 Section 120 – Contravention of DVO by defendant ... 73
5.44 Section 126 - Forms ... 74
5.45 Regulation 12 - Requirement to provide sample of blood ... 78
6 OTHER ISSUES ARISING OUT OF CONSULTATION ... 79
6.1 Providing evidence in chief via pre-recorded video statement ... 79
6.2 Increased protections for domestic violence service providers ... 80
6.3 Information sharing ... 81
6.4 Personal Violence Restraining Orders ... 84
6.5 Service of orders and notices ... 85
6.6 Specialist domestic violence court ... 86
6.7 Court processes and procedures ... 90
6.8 Training of judges, police prosecutors and court staff ... 91
6.9 Safe rooms in Courts ... 94
6.10 Police and SupportLink ... 95

6.11 Northern Territory Victims Register 95
6.12 Domestic Violence Disclosure Scheme - Clare's Law 96
6.13 Domestic violence death review process 99
6.14 Intersections with the *Care and Protection of Children Act* and the *Family Law Act* 101
6.15 Service Mapping 102
6.16 Safe houses 103
6.17 Victim and offender supports 104
6.18 Domestic and family violence education 108
6.19 Alcohol reduction 109
6.20 Sexual Offences - Intimate medical imaging 110
6.21 Domestic violence offender programs and parole 110
6.22 Electronic monitoring 113
6.23 Serious Sex Offenders Act for violent offenders 114
6.24 Flash Incarceration 116
6.25 Proximity alarms and personal safety devices. 123
6.26 Increasing bail programs for domestic violence offenders 126
6.27 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 circumstances of aggravation for assault 131
6.28 Ochre Cards 133

AMENDMENT:

NOTE: This report was amended on 13 September 2017 as the reference on page 43 stated that Recommendation 12-10 of the New South Wales and Australian Law Reform Commissions in their joint report 'Family Violence – A National Legal Response' was supported by the Northern Territory Police Force. This was an error. The recommendation was not supported by Northern Territory Police Force.

1 BACKGROUND TO CONSULTATION

On 15 February 2011, the Australia Government published the *National Plan to Reduce Violence against Women and their Children 2010-2022* (*the National Plan*), *providing* a framework for action by the Commonwealth, state and territory governments under the 12 year strategy to reduce violence against women and their children.

In line with its commitments under the National Plan, and in conjunction with the Australian Government, the Northern Territory Government established the *Domestic and Family Violence Reduction Strategy 2014-17: Safety is Everyone's Right* (the Strategy). The Strategy is directly aligned with the objectives and priority areas of action under the National Plan and the Northern Territory Government's *Framing the Future* blueprint.

At the Strategy's core is an integrated response by Government and non-Government agencies to increase the safety of victims and their children, reduce rates of intergenerational trauma caused by exposure to domestic and family violence, increase accountability of perpetrators and establish integrated service delivery systems that are sustainable and adaptable.

Lead agencies implementing the Strategy are the Northern Territory Department of the Attorney-General and Justice, the Department of Local Government and Community Services and Police, Fire and Emergency Services. Coordination of and support for the implementation of the Strategy is through the Domestic Violence Directorate now in the Department of Local Government and Community Services.

One of the key components of the Strategy is the review of all domestic and family violence related legislation in the Territory, in particular the *Domestic and Family Violence Act* (the DFVA).

2 CONSULTATION

In 2015, the Department of the Attorney-General and Justice released two domestic and family violence related issues papers. The first issues paper (Issues Paper 1), released in April 2015, sought submissions regarding possible improvements to the DFVA, its operation and its interaction with related Territory legislation such as the *Care and Protection of Children Act* and the Criminal Code of the Northern Territory.

To elicit discussion in relation to possible reforms to the DFVA, attached to Issues Paper 1 were a number of recommendations made by the Australian and New South Wales Law Reform Commissions in their joint report *Family Violence – A National Legal Response* (ALRC Report 114) (the ALRC Recommendations) identified by the Department of the Attorney-General and Justice as relevant in the context of the Northern Territory.

The second issues paper (Issues Paper 2) was released in September 2015 and sought submissions in relation to 11 possible options for improving the response to domestic and family violence in the Northern Territory:

1. Clare's Law;
2. domestic violence offender programs and parole;
3. Serious Sex Offenders legislation for violent offenders;
4. 'Flash Incarceration';
5. electronic monitoring;
6. proximity alarms;

7. additional counselling services to be provided in domestic violence matters;
8. streamlining the court process for domestic violence criminal matters and protection orders;
9. increasing bail programs for domestic violence offenders;
10. mutual recognition of domestic violence orders; and
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.

2.1 Stakeholders consulted

The views of the following stakeholders were sought on the issues papers:

- Aboriginal Resource and Development Services;
- Anti-Discrimination Commissioner (NT);
- Amity Community Services;
- Anyinginyi Health Aboriginal Corporation;
- Barkly Region Alcohol and Drug Abuse Advisory Group;
- Barkly Regional Council;
- Catholic Care NT;
- Central Australian Aboriginal Legal Aid Service;
- Central Australian Aboriginal Family Legal Unit;
- Central Australian Women's Legal Service;
- Chief Justice;
- Chief Judge;
- Children's Commissioner Northern Territory;
- Commonwealth Director of Public Prosecutions;
- Commonwealth Department of Social Services;
- Criminal Lawyers Association of the Northern Territory;
- Danila Dilba Health Service;
- Darwin Community Legal Service;
- Dawn House Women's Shelter;
- Department of Business (NT);
- Department of Chief Minister (NT);
- Department of Children and Families (NT);
- Department of Correctional Services (NT);
- Department of Education (NT);
- Department of Health (NT);
- Department of Housing (NT);
- Department of Land Resource Management (NT);

- Department of Lands, Planning and the Environment (NT);
- Department of Local Government and Community Services (NT);
- Department of Prime Minister and Cabinet;
- Director of Public Prosecutions (NT);
- Domestic Violence Legal Services (Alice Springs and Darwin);
- Family Planning Welfare Association of the NT;
- Health and Community Services Complaints Commission;
- Julalikari Council Aboriginal Corporation;
- Katherine Women's Information and Legal Service;
- Larrakia Nation;
- Law Society Northern Territory;
- Ngaanyatjarra Pitjantjatjara Yanjkunytjatjara Women's Council;
- North Australian Aboriginal Justice Agency;
- North Australian Aboriginal Family Violence Legal Service;
- Northern Territory Bar Association;
- Northern Territory Council of Social Services;
- Northern Territory Legal Aid Commission;
- Northern Territory Police, Fire and Emergency Services;
- Northern Territory Women Lawyer's Association
- Papulu Apparr-Kari Aboriginal Corporation;
- Red Cross;
- Ruby Gaea Darwin Centre Against Rape;
- Safety is Everyone's Right Strategy Reference Groups (Darwin, Katherine, Alice Springs and Tenant Creek);
- Save the Children Australia;
- Somerville Services;
- Tennant Creek Women's Refuge;
- Top End Women's Legal Service;
- Victims of Crime NT; and
- YWCA Darwin.

Issues Paper 1 was also published on the Department of the Attorney-General and Justice website and discussed at meetings of the four regional Reference Groups under the Safety is Everyone's Right Strategy (Darwin, Katherine, Tenant Creek and Alice Springs).

Issues Paper 2 was only released to stakeholders (ie not published). It is available on the Department of the Attorney-General and Justice website at https://justice.nt.gov.au/law, along with Issues Paper 1.

2.2 Submissions received

Submissions were received from the following stakeholders:

Issues Paper 1

- Alice Springs Town Council;
- Alice Springs Women's Shelter;
- Central Australian Aboriginal Legal Unit;
- Central Australian Family Violence and Sexual Assault Network;
- Central Australian Women's Legal Service;
- Commonwealth Minister for Indigenous Affairs, Senator the Hon Nigel Scullion;
- Department of Children and Families (NT);
- Department of Education (NT);
- Dr Sarah Holcombe, ARC Future Fellow, School of Archaeology and Anthropology, College of Arts and Social Sciences, Australian National University;
- Domestic Violence Legal Service;
- Felicity Gerry QC, Chair of Research and Training, School of Law, Charles Darwin University;
- National Seniors Australia Northern Territory;
- National Association for Prevention of Child Abuse and Neglect;
- North Australian Aboriginal Family Legal Service;
- North Australian Aboriginal Justice Agency;
- Northern Territory Legal Aid Commission;
- Northern Territory Police Force;
- Rainbow Territory;
- Relationships Australia;
- Royal Australian College of Surgeons;
- Sexual Assault Referral Centre (Alice Springs), Central Australian Health Service, Department of Health (NT); and
- Top End Women's Legal Service.

A number of informal submissions were also received from:

- Department of Correctional Services (NT);
- Central Australian Aboriginal Congress Targeted Family Support Service and Intensive Family Support Service;
- Jason L Abraham;
- Uncle P Turner;
- Safety is Everyone's Right – Tenant Creek Local Reference Group; and
- Criminal Lawyers Association of the Northern Territory.

Issues Paper 2

- Central Australian Aboriginal Legal Aid Service;
- Central Australian Women's Legal Service;
- Criminal Lawyers Association of the Northern Territory;
- Law Society Northern Territory;
- North Australia Aboriginal Justice Agency;
- Northern Territory Legal Aid Commission;
- Northern Territory Police Force;
- Relationships Australia; and
- Top End Women's Legal Service.

A number of confidential submissions were also received in response to both issues papers.

The submissions in response to both issues papers, excluding those marked as confidential or as not being for public release, are accessible on the Department of the Attorney-General and Justice website at https://justice.nt.gov.au/law.

3 REPORT ON CONSULTATION

3.1 Report

This Report summarises and makes limited observations in relation to the submissions received in relation to Issues Papers 1 and 2. Part 5 deals with amendments suggested by stakeholders to the DFVA and the *Domestic and Family Violence Regulations*. Part 6 deals with various issues and proposals discussed in the context of domestic violence. For example, the establishment of a specialist domestic violence court and Clare's Law.

It is noted that to the extent that issues raised have subsequently been addressed by legislation, or otherwise, they are not discussed in any detail in this Report. Further, noting that the DFVA equivalents in other jurisdiction use different terms to describe similar concepts, where possible, this Report uses, as a general rule, the terms of the DFVA to discuss those concepts.

3.2 Purpose

The purpose of this Report is to assist in formulating recommendations for amendments to the DFVA and Regulations. The document will also serve as a background document for government and non-government agencies and organisations on the various issues and reforms being discussed in relation to domestic violence.

Once recommendations and/or draft legislation have been prepared, further consultation will occur in accordance with standard government processes.

4 BACKGROUND TO *DOMESTIC AND FAMILY VIOLENCE ACT*

Following a comprehensive review in 2006-07, the *Domestic Violence Act 1996* was repealed and replaced by the *Domestic and Family Violence Act 2007*, which commenced operation on 1 July 2008.

The objects of the DFVA are set out in section 3(1) as follows:

(a) to ensure the safety and protection of all persons, including children, who experience or are exposed to domestic violence; and

(b) to ensure people who commit domestic violence accept responsibility for their conduct; and

(c) to reduce and prevent domestic violence.

To this end, the DFVA provides:

- for the making and variation of domestic violence orders by police officers and by the Court of Summary Jurisdiction (now the Local Court);
- for the confirmation of domestic violence orders by the Local Court;
- for the recognition in the Northern Territory of domestic violence orders made in other Australian jurisdictions and in New Zealand;
- for the enforcement of orders;
- for the establishment of mandatory reporting requirements such that an adult commits an offence if he or she fails to report to a police officer his or her belief, based on reasonable grounds, that someone has caused or is likely to cause serious physical harm to another person within a domestic relationship and/or the life or safety of another person is under serious or imminent threat from domestic violence;
- for the giving of evidence by vulnerable witnesses; and
- for the protection from liability for health practitioners who report domestic violence.

The principal improvements in the legislation over the *Domestic Violence Act 1996*, as outlined in the Explanatory Statement for the Domestic and Family Violence Bill 2007,[1] are as follows:

- young persons aged over 15 and under 18 years of age can obtain domestic violence orders on their own behalf with the leave of the Court and all children can obtain domestic violence orders through an authorised adult such as a relative;
- domestic violence orders can be made against young persons aged over 15 and under 18 years of age where they perpetrate domestic and family violence;
- other persons in close relationships (carer's relationships, betrothals, promised wives, dating relationships) can obtain domestic violence orders where they experience violence in their relationships;
- the basis on which a domestic violence order is granted is that there are reasonable grounds for the protected person to fear domestic violence by the defendant;
- economic abuse and intimidation are grounds for domestic violence orders;

[1] The Bill, Explanatory Statement and Second Reading speech are available in full at: http://notes.nt.gov.au/dcm/legislat/Acts.nsf/84c76a0f7bf3fb726925649e001c03bb/3e215043c8b59936692573770062f93?OpenDocument

- a child witnessing family violence is a ground for seeking a domestic violence order on the child's behalf by a Police Officer or child protection worker;
- there is a presumption in favour of the victim with children remaining in the family home when a domestic violence order is made (so that it is the offender who must leave the family home);
- the Court can make domestic violence orders mandating that an offender attend rehabilitation and treatment programs;
- the Court is obliged to explain to the applicant and the offender, in an appropriate language or appropriate terms, the effect of the domestic violence order;
- publication of the details of children affected by domestic violence is prohibited and the Court has the power to prohibit the publication of other details of a personal nature;
- vulnerable witness provisions apply to applicants and persons giving evidence when domestic violence orders are being sought;
- the maximum penalty for breach of a domestic violence order is increased to two years imprisonment, and the offence is one of strict liability;
- for a breach of a domestic violence order, the Court is required to impose a term of actual imprisonment for a second or subsequent offence unless it is of the opinion that such a penalty should not be imposed, with the exception being where harm has been caused to the victim and in which case a term of imprisonment is to be imposed;
- where a young person between 15 and 18 is being sentenced in proceedings for a breach of a domestic violence order, the above provisions in relation to sentencing an adult apply to the extent provided by the sentencing principles in the *Youth Justice Act*.

Despite these improvements, and subsequent ad hoc amendments to the DFVA (such as the introduction of mandatory reporting requirements in 2009), domestic violence remains a major problem in the Territory.

In 2015, there were 6,953 assault victims in the Territory. Almost 59 percent of these victims experienced domestic violence. Over 80 percent of domestic violence assault victims in the Territory in 2015 were women, with Indigenous women being approximately 20 times more likely to be victims of domestic violence assault than non-Indigenous women, and representing 72 percent of all domestic violence assault victims in the Territory.[2]

While legislative measures alone are unlikely to substantially improve these statistics, strong domestic and family violence legislation is a key component of the Strategy.

[2] Recorded Crime – Victims, Australia, 2015. Australian Bureau of Statistics, July 2016.

5 SUGGESTED IMPROVEMENTS TO THE *DOMESTIC AND FAMILY VIOLENCE ACT* AND REGULATIONS

5.1 Act's short title

Background

The current DFVA's short title is the *Domestic and Family Violence Act*.

Submissions

The North Australian Aboriginal Family Legal Service noted that culturally and linguistically diverse persons, specifically, their clients in remote indigenous communities, struggle with understanding the workings of the DFVA. In particular, confusion often arises over the interchangeable use of the terms 'domestic violence' and 'family violence'.

Accordingly, the North Australian Aboriginal Family Legal Service recommended that the title of the DFVA should be amended to read '*Family Violence Prevention and Protection Act*'.

5.2 Preamble

Background

The following is the current preamble of the DFVA:

> 'The Legislative Assembly enacts this Act because it recognises:
>
> (a) domestic violence is unacceptable behaviour that society does not condone; and
>
> (b) domestic violence has:
>
> (i) negative and long-lasting consequences for victims and others exposed to it; and
>
> (ii) negative consequences for the community, the workplace and the economy.'

Submissions

A number of stakeholders[3] submitted that they would like to see the preamble in the DFVA amended to acknowledge the prevalence and gendered nature of domestic violence as well as its impacts on victims and their families, society and the economy. Submissions received listed both the preamble in the *Family Violence Protection Act 2008* (Vic)[4] and section 10(1) of the *Interventions Orders (Prevention of Abuse) Act 2009* (SA)[5] as good examples.

The following is the Preamble of the *Family Violence Protection Act 2008* (Vic):

> 'In enacting this Act, the Parliament recognises the following principles—
>
> (a) that non-violence is a fundamental social value that must be promoted;
>
> (b) that family violence is a fundamental violation of human rights and is unacceptable in any form;

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[3] Central Australian Aboriginal Family Legal Unit, Central Australian Family Violence and Sexual Assault Network, Central Australian Women's Legal Service and Top End Women's Legal Service.

[4] Central Australian Aboriginal Family Legal Unit, Central Australian Family Violence and Sexual Assault Network and Central Australian Women's Legal Service.

[5] Central Australian Women's Legal Service and Top End Women's Legal Service.

(c) that family violence is not acceptable in any community or culture;

(d) that, in responding to family violence and promoting the safety of persons who have experienced family violence, the justice system should treat the views of victims of family violence with respect.

In enacting this Act, the Parliament also recognises the following features of family violence—

(a) that while anyone can be a victim or perpetrator of family violence, family violence is predominantly committed by men against women, children and other vulnerable persons;

(b) that children who are exposed to the effects of family violence are particularly vulnerable and exposure to family violence may have a serious impact on children's current and future physical, psychological and emotional wellbeing;

(c) that family violence—

(i) affects the entire community; and

(ii) occurs in all areas of society, regardless of location, socioeconomic and health status, age, culture, gender, sexual identity, ability, ethnicity or religion;

(d) that family violence extends beyond physical and sexual violence and may involve emotional or psychological abuse and economic abuse;

(e) that family violence may involve overt or subtle exploitation of power imbalances and may consist of isolated incidents or patterns of abuse over a period of time.'

Section 10 of the *Interventions Orders (Prevention of Abuse) Act 2009* (SA) provides as follows:

'(1) The following must be recognised and taken into account in determining whether it is appropriate to issue an intervention order and in determining the terms of an intervention order:

(a) abuse occurs in all areas of society, regardless of socio-economic status, health, age, culture, gender, sexuality, ability, ethnicity and religion;

(b) abuse may involve overt or subtle exploitation of power imbalances and may consist of isolated incidents or patterns of behaviour;

(c) it is of primary importance to prevent abuse and to prevent children from being exposed to the effects of abuse;

(d) as far as is practicable, intervention should be designed—

(i) to encourage defendants who it is suspected will, without intervention, commit abuse to accept responsibility and take steps to avoid committing abuse; and

(ii) to minimise disruption to protected persons and any child living with a protected person and to maintain social connections and support for protected persons; and

(iii) to ensure continuity and stability in the care of any child living with a protected person; and

(iv) to allow education, training and employment of a protected person and any child living with a protected person, and arrangements for the care of such a child, to continue without interruption; and

(v) if the defendant is a child—

(A) to ensure the child has appropriate accommodation, care and supervision; and

(B) to ensure the child has access to appropriate educational and health services; and

(C) to allow the education, training and employment of the child to continue without interruption.'

The Central Australian Aboriginal Family Legal Unit supports replacing the current preamble with that in the *Family Violence Protection Act 2008* (Vic), but with the following minor modification – replace the words 'reference to "the justice system should treat the views of victims of family violence with respect" with the words "the legal system should treat victims of family and domestic violence with respect and have particular regard to their safety".

The North Australian Aboriginal Family Legal Service also submitted that the DFVA should be amended to include a provision explaining the nature, features and dynamics of family violence, namely that:

- family violence is predominately committed by men against women;
- Indigenous women are overwhelmingly represented in statistics relating to victims of family violence;
- children who are exposed to the effects of family violence are particularly vulnerable and exposure to family violence may have a serious impact on children's current and future physical, psychological and emotional wellbeing; and
- family violence is significantly overrepresented in Indigenous communities, and factors which can be identified as contributing to the levels of family violence include: poverty, limited access to services, alcohol and substance misuse, socio-economic disadvantages, access to housing and overcrowding in housing, workforce participation, gender inequality, and the impacts of colonisation.

ALRC Recommendations

Recommendation 7-1

ALRC Recommendation 7-1 recommended that state and territory domestic violence legislation should contain guiding principles which expressly reference human rights frameworks and draw upon applicable international conventions.

This recommendation was supported by the Central Australian Aboriginal Family Legal Unit and the Central Australian Women's Legal Service.

The Department of Children and Families suggested that the DFVA could refer specifically to the United Nations Convention on the Rights of the Child.

Recommendation 7-2

ALRC Recommendation 7-2 recommended that state and territory domestic violence legislation should contain a provision that explains the nature, features and dynamics of domestic violence and refer to the particular impact of domestic violence on:

- indigenous persons;
- those from a culturally and linguistically diverse background;

- those from the lesbian, gay, bisexual, transgender, queer and intersex communities;
- older persons; and
- people with disabilities.

This recommendation was supported by the Central Australian Aboriginal Family Legal Unit and the Central Australian Women's Legal Service.

Rainbow Territory submitted that such a provision could include the following statement:

> 'The experience of LGBTQI identifying victims of domestic and family violence is unique, and has the potential to be compounded by the structural, institutional and interpersonal discrimination that many LGBTQI people experience every day.'

The Department of Children and Families suggested that this provision could include additional examples of domestic violence, including reference to 'lateral violence' amongst communities, and threats and pressure such as payback.

Observations

It is noted that the *Family Violence Protection Act 2008* (Vic) and the *Domestic and Family Violence Protection Act 2012* (Qld) are the only two DFVA equivalents which contain preambles. Both are consistent with the principles of ALRC Recommendations 7-1 and 7-2.

Further, it is noted that the Australian Capital Territory has introduced the Family Violence Bill 2016 (ACT),[6] which contains a preamble implementing ALRC recommendations 7-1 and 7-2.

5.3 Section 3 – Objects of Act and their achievement

Background

Section 3(1) of the DFVA provides that the objects of the DFVA 'are:

(a) to ensure the safety and protection of all persons, including children, who experience or are exposed to domestic violence; and

(b) to ensure people who commit domestic violence accept responsibility for their conduct; and

(c) to reduce and prevent domestic violence.'

Submissions

The North Australian Aboriginal Family Legal Service and the Central Australian Aboriginal Family Legal Unit submitted that the core purposes of the DFVA should be expanded.

The North Australian Aboriginal Family Legal Service recommended that the core purposes of the DFVA should reflect a commitment to ensuring children's safety and welfare. To this end, they submitted that, '[r]ather than using the term "all persons, including children" (or "persons" as proposed in the Issues Paper), the term "children and adults" should be used when referring to "safety and protection" as being a core purpose of the Act'.

The Central Australian Aboriginal Family Legal Unit submitted that the objects of the DFVA should be amended as follows:

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[6] ACT Legislation Register, Family Violence Bill 2016 (ACT) http://www.legislation.act.gov.au/b/db_54028//

(a) Amend section 3(a) to read "…who fear, experience or are exposed to domestic violence" in accordance with ALRC Recommendation 7-4.[7]

(b) Include an additional subsection 3(1)(d) 'to include promoting the recovery of victims of domestic violence'.

(c) Include an additional subsection 'to require that the judicial process in relation to Domestic Violence Orders be dealt with as little formality and technicality as each case requires.

In relation to (b), the Central Australian Aboriginal Family Legal Unit noted that:

> '…this should be something which the court can take into account when looking at the terms of a DVO. For example, a defendant may argue that, at most, a non-harm, non-harass and non-intimidate DVO should be made, whereas the protected person is seeking a full non-contact DVO because they "just want to feel safe". The Act currently does not provide any real guidance as to what types of orders should be made in this case'.

ALRC Recommendations

Recommendation 7-4

ALRC Recommendation 7-4 recommended that state and territory domestic violence legislation should articulate the following set of core purposes:

'(a) to ensure or maximize the safety and protection of persons who fear or experience family violence;

(b) to prevent or reduce family violence and the exposure of children to family violence; and

(c) to ensure that persons who use family violence are made accountable for their conduct.'

This recommendation was supported by the Central Australian Women's Legal Service and the Top End Women's Legal Service.

Observations

The current objects of the DFVA are very similar to those in clause 6 of the Family Violence Bill 2016 (ACT) and the common set of core purposes proposed by ALRC Recommendation 7-4.

[7] ALRC Recommendation 7-4 recommends a common set of core purposes that should be articulated in state and territory family violence legislation.

5.4 Section 4 – Definitions – 'harm'

Background

Pursuant to section 4 of the DFVA, 'harm' has the same meaning as provided by section 1A of the Northern Territory Criminal Code, specifically:

(1) Harm is physical harm or harm to a person's mental health, whether temporary or permanent.

(2) Physical harm includes unconsciousness, pain, disfigurement, infection with a disease and any physical contact with a person that a person might reasonably object to in the circumstances, whether or not the person was aware of it at the time.

(3) Harm to a person's mental health includes significant psychological harm, but does not include mere ordinary emotional reactions such as those of only distress, grief, fear or anger.

(4) Harm does not include being subjected to any force or impact that is within the limits of what is acceptable as incidental to social interaction or to life in the community.

Submissions

Noting that 'domestic violence' includes conduct causing 'harm', the Central Australian Aboriginal Family Legal Unit submitted that:

- it is not appropriate that the definition of 'harm' excludes emotional reactions such as 'distress, grief and fear' as '[t]hese emotions are fundamentally associated with domestic violence'; and
- the exclusion of these emotions is at odds with the definition and concepts of domestic violence in the DFVA.

Accordingly, the Central Australian Aboriginal Family Legal Unit 'supports the definition of harm being limited to "Harm is physical harm or harm to a person's mental health, whether temporary or permanent" without the additional subsections contained in section 1A of the Criminal Code'. They also suggested that 'harm' should include:

- the use of animals to control, or cause fear to, family members; and
- publishing information, photos or material about the victim without their consent, causing emotional and psychological harm.

In relation to the former, it was noted that there have been situations where family members have encouraged their dogs to menace and harass other family members, including to the point where, due to their fear of the animals, the victims are virtually held hostage in their own homes.

In relation to the latter, the Central Australian Aboriginal Family Legal Unit suggested that '[t]his could be adequately covered by incorporating it as specific example as set out in [ALRC] Recommendation 5.2 and by removing the need for the victim to prove emotional or psychological harm'.[8]

[8] ALRC Recommendation 5-2 provides that states and territory family violence legislation should include examples of emotional and psychological abuse or intimidation and harassment that would affect certain vulnerable groups.

Observations

Emotional and psychological abuse

Domestic and family violence legislation in the majority of jurisdictions refers to emotional or psychological abuse as a form of domestic violence.[9] However, there are differences in the way these terms are defined, if at all.

The Queensland and Victorian legislation defines emotional or psychological abuse as behaviour that 'torments, intimidates, harasses or is offensive'. The South Australian domestic violence legislation defines emotional or psychological harm as including mental illness, nervous shock, and distress, anxiety or fear that is more than trivial. The legislation in these three jurisdictions also provides examples of such abuse.

The Tasmanian legislation defines 'emotional abuse or intimidation' as the pursuit of 'a course of conduct that he or she knows, or ought to know, is likely to have the effect of unreasonably controlling or intimidating, or causing mental harm, apprehension or fear, in his or her spouse'.

While an 'act of family or domestic violence' under the Western Australian legislation includes 'emotionally abusive conduct', such conduct is not defined. Further, neither the Western Australian nor the Tasmanian legislation provides examples of such conduct.

The only jurisdictions other than the Territory which do not expressly recognise emotional or psychological abuse as domestic violence are New South Wales and the Australian Capital Territory.[10] However, they do refer to conduct which is intimidating, harassing and offensive. As demonstrated above, these are generally provided as subcategories of emotional or psychological abuse.

In the Territory, intimidation is a form of domestic violence and includes harassment and conduct that 'has the effect of unreasonably controlling the person or causing mental harm'. Although, it is noted that neither 'unreasonably controlling' or 'mental harm' are defined by the DFVA.

Clause 8(3) of the Family Violence Bill 2016 (ACT) defines emotional or psychological abuse of a family member in similar terms as the Queensland and Victorian legislation, namely as 'behaviour by a person that torments, intimidates, harasses or is offensive to the family member including by the person's exploitation of power imbalances between the person and the family member'.

ALRC Recommendation 5-1 recommends that state and territory domestic violence legislation should include 'emotional and psychological abuse'. This recommendation is discussed further in relation to Part 5.5 of this Report.

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[9] See ss 5(1)(a)(ii) and 7 *Family Violence Protection Act 2009* (Vic), 8(1)(b) and 11 *Domestic and Family Violence Protection Act 2012* (Qld), 6(1)(d) *Restraining Orders Act 1997* (WA), 8(2)(d), (3) and (4) *Intervention Orders (Prevention of Abuse) Act 2009* (SA) and 7(b)(ii) and 9 *Family Violence Act 2004* (Tas).

[10] See *Crimes (Domestic and Personal Violence) Act 2007* (NSW) and the *Domestic Violence and Protection Orders Act 2008* (ACT).

Use of animals to cause fear

Domestic violence in most jurisdictions, including in the Territory, includes causing or threatening to cause death or injury to an animal.[11] However, the use of animals to cause fear or harm is not expressly provided for. Such conduct potentially amounts to intimidation under section 6 of the DFVA as it may cause mental harm or have the effect of unreasonably controlling a person.

Publication of information or material about the victim without consent

The publication of information or material about a victim without their consent is not expressly recognised as domestic or family violence in any jurisdiction. However, such conduct might be considered emotional or psychological abuse in other jurisdictions. Similarly, the publication or threat of publication of such material potentially amounts to intimidation under section 6 of the DFVA as it may cause mental harm or have the effect of unreasonably controlling a person.

It is also relevant to note that the release of intimate personal images (including both still and moving images) without consent is a criminal offence in both South Australia and Victoria.[12] While only the Victorian legislation currently criminalises threats to distribute intimate images, South Australia has enacted the *Summary Offences (Filming and Sexting Offences) Amendment Act 2015*[13], which provides for the criminalisation such threats.

The Northern Territory Law Reform Committee (NTLRC) is also currently considering the structure, nature and scope of similar offences in the Northern Territory. It is anticipated that the NTLRC will provide a report on this matter in November 2016.

5.5 Section 5 – Domestic violence

Background

Section 5 of the of the DFVA sets out the conduct that qualifies as domestic violence when committed by a person against someone with whom the person is in a domestic relationship. The conduct includes conduct causing harm; damaging property, including the injury or death of an animal; intimidation; stalking; economic abuse and attempting or threatening to commit any of such conduct.

Submissions

A number of stakeholders[14] submitted that it would be useful if the current definition of 'domestic violence' included more detailed definitions about the kinds of behavior that may constitute domestic violence. To this end, it was noted that section 8 of the *Intervention Orders (Prevention of Abuse Act) 2009* (SA) includes an extensive range of examples across a number of areas. For example, section 8(5) of that Act provides extensive examples of economic and other abuse.

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[11] See s 5(2)(e) *Family Violence Protection Act 2009* (Vic), 8(2)(g) *Domestic and Family Violence Protection Act 2012* (Qld), 6(1)(c) *Restraining Orders Act 1997* (WA), 8(4)(d) *Intervention Orders (Prevention of Abuse) Act 2009* (SA), 13(1)(f) and (g) *Domestic Violence and Protection Orders Act 2008* (ACT) and 8(2)(c) Family Violence Protection Bill 2016 (ACT).

[12] See s 26C of the *Summary Offences Act 1953* (SA) and s 41DA of the *Summary Offences Act* 1966 (Vic).

[13] Enacted on 23 June 2016.

[14] Central Australian Family Violence and Sexual Assault Network, Felicity Gerry QC, Chair of Research and Training, School of Law, Charles Darwin University and the Central Australian Women's Legal Service and Top End Women's Legal Service.

Felicity Gerry QC, Chair of Research and Training, School of Law, Charles Darwin University, also suggested that the DFVA should have a wide definition of violence which includes harassment and trauma.

The Top End Women's Legal Service recommended that the definition of domestic violence should include:

- damage to property and animals, regardless of whether that property or those animals belong to the victim or someone else; and
- behaviour that causes a child to be exposed to violence.

Again, noting that their clients struggle with understanding the workings of the DFVA and the interchangeable use of the terms 'domestic violence' and 'family violence', the North Australian Aboriginal Family Legal Service recommended amending section 5 of the DFVA 'to refer to "family violence" (as opposed to "domestic violence")'. Like other stakeholders, they also recommended that the DFVA include detailed examples of behavior constituting family violence (which are not exhaustive), including examples that incorporate Aboriginal English terms such as 'humbugging' and 'jealousing'. They suggested that this is particularly necessary given the overrepresentation of Indigenous women as victims of family violence in the Northern Territory.

National Seniors Australia Northern Territory and the Alice Springs Town Council each submitted that 'Elder Abuse should be considered by the review as distinct and separate behaviours within domestic and family violence' and that specific reference of such abuse be contained in the DFVA.

The Central Australian Aboriginal Family Legal unit submitted that attempted strangulation should be listed as an example of domestic violence.

ALRC Recommendations

Recommendation 5-1

ALRC Recommendation 5-1 recommended that state and territory domestic violence legislation should provide that domestic violence is:

> 'Violent or threatening behaviour, or any other form of behaviour, that coerces or controls a family member or causes a 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.'

The National Association for Prevention of Child Abuse and Neglect noted that while this proposed definition goes some way to incorporating the exposure of children to domestic violence, they suggested that paragraph (i) could read as follows:

> ‘behaviour by the person using violence that causes a child to be implemented in the violent acts. A child can be used as part of the violent behaviour of the perpetrator directed towards the victim of the domestic violence in multiple ways. For example, as a hostage, used to spy on a parent, encouraged to assault / degrade the victim of the violence, being used as a physical weapon etc.’

The North Australian Aboriginal Justice Agency noted that while it is important that domestic violence includes coercive and controlling behaviour, there needs to be a caveat relating to the reasonable exercise of parental discretion.

This recommendation was supported by the Northern Territory Police Force.

Recommendation 5-2

ALRC Recommendation 5-2 recommended that state and territory family violence legislation include examples of domestic violence behaviour such as emotional and psychological abuse, intimidation etc that illustrate conduct that would affect certain vulnerable groups including indigenous persons and those from the gay, lesbian, bisexual, transgender and intersex communities.

The National Association for Prevention of Child Abuse and Neglect recommended that children should be specifically listed as a vulnerable group.

The Department of Children and Families suggested that specific reference could be made to the emotional and psychological effects on children who are exposed to domestic violence, ‘including cumulative harm references to the detrimental impact of being subjected to domestic and family violence on parenting capacity’.

Relationships Australia suggested that, further to examples of conduct constituting domestic violence, examples of the effects of abuse should also be included.

Rainbow Territory submitted that in relation to the lesbian, gay, bisexual, transgender, queer and intersex community, the following could be included as examples of domestic violence:

- ‘“outing” or threatening to “out” their partner to friends, family, police, church or employer;
- telling their partner that s/he will lose custody of the children as a result of being ‘outed’;
- threatening to reveal a person’s HIV status;
- telling a partner that the police or justice system will not assist because the legal justice system is homophobic; and
- telling a partner that the abusive behaviour is normal within LGBTQI relationships and convincing the abused partner that s/he does not understand LGBTQI relationships and sexual practices because of hetrosexism.”’

Observations

Damage to property and animals regardless of ownership

As noted above, section 5(b) of the DFVA provides that 'damaging property, including the injury or death of an animal' is conduct which constitutes 'domestic violence'. Nothing in section 5(b) suggests that such conduct is not domestic violence merely because the property or animal is not owned by a protected person. However, such a distinction is made in section 6(1)(b)(ii) of the DFVA in relation to intimidation, insofar as it relates to any conduct that causes a reasonable apprehension of damage to property or the injury or death of an animal.

In relation to damaging property, section 8(2)(c) of the *Domestic and Family Violence Protection Act 2012* (Qld) provides that 'domestic violence' includes 'damaging a person's property or threatening to do so'. The *Crimes (Domestic and Personal Violence) Act 2007* (NSW) also provides that intimidation includes 'any conduct that causes a reasonable apprehension of…violence or damage to any person or property'.[15]

In relation to harming animals, the DFVA equivalents in both Victoria and Queensland expressly provide that domestic violence includes causing or threatening to cause harm to an animal, regardless of the ownership of the animal.[16] Similarly, section 8(4)(d) of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) provides that emotional or psychological harm includes 'causing the death of, or injury to, <u>an animal</u>' [Emphasis added].

Clauses 8(2)(b) and (c) of the Family Violence Bill 2016 (ACT) also provide that family violence by a person in relation to a family member of the person includes 'damaging property' and 'harming an animal', respectively.

As noted above, ALRC Recommendation 5-1 provides that state and territory domestic violence legislation should provide that domestic violence includes '(h) causing injury or death to an animal irrespective of whether the victim owns the animal'.

Exposure of children to domestic violence

The *Family Violence Protection Act 2009* (Vic) is the only DFVA equivalent which provides that causing a child to witness or otherwise be exposed to the effects of domestic violence itself constitutes domestic violence.[17] Like the DFVA, the legislation in Western Australia and South Australia does not treat exposure of a child to domestic violence as constituting domestic violence, but does expressly allow for the making of a DVO to protect children from exposure to such.[18] In New South Wales, a child must be included in a DVO if the child is in a domestic relationship with the person subject to the order.[19]

Like the Victorian legislation, clause 8(1)(b) of the Family Violence Bill 2016 (ACT) recognises behaviour that causes a child to hear, witness or otherwise be exposed to domestic violence, or the effects of such behaviour as domestic violence.

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[15] s 7(1)(c).

[16] ss 5(2)(e) *Family Violence Protection Act 2009* (Vic) and 8(2)(g) *Domestic and Family Violence Protection Act 2012* (Qld).

[17] s 5(1)(b).

[18] s 11B *Restraining Orders Act 1997* (WA) and 7(1)(b) *Intervention Orders (Prevention of Abuse) Act 2009* (SA).

[19] s 38 *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

5.6 Section 6 – Intimidation

Background

Section 6 of the DFVA provides that intimidation of a person includes harassment of the person; any conduct that causes a reasonable apprehension of violence to the person or damage to the property of the person, including the injury or death of an animal that is the person's property; or any conduct that has the effect of unreasonably controlling the person or causes the person mental harm.

Submissions

The Top End Women's Legal Service submitted that the definition of 'intimidation' in section 6 of the DFVA does not consider the full spectrum of emotional and psychological abuse. To this end, they agreed with ALRC Recommendation 5-2 that illustrative examples of intimidation, emotional and psychological abuse and harassment should be included in the DFVA, with particular reference to vulnerable groups.

They also suggested that the terms 'harassment', 'unreasonably controlling', 'mental harm' and 'pattern of conduct' be either defined or illustrated by examples.

Observations

Illustrative examples are used extensively in the Victorian, Queensland and South Australian DFVA equivalents.[20] This approach has also been adopted in the Family Violence Bill 2016 (ACT).

Also, it is noted that the principles for administering the *Domestic and Family Violence Protection Act 2012* (Qld) (section 4) recognise people who are LGBTQI as particularly vulnerable to domestic violence.[21]

Further, the Victorian Royal Commission into Family Violence has recommended that section 6 of the *Family Violence Protection Act 2008* (Vic) (economic abuse) be amended to expand the statutory examples of family violence to include forced marriage and dowry related abuse.[22]

5.7 Section 7 – Stalking

Background

Section 7 of the DFVA provides that, for the purposes of section 5, the term 'stalking' includes intentionally following a person and intentionally watching or loitering in the vicinity of; or intentionally approaching the place where the person lives, works or regularly goes for a social or leisure activity, on at least two separate occasions with the intention of causing or making the person fear harm.

[20] For example, see s 12 ('Meaning of *economic abuse*') *Domestic and Family Violence Protection Act 2012* (Qld).

[21] s 4(d).

[22] Victorian Royal Commission into Family Violence, *Report and Recommendations* (March 2016) Recommendation 156.

Submissions

The Central Australian Aboriginal Family Legal United submitted that the definition of stalking should be amended to:

- remove the requirement for the victim to prove the offender's intention; and
- add the wording 'including, but not limited to…' before the references to subsections (a) and (b).

ALRC Recommendations

Recommendation 6-3

ALRC Recommendation 6-3 recommended that where the definition of domestic violence in state or territory domestic violence legislation includes concepts recognised in that state or territory's criminal legislation, such as stalking, kidnapping and psychological harm, domestic violence legislation should expressly adopt the criminal law definitions of those concepts.

In particular, the ALRC recommended that the definition of stalking in the DFVA should be amended to include all stalking behaviour referred to in section 189 of the Criminal Code, for example, by defining 'stalking' in section 7 of the DFVA by reference to, or consistently with, the definition of stalking in the Northern Territory Criminal Code.[23]

Observations

The definition of 'stalking' under section 7 of the DFVA and the definition of 'unlawful stalking' in the Criminal Code are not identical.

5.8 Section 8 – Economic abuse

Background

Section 8 of the DFVA provides that, for the purposes of section 5, the term 'economic abuse' includes: coercing the person to relinquish control over assets or income; unreasonably disposing of property without consent; unreasonably preventing the person from taking part in decisions over household expenditure or the disposition of joint property; and withholding money reasonably necessary for the maintenance of the person or a child of the person.

Submissions

As indicated above at Part 5.5 and 5.6 of this Report, stakeholders noted that 'economic abuse' could be illustrated by examples as provided in the DFVA equivalents in other jurisdictions.

[23] Australian Law Reform Commission, *Family Violence – A National Legal Response*, Report No 114 (2011) vol 1, [6.57].

5.9 Section 9 – Domestic relationship

Background

Section 9 sets out that a person is in a domestic relationship with another person if the person is or has been in a family relationship with the other person; has or had the custody or guardianship of, or right of access to, the other person; is or has been subject to the custody or guardianship of the other person or the other person has or has had a right of access to the person; ordinarily or regularly lives or has lived with the other person or someone else who is in a family relationship with the other person; is or has been in a family relationship with a child of the other person; is or has been in an intimate personal relationship with the other person; is or has been in a carers relationship with the other person.

Submissions

The North Australian Aboriginal Family Legal Service recommended that the definitions of 'domestic relationship' (section 9) and 'family relationship' (section 10) should be amalgamated into a single definition of 'family relationship' as follows:

> 'A person is in a "**family relationship**" with another person if the person:
>
> (a) is or has been the spouse or de facto partner of the other person;
>
> (b) is or has been a relative of the person;
>
> (c) has or has had the custody or guardianship of, or right of access to, the other person;
>
> (d) is or has been subject to the custody or guardianship of the other person or the other person has or has had a right of access to that person;
>
> (e) ordinarily or regularly lives, or has lived with:
>
> i) [t]he other person; or
>
> ii) someone else who falls within paragraphs (a) and/or(b) above;
>
> (f) is or has been a spouse, de facto partner or relative of a child of the other person;
>
> (g) is or has been in an intimate personal relationship with the other person; or
>
> (h) is or has been in a carers relationship with the other person.'

The North Australian Aboriginal Family Legal Service suggested that any terms within the new definition, such as 'relative' can be separately defined in the same way that 'intimate personal relationship' (section 11) and 'careers relationship' (section 12) currently are.

The Central Australian Aboriginal Family Legal Unit, Domestic Violence Legal Service and the North Australian Aboriginal Family Legal Service each noted that there are a number of relationships which are often impacted by conduct arising out of a domestic relationship which should be captured by the DFVA and are not.

The Domestic Violence Legal Service gave the following examples:

1. Bob and Jane dated for a couple of months until Jane ended the relationship. During the relationship, Jane lived with her parents and Bob had met them a number of times. After the break-up, Bob starts to harass and threaten Jane's parents. Although Jane can establish a domestic relationship with Bob, as she was in an intimate personal relationship with him, her parents and other family are not covered under section 9(d)(ii) and thus cannot establish a domestic relationship. They are unable to seek relief under the DFVA.
2. Ben and Chloe dated for a couple of months and then separated. Ben then commences a relationship with Sophie and they have a baby together. Chloe finds out about Sophie, becomes jealous, and begins threatening and stalking Sophie and making threats to harm

the baby. Sophie's connection with Chloe does not fall within the definition of domestic relationship under the Act.

3. Tom is in a long-term relationship with Marie and they have three children together. Tom goes out with the boys and has a one night stand with Naomi. Marie finds out about the one-night stand and begins sending threatening and abusive text messages to Naomi. Naomi (the 'other woman') has no avenue of obtaining relief under the Act because Marie and Naomi have not been in a domestic relationship.

Accordingly, the Domestic and Family Violence Legal Service recommended amending section 9 so that a domestic relationship includes where a person:

- 'is or has been in a family relationship with a spouse, de facto, or relative of the other person'; or
- 'is or has been in an intimate personal relationship with a spouse, de facto, or relative of the other person'.

Similarly, the Central Australian Aboriginal Family Legal Unit suggested that sections 9 to 11 should be extended to include:

- '[c]asual and one-off sexual relationships, including consensual and non-consensual'; and
- '[t]he partners and former partners of parties to casual and one off sexual relationships, including consensual and non-consensual'.

Both the Domestic Violence Legal Service and Central Australian Aboriginal Family Legal Unit noted that the only option for people in these classes of relationships is to seek a Personal Violence Restraining Order (PVRO), which require mediation to be attempted before an order can be made.

The Central Australian Women's Legal Service also noted that victims of sexual violence can only seek the protection of a PVRO. This can leave victims feeling vulnerable and hinder recovery post-sexual assault. Accordingly, they recommend enabling survivors of sexual assault to seek protection through a process similar to that available to a victim of domestic or family violence. Whether this should be enabled through a reform of the DFVA or the PVRO legislation is a matter that needs to be explored.

To this end, the Central Australian Women's Legal Service suggested that, if this proposal was to be enabled through the DFVA, a useful point of comparison may be found in section 8 of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA), which provides a distinction between domestic violence and non-domestic violence.

Despite these various issues, the Domestic Violence Legal Service noted that expanding the definition of domestic relationship would require careful consideration as doing so will increase the workload of all services involved. However, they noted that this would need to be balanced against the cost to the community where matters are not resolved and the safety of the protected person is not secured.

The North Australian Aboriginal Family Legal Service also recommended:

- expanding its suggested definition of 'family relationship' to include: 'a person who is so closely connected with a family member, that the family member can influence the actions of the person, either directly or indirectly'; and
- inserting the following new definition of 'family member': 'a family member is someone who is in a family relationship with the Protected Person, as defined in [the section of the DFVA that defines 'family relationship']'.

To this end, they noted that:

> 'a similar provision is included in the *Family Violence Protection Act 2008* ("Victorian Act") in providing a definition of "associate" in section 4, and enabling a final order to be made against such a person where a final order has been made against the Respondent (or Defendant). It is not recommended that the Northern Territory Act limit the making of an order against associates of the "family member" (as defined above), in this way. It is our submission that both interim orders and final orders should be able to be made against such persons, where appropriate, even when a Domestic Violence Order ("DVO") has not been made against the ex-partner or other "family member".'

Similarly, the Alice Springs Sexual Assault Referral Centre recommended making it an offence for a representative or relative of the defendant to threaten, intimidate or attempt to coerce a complainant. To this end, they noted that many of their clients have decided not to proceed with charges due to fear from threats and repercussions implied.

ALRC Recommendations

Recommendation 7-6

ALRC Recommendation 7-6 recommended that:

> 'State and territory family violence legislation should include as the core group of protected persons those who fall within the following categories of relationships:
>
> (a) past or current intimate relationships, including dating, cohabiting, and spousal relationships, irrespective of the gender of the parties and whether the relationship is of a sexual nature;
>
> (b) family members;
>
> (c) relatives;
>
> (d) children of an intimate partner;
>
> (e) those who fall within Indigenous concepts of family; and
>
> (f) those who fall within culturally recognised family groups.'

The Central Australian Aboriginal Family Legal Unit noted its support for this recommendation.

Observations

Core group of protected persons

It is noted that the core group of protected persons recommended by the ALRC are captured by sections 9 to 12 of the DFVA. However, it is also noted that it is unclear whether the definition of 'domestic relationship' captures children of an intimate partner.

Non-domestic relationships

In May 2016, the *Personal Violence Restraining Orders Act* (PVRO Act) was passed, repealing the Personal Violence Restraining Orders provisions in Part IVA of the *Justices Act* and replicating them as a standalone Act. Relevantly, pursuant to section 14(2) of this new Act, the Court must not refer a PVRO application to mediation and must hear the application if it is satisfied that mediation is not appropriate in the circumstances.[24] Further, like the DFVA, the PRVO Act also enables the Court to make interim PVROs.[25]

However, it the New South Wales Department of Justice, in its 2015 *Report on the Statutory Review of the Crimes (Domestic and Personal Violence) Act 2007* (NSW), recommended that '[t]he relationship between a person's new partner and ex-partner should be recognised as a "domestic relationship" in section 5 of the Act'.[26] In particular, it was noted that, while the Apprehended Personal Violence Order scheme applies to relationships, violence against new partners by ex-partners displays the dynamics common to domestic violence, and affects children.[27] Legislation amending section 5 of that Act have seen been passed, but is yet to commence.[28]

Associates

Domestic violence by, and towards, associates

As noted above by the North Australian Aboriginal Family Legal Service, the *Family Violence Protection Act 2008* (Vic) provides that the Court may make a DVO against an associate of a respondent to a DVO.[29] Pursuant to section 76(2) of that Act, the court may also make an order protecting an associate of a protected person.

Similarly, the *Domestic and Family Violence Protection Act 2012* (Qld) provides that an associate of a protected person may be included in a DVO.[30] However, unlike in Victoria, that Act does not provide for the making of a DVO against an associate of a respondent.

Section 17 of the *Domestic Violence Act 1995* (NZ) provides that where a court makes a protection order against the respondent, the court may also direct that the order apply against an associate of the respondent (an associate respondent) if the respondent encourages them to engage in conduct that would be domestic violence if engaged in by the respondent.

Criminal conduct by associates

While it is not an offence under the DFVA for an associate of a defendant (an associate) to engage in conduct which, if committed by the defendant would be domestic violence, where a DVO is in place against the defendant, if the defendant counsels or procures the associate to engage in such conduct, the associate could potentially be charged with aiding and abetting a breach of the DVO.[31] Similarly, the defendant could potentially be charged with counselling or procuring a breach of the DVO.[32]

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[24] s 14(2).

[25] s 19.

[26] New South Wales Department of Justice, *Statutory Review of the Crimes (Domestic and Personal Violence) Act 2007 (NSW)* (2015) Recommendation 1.

[27] Ibid, 22.

[28] Item 7 Schedule 1 *Crimes (Domestic and Personal Violence) Amendemnt (Review) Act 2016* (NSW).

[29] s 76(1).

[30] ss 9, 24 and 52.

[31] s 43BG Criminal Code (NT).

[32] Ibid.

Section 17 of the DFVA also provides that a person who counsels or procures someone else to commit conduct that would amount to domestic violence is taken to also have committed the conduct.

A protected person could also apply for a PVRO against the associate.

This appears to be the same situation in all other jurisdictions subject that section 13(1) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) does provide that:

> '[a] person who stalks or intimidates another person with the intention of causing the other person to fear physical or mental harm is guilty of an offence'.

5.10 Section 10 – Family relationship

Background

Section 10 of the DFVA provides that a person is in a 'family relationship' with another person if the person is the spouse or de facto partner of the other person or is otherwise a relative of the other person. A relative in this section includes someone who, according to Aboriginal tradition or contemporary social practice, is a relative of the person.

Submissions

Refer to the comments made by the Central Australian Aboriginal Family Legal Unit and the North Australian Aboriginal Family Legal Service in relation to section 9 at Part 5.1.9 of this Report.

5.11 Section 11 – Intimate personal relationship

Background

Section 11 of the DFVA provides that an intimate personal relationship exists if two persons are engaged to be married to each other, including a betrothal under cultural or religious tradition. This relationship exists whether or not the relationship involves a sexual relationship if the persons date each other.

To decide whether an intimate personal relationship exists, the following can be taken into account: the circumstances of the relationship, the length of time the relationship has existed, the frequency of contact between the persons, and the level of intimacy between them. An intimate relationship can exist whether the persons are the same or opposite sex.

Submissions

The Top End Women's Legal Service noted that transgender individuals are not expressly covered by the definition of 'intimate personal relationship' in section 11(4) of the DFVA. Specifically including transgender peoples within the DFVA would align it with current discrimination policies.

Also see to the comments made by the Central Australian Aboriginal Family Legal Unit in relation to section 9 at Part 5.1.9 of this Report.

5.12 Section 14 - Defendant

Background

Section 14(3) of the DFVA provides that a person against whom a DVO is sought or in force must be at least 15 years old.

Submissions

The Central Australian Aboriginal Family Legal Unit submitted that the age at which a DVO can be made against a defendant should be reduced to 12 years of age (noting that the age for criminal responsibility is currently 10 years).

In particular, they noted that:

- children are entering into relationships at younger and younger ages, particularly from the time they commence high school;
- there are increasing problems of domestic violence at schools particularly involving social media;
- children may not feel comfortable or want to involve their parent or another adult in a court application. The effects of social media can exacerbate this.

The Central Australian Aboriginal Family Legal Unit made the same submission in relation to section 28 (Who may apply for DVO), which provides that a 'young person' (between 15 and 18 years old) may apply for a DVO with leave of the court.

The Northern Territory Police Force also submitted that the age at which a DVO can be made against a defendant should be reduced.

Observations

Child defendants

The DFVA equivalents in both Western Australia and the Australian Capital Territory expressly provide that a DVO cannot be made against a child younger than 10 years of age.[33]

This age limit is retained in the Family Violence Bill 2016 (ACT), which also provides that a respondent who is 10 to 14 years of age is taken to have a presumption of impaired decision-making ability.[34] The explanatory statement to that Bill provides that '[t]his aligns with the principles of *doli incapax* and further supports the rights of children by providing them with appropriate support in making decisions relating to protection orders'.[35]

Child applicants

Section 48(6) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) provides that an application for a DVO may be made by a person who is 16 years and over.

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[33] s 50 *Restraining Orders Act 1997* (WA) and s 20 *Domestic and Family Violence Protection Orders Act 2008* (ACT).

[34] Clause 75.

[35] ACT Legislation Register, Explanatory Statement - Family Violence Bill 2016 (ACT) http://www.legislation.act.gov.au/es/db_54020/current/pdf/db_54020.pdf

The legislation in both Victoria and South Australia provides that an application for a DVO may be made by a child 14 years and over with the leave of the court.[36] Pursuant to section 15(1)(c) of the *Family Violence Act 2004* (Tas), a child (under 18 years of age) may apply for a DVO if the Court is satisfied that the child is capable of understanding the nature of the proceedings. Similarly, section 19(3)(b) of the *Domestic Violence and Protection Orders Act 2008* (ACT) provides that a child may apply for a DVO in their own right.

5.13 Section 16 – Objects of Chapter 2 'Domestic violence orders'

Background

Section 16 of the DFVA sets out that the objects of Chapter 2 (Domestic violence orders) are to provide for the making of domestic violence orders to protect people from domestic violence and for the variation and revocation of domestic violence orders.

Submissions

The Central Australian Aboriginal Family Legal Unit stated that the current objects of Chapter 2 are silent on the accountability and rehabilitation of perpetrators. Accordingly, they submitted that section 16 should be amended so that it incorporates all of the objects of the DFVA given that the Chapter 2 contains the bulk of the provisions relating to the making, variation and revocation of DVOs.

5.14 Section 17 – When person taken to have committed domestic violence

Background

Section 17 of the DFVA provides that a person who counsels or procures someone else to commit conduct that would amount to domestic violence is taken to also have committed the conduct.

Submissions

The Central Australian Aboriginal Family Legal Unit submitted that section 17 is confusing and should be repealed and replaced with a new provision in Chapter 1, Division 2, Subdivision 1, that makes it clear that 'if a person procures or counsels a third party to commit any of the acts set out in section, then the person procuring or counselling the third party is taken to have committed domestic violence themselves. Currently this is suggested by a note to section 5 and section 17, however a specific provision would be more appropriate'.

5.15 Section 18 – When DVO may be made

Background

Section 18 of the DFVA provides that a DVO can be made if there are reasonable grounds for the protected person to fear the commission of domestic violence against the person by the defendant. It also allows for a DVO to be made if the protected person is a child and there is fear they may be exposed to domestic violence.

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[36] ss 45(d)(iii) and 46(2) *Family Violence Protection Act 2008* (Vic) and s 20(2)(a) Intervention Orders (Prevention of Abuse) Act 2009 (SA).

Submissions

The Central Australian Aboriginal Family Legal Unit submitted that 'section 18 should be amended to include an obligation placed on the Defendant to attend Court when a DVO is being made, unless otherwise excused, but acknowledging attendance includes by telephone, to accommodate Defendants who live remotely'.

ALRC Recommendations

Recommendation 7-5

ALRC Recommendation 7-5 recommended that state and territory domestic violence legislation should adopt the following alternative grounds for obtaining a DVO:

'(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.'

The North Australian Aboriginal Justice Agency submitted that:

1. ground (a) should be modified to make clear that to obtain a DVO on this ground, the person seeking protection must *actually* have a fear, not just have objective grounds for a fear. They suggested the following wording: 'the person seeking protection has reasonable grounds to fear family violence and in fact fears such violence'; and
2. ground (b) should be modified to include a time constraint on the court's considerations of past and future conduct. For example, convictions for domestic violence that are, say, 20 years old should not be considered in respect of a fresh order.

The Central Australian Aboriginal Family Legal Unit noted its support for this recommendation.

Observations

Requiring defendant to attend court

There does not appear to be such a requirement in any other jurisdiction.

Grounds for making DVO

Section 18 of the DFVA currently adopts ground (a) of ALRC Recommendation 7-5.

5.16 Section 19 – Matters to be considered in making DVO

Background

Section 19 of the DFVA provides that the issuing authority of a DVO must consider the safety and protection of the protected person to be of paramount importance. In addition, they must consider the following: any family law orders or pending family law orders in relation to the defendant, the accommodation needs of the protected person, the defendant's criminal records, the defendant's previous conduct whether in relation to the protected person or someone else, or other matters considered relevant.

Submissions

The Central Australian Aboriginal Family Legal Unit recommended that:

- section 19(2)(a) be extended to require the court to consider any child protection orders either in force or pending in relation to the children of the parties; and
- section 19(2)(e) should include the defendant's mental health as an example of another relevant consideration.

They also recommended that, in relation section 19(2)(c), there should be a requirement, upon filing an application for a DVO, that a copy of the defendant's criminal record (including pending charges) be placed on the Court file and that the parties can seek leave to inspect and copy it.

The Central Australian Aboriginal Family Legal Unit believes this is necessary given that in their experience:

- the Court in Alice Springs only considers the defendant's criminal history when the matter proceeds to a contested hearing;
- generally, the defendant's criminal history is based on the knowledge of the defendant deposed in their affidavit which may not be complete or accurate for various reasons including a limited understanding of the criminal justice system.

They also suggested that there should be an obligation on the defendant to disclose any mental health episodes or admissions to hospital within the last 12 months along with any current mental health diagnosis, treatment plans or medication that they are taking.

The Central Australian Women's Legal Service noted that:

- despite the requirement under section 19(2) that an issuing authority 'must' consider a defendant's criminal history, the current practice in relation to non-police applications is that the applicant or their representative obtains this material;
- while section 19 states that the court must consider the criminal record and past conduct of the defendant, the criminal record will only contain information regarding past domestic violence orders where there has been a breach of DVO.

Accordingly, the Central Australian Women's Legal Service recommended amending section 19(2) of the DFVA so that the defendant's criminal history and domestic violence history is automatically made available to the court at the time when an application for domestic violence has been brought before the court.

ALRC Recommendations

Recommendation 16-1

ALRC Recommendation 16-1 recommended that domestic violence legislation in each state and territory should require judicial officers making or varying a DVO to consider, under section 68R of the *Family Law Act 1975* (Cth), reviving, varying, discharging or suspending an inconsistent parenting order.

The Northern Territory Legal Aid Commission noted that this is already provided for under section 68R(5)(c) of the *Family Law Act*.

The Department of Children and Families noted that this aspect of the *Family Law Act* is not necessarily well understood or used by Territory judicial officers and that significant training of judicial officers, police and prosecutors would be required if applicants for DVOs were to seek orders under the *Family Law Act*.

The Northern Territory Police Force support this recommendation.

Recommendation 16-6

ALRC Recommendation 16-6 recommended that state and territory domestic violence legislation should provide that courts not significantly diminish the standard of protection afforded by a DVO for the purpose of facilitating consistency with a parenting order.

The Northern Territory Legal Aid Commission noted that this is already provided for under section 68R(5)(c) of the *Family Law Act*.

The Northern Territory Police Force supports this recommendation.

Observations

Child protection orders and mental health issues

While section 19(2) of the DFVA does not expressly provide that a court may consider child protection orders and a defendant's mental health, where these matters are relevant, the court must consider them under section 19(2)(e).

However, it is noted that there are a number of jurisdictions which expressly provide that a court must consider child protection orders when deciding to make a DVO. In Victoria and South Australia, there is a positive obligation on courts to enquire as to the existence of such orders.[37] In Western Australia, a court must not make a restraining order in relation to a child who is under the control of a person under a child welfare law without the intervention of the CEO (child welfare).[38]

No jurisdiction appears to expressly provide that a court must consider the mental health of a person when making a DVO.

Provision of criminal and related history to court

Similar to the DFVA, section 12(1) of the *Restraining Orders Act 1997* (WA) provides that the Court must consider the criminal record of the respondent and 'any previous similar behaviour of the respondent whether in relation to the person seeking to be protected or otherwise'. However, unlike the DFVA, or its equivalent in any other jurisdiction, the Western Australian Act also requires this information to be provided to the Court by the Commissioner of Police, where practicable. Specifically, section 12 provides that:

> '(4) The Commissioner of Police, is, where practicable, to provide to a court any information in the possession of the Police Force of Western Australia referred to in subsection (1)(h) or (i) that is relevant to a matter before the court.
>
> (5) The information is to be provided in the form of a certificate signed by a police officer of or above the rank of inspector.

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[37] ss 89 and 90 *Family Violence Protection Act 2008* (Vic) and s 23(1a)(a) *Intervention Orders (Prevention of Abuse) Act 2009* (SA).

[38] s 50B *Restraining Orders Act 1997* (WA).

(6) The certificate is prima facie evidence of the matters specified in it, without proof of the signature of the person purporting to have signed it or proof that the purported signatory was a police officer of or above the rank of inspector.'

Family Law Orders

The DFVA equivalents in Victoria, Queensland and South Australia are consistent with ALRC Recommendations 16-1 and 16-6.[39]

Note 2 of clause 15 of the Family Violence Bill 2016 (ACT) notes that section 68R of the *Family Law Act* gives a Territory court, in a proceeding for a DVO, jurisdiction in certain circumstances to revive, vary, discharge or suspend certain family law orders.

5.17 Sections 20 and 22 – Premises access orders and presumption in favour of protected person with child remaining at home

Background

Section 20 of the DFVA provides that the issuing authority must presume the protection of the protected person and child is best achieved at home. It applies if the defendant and protected person normally live in the same home with a child and in deciding the conditions of a DVO a restraint on having contact with the child is imposed on the defendant. This section does not prevent a DVO including a premises access order.

Section 22 provides that an issuing authority may include in a DVO a requirement to vacate premises and also conditions about access (a premises access order).

Submissions

The Alice Springs Women's Shelter recommended as follows:

> 'Northern Territory legislation should adopt the approach of other jurisdictions whereby courts must explicitly consider exclusion orders regardless of whether children are involved, and judges must give reasons when exclusion orders are applied for and are not granted. Courts should be required to consider ways in which to minimise disruption to the aggrieved person and their children when making a protection order.'

To this end they noted that:

- in the Australian Capital Territory (section 47 *Domestic Violence and Protection Orders Act 2008* (ACT)) and Victoria (section 82 *Family Violent Protection Act 2008* (Vic)), the court is required to consider the accommodation needs of the victim when making a final order, even when a child is not involved;
- in New South Wales, the court must give reasons for not granting a premises access order when such an application has been made (section 17(2)(c) and (4) of the *Restraining Orders Act 1997* (NSW))[40];

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[39] s 16 *Intervention Orders (Prevention of Abuse) Act 2009* (SA), Pt 3 Div 7 *Domestic and Family Violence Protection Act 2012* (QLD), e.g. s 90 and 176 *Family Violence Protection Act 2008* (Vic).

[40] The reference made by the Alice Springs Women's Shelter to section 17 of the *'Restraining Orders Act 1997 (NSW)'* appears as if it should be a reference to section 17 of the *Crimes (Domestic and Personal Violence) 2007* (NSW). The *Restraining Orders Act 1997* is an Act of the Western Australian Parliament.

- the Victorian and South Australian legislation explicitly enables the court to design DVOs which ‘minimise disruption’ for the aggrieved person and child, with the South Australian court considering the continuity and stability of care of any child and allowing the continuation of education, training and employment of a protected person and any child living with them (section 10(1)(d) *Intervention Orders (Prevention of Abuse) Act 2009* (SA)).

The Central Australian Aboriginal Family Legal Unit also recommended ‘that the presumption should delete the reference to “a child” altogether, so that the presumption is simply that the protection of the protected person is best achieved by them living in the home’.

ALRC Recommendations

Recommendation 11-8

ALRC Recommendation 11-8 recommended that state and territory domestic violence legislation should require judicial officers making DVOs to consider whether or not to make a premises access order, even if the defendant has a legal or equitable interest in such premises.

The Department of Education noted:

- that this may impact students residing at school boarding facilities;
- schools and boarding facilities may be premises that a defendant is prohibited from attending; and
- if the defendant is a student, ‘schools would need to consider alternative services to ensure the student complies with requirements under section 20 of the *Education Act*, for compulsory school aged children to participate in an approved education program or training, or paid employment’.

Recommendation 11-9

ALRC Recommendation 11-9 recommended that state and territory domestic violence legislation should provide that a court should only make a premises access order when it is necessary to ensure the safety of a victim or affected child. Also, further to the paramount consideration of safety, the primary factors to which the court should have regard in making such an order should 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 should 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.

The North Australian Aboriginal Justice Agency recommended as follows:

- the secondary factors to be considered should include the nature of any financial contributions made or to be made in relation to the property by both the defendant and the protected person; and
- premises access orders should only operate for a limited period. For example, where a defendant is excluded from his or her own home, the exclusion should only operate for a period sufficient to allow the victim to arrange alternative arrangements.

The Top End Women’s Legal service noted its support for this recommendation.

Recommendation 11-10

ALRC Recommendation 11-10 recommended that a court should be required to give reasons for declining to make a premises access order in circumstances where one has been sought.

The North Australian Aboriginal Justice Agency submitted that is particularly necessary in circumstances where either, or both, the defendant or protected person are not in attendance when the decision is made.

Observations

The *Domestic and Family Violence Protection Act 2012* (Qld) is consistent with ALRC Recommendations 11-8 to 11-10.[41] The *Family Violence Protection Act 2008* (Vic) is consistent with ALRC Recommendations 11-8 and 11-9.[42] These provisions also do not appear to prevent the court making an exclusion order in respect of the protected person alone.

The Family Violence Bill 2016 (ACT) is also consistent with ALRC Recommendations 11-9 and 11-10 and provides that a court may make an exclusion order in respect of the protected person alone.[43]

5.18 Section 21 – What DVO may provide

Background

Section 21 of the DFVA provides that a DVO can provide for the following orders:

- an order imposing the restraints on the defendant stated in the DVO that are considered necessary or desirable to prevent the commission of domestic violence against the protected person;
- an order imposing obligations on the defendant stated in the DVO as considered necessary to ensure the defendant accepts responsibility for the violence committed and to encourage the defendant to change his or her behaviour;
- other orders that are just or desirable to make in the circumstances of the particular case;
- an ancillary order that aims to ensure compliance by the defendant.

This section also sets out that an ancillary order may prohibit the defendant from engaging in specified conduct or require the defendant to take specified action. The regulations may make a provision about a matter relating to an ancillary order and section 21 is not limited by the specific orders provided in Part 2.3 of Chapter 2.

Submissions

The Domestic Violence Legal Service noted that, while the DFVA (sections 13(3) and 18(2)) enables children to be included as protected persons on a DVO, there is no clear power to make an order not to expose children to domestic violence where those children are not named as protected persons on the DVO.

They suggested that, as a result of this ambiguity, some judges have been reluctant to make orders preventing the defendant from exposing the children of the relationship to domestic violence where the children are not listed as protected persons.

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[41] ss 63 and 64.
[42] s 82.
[43] clause 39.

This can present an applicant with the challenge of instituting separate new proceedings for orders in relation to children.

Accordingly, the Domestic Violence Legal Service recommended amending section 21 of the DFVA 'to provide for the making of an order that the defendant is restrained from exposing the children of the parties to domestic violence where the children are not named as protected persons on the DVO'.

The Top End Women's Legal Service suggested that, while section 21 of the DFVA is broad enough to encompass an order prohibiting a defendant from attempting to locate a victim, it would be helpful to clearly state this in the legislation.

The Department of Children and Families submitted that '[i]t may be relevant for a [DVO] that prevents defendants from locating victims to include children of the victims'.

ALRC Recommendations

Recommendation 11-6

ALRC Recommendation 11-6 recommended that state and territory domestic violence legislation should expressly provide that a DVO may include a condition prohibiting a defendant from locating or attempting to locate the protected person.

This recommendation was supported by the Central Australian Aboriginal Family Legal Unit and the Northern Territory Police Force.

Observations

Prohibiting exposure of children to domestic violence

The DFVA equivalents in Queensland, Western Australia and the Australian Capital Territory are the only jurisdictions which expressly provide for the making of orders prohibiting a respondent from exposing a child to domestic violence. However, in both Queensland and Western Australian Acts, such orders can only be made in favour of a child who is named as a protected person.[44]

The *Domestic Violence and Protection Orders Act 2008* (ACT) is the only DFVA equivalent which expressly provides that a DVO may prohibit a defendant from engaging in certain conduct in relation to a child who is not named as a protected person.[45] However, that conduct does not include the full spectrum of domestic violence behaviour. However, this is proposed to be rectified in the Family Violence Bill 2016 (ACT). Specifically, clause 38(2)(i) (which replicates section 48(2)(h) of the current Act) provides that a DVO may prohibit the defendant from engaging in behaviour constituting domestic violence in relation to:

'(i) a child of the protected person; or

(ii) any other child if the court is satisfied that there is an unacceptable risk of the child being exposed to family violence'.

The Victorian Royal Commission into Family Violence has also recommended that the *Family Violence Protection Act 2008* (Vic) be amended 'to establish a rebuttable presumption that, if an applicant for a family violence intervention order has a child who has experienced

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[44] s 56(1)(c) *Domestic and Family Violence Protection Act 2012* (Qld) and s 13(1)(aa) *Restraining Orders Act 1997* (WA).

[45] s 38(2)(f) *Domestic Violence and Protection Orders Act 2008* (ACT) and s 58(e) *Restraining Orders Act 1997* (WA).

family violence, that child should be included in the applicant's family violence intervention order or protected by their own order [within 12 months]'.[46]

Prohibition on locating protected persons

The DFVA equivalents in both the Australian Capital Territory and Western Australia expressly provide that a DVO may prohibit a defendant from locating or attempting to locate the protected person.[47] The *Restraining Orders Act 1997* (WA) also provides that a defendant may be prohibited from '…asking someone else to locate the aggrieved or a named person if the aggrieved's or named person's whereabouts are unknown to the respondent'.

5.19 Section 23 – Order for replacement tenancy agreement

Background

Section 23 provides that the Court may terminate tenancy agreements and replace them so that the protected person rather than the defendant is the tenant.

Submissions

The Department of Housing recommended that section 23(3)(a)(i) of the DFVA be amended to remove the requirement to prove that a domestic relationship has broken down permanently. It was suggested that this would reduce further victimising and assist with preventing further disadvantage.

The Department of Housing also suggested enabling:

- final restitution for acts of violence such as damage to property to be made at the time a domestic violence order is made;
- costs incurred as a result of property damage to be recovered through the *Fines and Penalties (Recovery) Act*.

Observations

The Victorian Royal Commission into Family Violence has recommended amending section 233A of the *Residential Tenancies Act 2006* (Vic) (Application for new tenancy agreement because of final family violence intervention order) to empower the Victorian Civil and Administrative Tribunal (VCAT) to make an order for a replacement tenancy in the absence of a final DVO.[48] In noting that such an order would require the VCAT to determine whether domestic violence were in fact occurring, the Commission noted that the VCAT should have regard to specific criteria in considering whether to make a replacement tenancy, such as whether an application for a DVO has been made and, if so, the status of the application.[49]

The Victorian Royal Commission into Family Violence also recommended:[50]

- providing a clear mechanism for apportionment of liability arising out of the tenancy in situations of family violence, to ensure that victims of family violence are not held liable

[46] Victoria, Royal Commission into Family Violence, *Report and Recommendations* (March 2016) Recommendation 22.

[47] Ibid.

[48] Victorian Royal Commission into Family Violence, *Report and Recommendations* (March 2016) Recommendation 116.

[49] Ibid, vol IV, 123-124.

[50] *Above* and 40.

for rent (or other tenancy-related debts) that are properly attributable to perpetrators of family violence; and

- enabling victims of family violence to prevent their personal details from being listed on residential tenancy databases, and to remove existing listings, where the breach of the Act or the tenancy agreement occurred in the context of family violence.

5.20 Sections 24, 121 and 122 – Order for rehabilitation program

Background

Section 24 of the DFVA provides that a DVO can include an order requiring the defendant to take part in a rehabilitation program. This order can only be made if the court is satisfied the defendant is a suitable person to take part in the program, there is a place available in the program for the defendant and the defendant consents to the order. This order can be made subject to appropriate conditions.

Sections 121 and 122 of the DFVA provide the penalties for contravening a DVO by adults and young persons, respectively. The main difference between the prescribed penalties is that adults who have previously been found guilty of a DVO contravention must serve an actual term of imprisonment.

Submissions

A number of stakeholders[51] recommended that it should be mandatory for a defendant to attend counselling or behavioral change programs as part of a DVO made by the court, as is the case in other jurisdictions such as Victoria.

To this end, the Central Australian Aboriginal Family Legal Unit recommended the following amendments to section 24:

- The definition of “rehabilitation program” be expanded to specifically include counselling, courses and other programs.
- The defendant’s consent to participate in a rehabilitation program should not be required.
- That a provision be included specifically allowing the Court to adjourn an application for a DVO to enable a party to attend a rehabilitation program if considered appropriate.

They also recommended the establishment of effective behaviour change programs be made available across the Territory, particularly in rural and remote communities, noting that many of their clients who are victims of domestic violence do not want to leave their partners, but instead want them to have access to behaviour change programs to allow them to maintain their relationship.

The North Australian Aboriginal Family Legal Service recommended:

- replacing section 24 with a provision requiring mandatory attendance at an accredited men’s behavior change program following the making of a final DVO, subject to the Defendant being assessed as suitable for participation in the program;
- that failure to attend the assessment or the program should be treated as a separate offence to that of a breach of a DVO under the Act;

[51] Central Australian Aboriginal Family Legal Unit, Central Australian Women’s Legal Service and North Australian Aboriginal Family Violent Legal Service.

- that such a mandatory program roll out in specific regional areas, commencing first with Darwin and Katherine, then move out to the more remote areas; and
- a pilot program be implemented similar to those run by Child and Family Services in Ballarat, Victoria and Kildonan Uniting Care in Heidleberg, Victoria.

The Central Australian Aboriginal Family Legal Unit recommended amending sections 121 and 122 to enable the court to order a person found guilty of contravening a DVO to complete a rehabilitation program, including as an alternative to imprisonment for less serious breaches. They further suggested that the successful completion of a rehabilitation program be something that the court may consider in sentencing.

In noting that behaviour change programs are not generally available to men serving shorter sentences, Dr Sarah Holcombe suggested that rehabilitation could be made mandatory for all first time DVO defendants or, alternatively, in relation to their first breach of a DVO.

The Central Australian Women's Legal Service also noted that:

- 'the inclusion of such a requirement would place a responsibility on the defendant to address their abusive behaviour, hopefully reducing the risk of reoffending; and
- should this approach be adopted in the Northern Territory, it would be essential that adequate resourcing be provided for such programs to be appropriate to the Central Australia'.

ALRC Recommendations

Recommendation 11-11

ALRC Recommendation 11-11 recommended that state and territory domestic 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.'

The North Australian Aboriginal Justice Agency disagreed with this recommendation on the basis that it:

- it could result in large numbers of breaches for failing to attend a residential rehabilitation centre;
- is onerous; and
- even though the proposed penalty is a fine, this could have a significant impact on persons of limited financial means.

To this end, they recommended that '[i]f 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'.

This recommendation was supported by the Northern Territory Police Force.

The Central Australian Aboriginal Congress Targeted Family Support Service and Intensive Family Support Service queried 'why a defendant may not receive a prison sentence if he did not attend a rehab program that was a condition on the orders received?'

Recommendation 12-10

ALRC Recommendation 12-10 recommended that state and territory domestic violence legislation should not impose mandatory minimum penalties or mandatory imprisonment for the offence of breaching a DVO.

This recommendation was supported by the North Australian Aboriginal Justice Agency, the Northern Territory Legal Aid Commission and the Top End Women's Legal Service. In particular, the North Australian Aboriginal Justice Agency noted that:

- there is no evidence that mandatory penalties have reduced the incidence of domestic violence or breaches of DVOs; and
- consideration is required as to how imprisonment is likely to affect a victim where the relationship is to be ongoing. For example, imprisonment potentially punishes victims who are required to take sole parental and financial responsibilities for the children and household while the defendant is in prison.

This recommendation was not supported by the Northern Territory Police Force.

Observations

Mandatory rehabilitation

Victoria is the only jurisdiction in which it is mandatory for a person the subject of a 'protection order' to attend counselling. Specifically, section 129 of the *Family Violence Protection Act 2008* (Vic) provides that, upon the making of a final protection order against a person, the Court must order the person to be assessed in relation to their suitability to attend counselling. If the person is assessed as eligible to attend counselling, the Court must order the person to attend counselling. Pursuant to section 130 of that Act, it is an offence for the person to fail to attend counselling, without reasonable excuse.

Mandatory sentencing

It is noted that ALRC Recommendation 12-10 is contrary to current Northern Territory Government policy.

5.21 Sections 26, 123 and 124 – Prohibition on publication of personal details

Background

Section 26 of the DFVA provides that a Court DVO can prohibit the publication of personal details of a protected person or witness in a proceeding if satisfied the publication would expose the person to a risk of harm.

Section 124 makes it an offence if a person publishes a person's personal details in breach of an order made under section 26.

Section 123 of the DFVA provides that it is an offence for a person to publish the name of a child who is a protected person named in a domestic violence order or who is or may be a witness in a domestic violence order matter or who is or is likely to be mentioned in a domestic violence order.

The exceptions to this rule are if the publication occurs in an official report of the proceedings or if the Court consents to the publication.

Submissions

The Central Australian Aboriginal Family Legal Unit stated that:

> ‘the sections empowering the court to make orders prohibiting third parties from publishing information identifying the protected person are unclear and confusing, as evidenced earlier this year by 2 Alice Springs magistrates following 2 very different processes and in one case relying on another Act to make a non-publication order aimed at the media’.

Further, they noted that they have assisted a number of protected persons where the offender was a high profile person. In each case, the victims seriously considered not proceeding with a DVO due to concerns that they may become the focus of media attention and the implications it could have for their friends and family, and those of the offender, particularly given the small size of Alice Springs’ population.

The Central Australian Aboriginal Family Legal Unit recommended that:

- Section 26 be extended to empower the court to prohibit the publication of details of not only the protected person and witnesses but also the defendant’s where such publication may indirectly identify the protected person and expose that person to a risk of harm, including publication of the parties’ names being published in court lists.
- Sections 26, 123 and 124 be amended and extended to make it clear that a DVO may include a provision prohibiting both a defendant and third parties (such as newspapers) from publishing the names and identifying information about the protected person (irrespective of whether they are a child) and that there are clear penalties for breaches by third parties.’

ALRC Recommendations

Recommendation 30-3

ALRC Recommendation 30-3 recommended that non-publication provisions in state and territory domestic violence legislation should expressly allow disclosure of information in relation to DVOs and related proceedings that contains identifying information in appropriate circumstances, including disclosure of DVOs to the federal family courts under section 60CF of the *Family Law Act 1975* (Cth) (Informing court of relevant family violence orders).

The Alice Springs Sexual Assault Referral Centre supported this recommendation and the need for improved information sharing generally.

Observations

The DFVA equivalents in every jurisdiction except Western Australia prohibit, to some extent, the publication of identifying information about persons involved in DVO proceedings. The only jurisdiction which excludes defendants is South Australia.

In Victoria, Queensland and the Australian Capital Territory, the publication of this kind of material is an offence. In Victoria, it is an offence to publish a report about proceedings under

the *Family Violence Protection Act 2008* (Vic) or about DVOs which contain particulars that are likely to lead to the identification of the parties of the DVO or any persons involved in the proceedings,[52] unless the court orders that the particulars may be published.[53]

Similarly, in Queensland and the Australian Capital Territory it is an offence to publish information that identifies or is likely to identify any party to a proceeding or a witness to a proceeding.[54] In the Australian Capital Territory, this prohibition extends to information that identifies 'a person who is related to, or associated with, a party to the proceeding or is, or is claimed to be, in any other way concerned in the matter to which the proceeding relates.[55] The relevant provision of the current Act is retained in the Family Violence Bill 2016 (ACT).[56]

In New South Wales, Tasmania and South Australia, like in the Northern Territory, it is not an offence to publish identifying information unless the court has ordered that such information should not be published. In New South Wales 'a court may direct that the name of a protected person, a witness in [DVO] proceedings or a person otherwise involved in such proceedings must not be published or broadcast before the proceedings are concluded'.[57]

In South Australia, the court may prohibit the publication of a report about a proceeding under the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) or an order registered or issued under that Act which identifies or contains information which tends to identify persons involved in the proceeding.[58] However, pursuant to section 33(a) of that Act, defendants are expressly excluded.

In Tasmania, a court may prohibit the publication of any material relating to proceedings.[59] The publication of 'any reference or allusion' to any material which is forbidden to be published if that material may is intended or sufficient to disclose the material, is also taken to be a publication of the material.[60]

5.22 Section 27 – Duration of DVO

Background

Section 27 of the DFVA provides that a DVO (other than an interim DVO) is in force for the period stated in it.

Submissions

A number of stakeholders submitted that section 27 of the DFVA should be amended to provide a presumption that a DVO has no end date unless one is sought by the protected person and / or the court otherwise believes it is appropriate in the circumstances.[61] Each

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[52] s 166.

[53] s 169.

[54] s 159(1) *Domestic and Family Violence Protection Act 2012* (Qld) and s 111(1) *Domestic Violence and Protection Orders Act 2008* (ACT).

[55] Ibid.

[56] Clause 149(1).

[57] s 45(2) *Crimes (Domestic and Personal Violence) Act 2007* (NSW)

[58] s 33 *Intervention Orders (Prevention of Abuse) Act 2009* (SA).

[59] s 32(1) *Family Violence Act 2005* (Tas).

[60] Ibid, s 32(3).

[61] Alice Springs Women's Shelter, Central Australian Aboriginal Family Legal Unit, Central Australian Family Violence and Sexual Assault Network and Central Australian Women's Legal Service.

suggested section 11 of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) as a good example.

The Central Australian Family Violence and Sexual Assault Network and the Department of Children and Families also suggested that the presumptive departure point for finite DVOs should be between 2 and 5 years, not 6-12 months.[62]

Stakeholders made the following comments in support of indefinite DVOs:

- they would prevent victims having to repeat the process of proving their danger and the risk of re-traumatisation.[63] In particular, the Central Australian Aboriginal Family Legal Unit noted that victims are sometimes required to prove why the DVO should be renewed in circumstances where there has been no violence for a period of 6 months;
- they may benefit clients living in remote areas who may not be in a position to regularly engage with the legal system, despite ongoing concerns and the risk of further violence;[64]
- indefinite orders would provide more security to victims and their families;[65]
- the ongoing element of protection orders better reflects the nature of DFV, which is often perpetrated over a matter of years, and sometimes over a lifetime;[66] and
- they provide more certainty and predictability for the aggrieved person, while also giving them more control and agency over the court process and their own protection.[67]

The Alice Springs Women's Shelter, Central Australian Family Violence and Sexual Assault Network and Central Australian Women's Legal Service also noted that section 26(4) of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) provides that an 'intervention order' can only be varied or revoked where the court is satisfied that 'there has been a substantial change in the relevant circumstances since the order was issued or last varied'. This puts the onus on the offender to contest and demonstrate a significant change and provides incentive to address underlying behaviour. The Central Australian Women's Legal Service also implied that such a requirement might also be of benefit in circumstances where the defendant or family members attempt to pressure the protected person into varying or revoking the DVO.

Police DVOs

The Domestic Violence Legal Service recommended amending section 27 to ensure that the duration and enforceability of Police section 41 DVOs is beyond doubt, whether as made or varied on an interim basis.

This recommendation was based on ambiguity which existed in relation to section 27 and its application in relation to Police DVOs issued under section 41 of the DFVA. Specifically, it had been argued that:

- a Police DVOs is invalid and incapable of being confirmed by a court unless it specifies a duration; and

[62] The Northern Territory Police Force made a similar submission, but did not indicate a view as to whether or not a DVO should be for an indefinite period.

[63] Alice Springs Women's Shelter and Central Australian Aboriginal Family Legal Unit, Central Australian Family Violence and Sexual Assault Network.

[64] Alice Springs Women's Shelter and Central Australian Women's Legal Service.

[65] Ibid.

[66] Alice Springs Women's Shelter.

[67] Ibid.

- if a police DVO is not invalid for these reasons, it ceases to be in force either once it is confirmed by the Court or on the date it is listed to be heard in court.

Observations

These issues have since been clarified by Justice Southwood in *Houseman v Higgins* [2015] NTSC 88, who determined as follows:

'[1] This appeal raises for consideration the provisions of s 27 of the *Domestic and Family Violence Act 2007* (NT) and whether it is necessary for an authorised police officer to state in an order made under s 41 of the Act the period during which a domestic violence order is to be in force. In my opinion it is not necessary for the police to do so. A police domestic violence order continues in force until it is revoked either in accordance with Part 2.9 of the Act following a review, or under s 82 of the Act following a show cause hearing.'

In reaching this conclusion, His Honour determined that:

> 'On its face, [section 27] declares that a domestic violence order which is made for a stated period is in force for the period stated. The section does not state that the Court or authority which makes a domestic violence order cannot make an order for an unspecified period; nor is there any provision elsewhere in the Act which states that a domestic violence order cannot be made for an unlimited period or until further order.'

5.23 Section 30 – How application is made

Background

Section 30 of the DFVA provides that an application for a CSJ DVO must be made in the approved form and must be filed in the Court.

Submissions

The Domestic Violence Legal Service noted that:

- approved Forms 2 (Application for Domestic Violence Order), 3 (Application for Domestic Violence Order by Young Person) and 8 (Application to Vary/Revoke Domestic Violence Order) require an applicant / protected person to specify their address on the covering page of the application, both in the 'applicant' and 'protected person' fields;
- applicants are not often aware that the application, along with their address, will be served on the defendant;
- there have been a number of cases where this has resulted a defendant being provided with the applicant's address, and on one occasion, the address of the women's shelter where the applicant was residing;
- it is aware of two cases in the last year where clients have reported that Registry staff have insisted that the applicants include their address on the application, despite telling court staff they feared the defendant learning their respective addresses.
- the disclosure of the applicants' previously unknown address could have disastrous consequences for the applicant.

Accordingly, the Domestic Violence Legal Service recommended:

- amending section 30 to make it clear that the applicant's address must not be stated on an application where to do so would compromise the safety of the applicant / protected persons named on the application;
- redesigning the application forms so that an applicant may choose whether to withhold or disclose their address; and

- the introduction of a procedure requiring Registry staff to check with the applicant if their address can be disclosed to the defendant, and if not, to redact the applicants address in the application and supporting affidavit.

Observations

It is noted that section 25 of the DFVA provides that a protected person's address, or intended residential address, must not be stated in a DVO unless the issuing authority is satisfied that defendant knows the address or it is necessary to achieve compliance with the order and will not seriously threaten the safety of the protected person.

Further, pursuant to section 43 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW), 'the address at which a protected person resides or intends to reside must not be stated in an application for a [DVO] or an order', unless the protected person consents, the defendant already knows the address or where it is necessary to state the address in order to achieve compliance with the order.

Similarly, pursuant to section 21 of the *Domestic Violence and Protection Orders Act 2008* (ACT), if a DVO application form requires the protected person's address, the address need not be included unless the protected person agrees to it being included. This provision is retained by clause 17 of the Family Violence Bill 2016 (ACT).

5.24 Section 31 – Notice of hearing of application

Background

Section 31 of the DFVA provides that, as soon as practicable after the application is filed, a registrar must give written notice to the parties of the DVO of the time and place for hearing the application.

Submissions

Both the Central Australian Aboriginal Family Legal Unit and the Central Australian Women's Legal Service noted that it is common practice that, when an application for a DVO is initiated, the defendant is served with a copy of the application and the supporting affidavit. The Central Australian Women's Legal Service noted that this is despite the fact that neither section 31 of the DFVA, nor the *Local Court (Criminal Procedure) Act*, expressly requires a supporting affidavit to be filed at the time the application is lodged.

They expressed the following concerns about the defendant being served with a copy of the supporting affidavit before the matter reaches court:

- the information contained in the supporting affidavit may aggravate the defendant as well as the families of the defendant and the victim; and
- there is a significant risk that sensitive information could be circulated within the community, causing the victim shame. For example, these documents may be served through being left with another resident of the defendant's home.

The Central Australian Women's Legal Service also noted that police have expressed concerns regarding the amount of paperwork needing to be served on defendants.

Accordingly, both the Central Australian Aboriginal Family Legal Unit and the Central Australian Women's Legal Service recommended amending section 31 to expressly indicate that the defendant should only initially be served with a copy of the DVO application, with a copy of the supporting affidavit to be provided once the defendant attends court or upon request of the defendant or their legal representative.

Both submitted that such an amendment is unlikely to prejudice the defendant in any way.

The Central Australian Aboriginal Family Legal Unit also submitted that:

> '…the benefits of providing the affidavit to the defendant at a later stage of proceedings outweigh any advantages of providing it earlier, particularly given that it is our submission that defendants be required to actively participate in DVO court proceedings as part of them taking responsibility for their actions and due to the longer durations of DVOs that we are proposing.'

Observations

As in the Territory, none of the DFVA equivalents in any of the other jurisdictions appear to require that an application must include a supporting affidavit.

5.25 Section 38 – When consent DVO may be made

Background

Section 38 of the DFVA provides that a defendant may consent to a DVO being made by the Court or by a registrar of the Court.

Submissions

The Top End Women's Legal Service recommended that reciprocal DVOs should not be made by consent, but rather the court must be satisfied that there are grounds for making an order against each party.

The Central Australian Aboriginal Family Legal Unit noted that:

> 'it has been involved in a number of cases where the victim is in a relationship with the offender and wants to continue to be in a relationship with the offender but also wants a non-intoxication or non-harm DVO in place for their safety. The victim also reports that she has spoken to the offender about it and the offender has indicated to the victim that he would consent to such an order being made'.

Accordingly, they noted their support for the development of a form and a Court process to enable the parties to file a consent application for a DVO, similar to an application for consent orders in the family law courts. They suggest that such would reduce the need to re-traumatise victims as they would not need to file an affidavit (which is by its nature likely to offend the offender) and save lawyers, courts and police resources.

ALRC Recommendations

Recommendation 18-5

ALRC Recommendation 18-5 recommended that mutual protection orders should not be made by consent.

The Northern Territory Legal Aid Commission submitted that:

> 'We support this recommendation but believe they should go further and allow for mutual consent orders without admissions to liability once the court has determined that grounds exist for making the order. If defendants don't have the ability to consent without admission of liability more matters will be contested which will impact on Court resources and more importantly, victims.'

They also noted that:

- defendants often rely on cross-applications to further harass and threaten victims and pressure them into withdrawing their initial application; and
- the situation in the Territory is further complicated by the possibility of reciprocal police DVOs under section 41 of the DFVA.

Observations

It is noted that while the Family Violence Bill 2016 (ACT) adopts a number of the ALRC Recommendations, this is not the case in relation to recommendation 18-5. However, clause 33 of that Bill provides that before making a final consent order, the court may conduct a hearing in relation to the particulars of the application if the court is satisfied that it is in the interests of justice to do so.

5.26 Sections 36, 40, 46 and 83 – Notice of DVO

Background

Section 36 of the DFVA provide that, as soon as practicable after a Local Court DVO or interim DVO is made, a registrar must give a copy of it to the parties to the DVO and the Commissioner of Police (if a police officer is not already a party).

Section 40 provides as soon as practicable after a consent DVO is made, a registrar must give a copy of it to the parties to the DVO and the Commissioner of Police (if a police officer is not already a party).

Section 46 provides that as soon as practicable after a DVO is made under section 45 of the DFVA, the court must give a copy of it to the parties to the DVO and the Commissioner of Police. Section 45 provides that a court before which a person pleads guilty to, or is guilty of a domestic violence related offence can make a DVO.

Section 83 provides that, where the Court makes a decision in relation to a hearing under Part 2.10 (Confirmation of domestic violence orders), as soon as practicable after the Court makes its order, a registrar must give to the parties to the DVO and the Commissioner of Police:

(a) 'If it confirms the DVO without variation or revokes it – written notice of that order; or

(b) If it confirms the DVO with variations – a copy of the DVO as varied.'

Each of these provisions notes that under section 119, 'a copy of a DVO is given to the defendant if the defendant is before the Court when it is made. Otherwise a copy of a DVO is given to the defendant if it is given in any of the ways mentioned in that section'.

Pursuant to section 119, the other ways a DVO may be given to a defendant are:

- if it is served in a way mentioned in section 25 of the *Interpretation Act*; or
- if a police officer informs the defendant, orally or in writing, of its making and terms; or
- if it is given to the defendant in another way the Court or a Judge orders.

Submissions

The Northern Territory Police Force recommended that consideration be given to abolishing the requirement to re-serve DVOs on defendants as the transient population of the Northern

Territory creates extreme challenges in serving documents during various stages of proceedings.

They also submitted that interims orders that are confirmed in identical terms should not have to be re-served to be effective.

Observations

Pursuant to section 113(2) of the *Domestic and Family Violence Act 2012* (Qld), if a court makes an interim DVO that includes the same conditions as a police DVO, the interim DVO is taken to have been served on the respondent when it is made.

5.27 Section 41 – When authorised police officer may make DVO

Background

Section 41 of the DFVA provides in what circumstances a police officer may make a DVO under Part 2.6 of the DFVA. In particular, that section provides that an authorised police officer may make a DVO if satisfied that it is necessary to ensure a person's safety because of urgent circumstances or because it is not otherwise practicable to obtain a Local Court DVO and satisfied that a Local Court DVO might reasonably have been made had it been practicable to apply for one.

Submissions

The Central Australian Aboriginal Family Legal Unit submitted that 'section 41 should explicitly require the wishes of the protected person to be considered by the police before they issue a police DVO, unless it is not appropriate due to urgent circumstances'. They also noted that:

- Police DVOs are generally listed for confirmation in the first domestic violence duty list which in Alice Springs is Monday, leaving minimal time for the victims to seek legal advice or make an informed and considered decision in relation to the terms of the DVO before it is confirmed, especially if the violence occurred on a Thursday or Friday;
- it is not uncommon for victims of domestic violence to seek assistance from its service to vary a Police DVO which was only confirmed a few weeks earlier; and
- by allowing parties extra time between the 'violent act' and confirmation of the DVO by the Court, there may be less applications to vary DVOs saving Court, Police and legal resources.

To this end, the Central Australian Aboriginal Family Legal Unit submitted that the date of listing a police DVO before a court for confirmation should be set at least 7 to 14 days from the date of issue, with scope for parties to request the matter be re-listed at an earlier date if required.

The Central Australian Aboriginal Congress Targeted Family Support Service and Intensive Family Support Service suggested that where a Police DVO is issued and it is known that the adults involved have children, even though the children may not have been present at the time of the domestic violence incident, the children should be included as protected persons on the DVO.

ALRC Recommendations

Recommendation 9-1

ALRC Recommendation 9-1 recommended that:

- police issued DVOs should be called 'safety notices' or 'notices' to distinguish them from court DVOs;
- police may only issues a DVO where it is not reasonable or practicable for:
  '(a) the matter to be immediately heard before a court; or
  '(b) police apply to a judicial officer for an order (by telephone or other electronic medium).
- Police issued DVO should:
  - act as an application to the court for a DVO;
  - act as a summons for the defendant to appear before the court; and
  - expire at the first mention the defendant appears at court.

The Northern Territory Police Force did not support this recommendation, noting that:

- police issued DVOs are clearly defined as 'police DVOs', which sufficiently differentiates them from 'court DVOs';
- it opposes further limiting the circumstances in which a police DVO may be issued, noting that police DVOs are only interim in nature and must be finally determined by a judicial officer;
- in light of the dispersion of the population across the Territory and its transient nature, the circumstances in which police DVOs can be issued should be expanded.

The North Australian Aboriginal Justice Agency submitted that the DFVA should provide that a police DVO expires on the first return date, regardless of whether the defendant appears in court, to avoid it continuing indefinitely, at which time the court can make the DVO if satisfied that there are grounds to do so or make an interim order.

Recommendation 9-2

ALRC Recommendation 9-2 recommended that state and territory domestic 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.'

The Central Australian Aboriginal Family Legal Unit, North Australian Aboriginal Justice Agency and Relationships Australia were each supportive of this recommendation. In particular, Relationships Australia noted that they are aware of 'instances when people have presented to the police to report family violence and been talked out of it by front office staff, leaving the vulnerable party feeling humiliated and powerless'. To this end, they noted that they support all levels of front line staff in policing having extensive training in the dynamics and effects of family violence.

The Northern Territory Police Force submitted that this recommendation is already implemented through police policies and procedures and should not be legislated.

Observations

Views of protected persons

No jurisdiction which permits the making of a DVO by police provides that the police officer making the DVO must have regard to the views of the protected person.

When police must make application for child

In New South Wales, a police officer must make a police DVO in certain circumstances, including in relation to a child where the police officer suspects that an offence under section 227 (Child and young person abuse) of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) has recently been or is being committed, or is imminent, or is likely to be committed, against the child for whose protection the order would be made.[68] In essence, section 227 of that Act relates to action that has resulted in or appears likely to result in physical injury, sexual abuse or significant emotional or psychological harm to a child.

Time for first mention of police DVO

It is noted that the Victorian Royal Commission into Family Violence has recommended that section 31 of the *Family Violence Protection Act 2008* (Vic) be amended 'to stipulate that the first mention date for a family violence safety notice [the equivalent of a police DVO] must be no later than 14 days after the notice, or form of notice, is served [within 12 months]'.[69] Currently, that section provides that the first mention date must be no later than 5 working days after the notice is served, unless it excludes the defendant from premises, in which case the matter must be mentioned as soon as is practicable.[70]

5.28 Sections 43 and 89 – Explanation of Police and Court DVOs

Background

Section 43(1) provides that as soon as practicable after a police DVO is made, a police officer must provide a copy to the parties of the DVO and send the original to the Court.

Section 43(2) provides that, if the DVO is personally given to the defendant, the officer must explain:

(a) the effect of the DVO, including any restrictions and obligations imposed by the DVO;

(b) the consequences that may follow if the defendant contravenes the DVO; and

(c) the defendant has a right to apply for a review of the DVO under Part 2.9.

Section 43(3) provides that, as far as it is reasonably practicable to do so, the explanation must be given in a language or in terms that are likely to be readily understood by the defendant.

Section 89 of the DFVA provides that when a Court DVO is made, confirmed or varied, the issuing authority must explain to the defendant and protected person, if the protected person is present, the effect of any restrictions and obligations stated in the order; that the order can be registered interstate or in New Zealand, the consequences of a contravention of the order and how it can be varied or revoked. This must be done in a language or in terms the defendant and/or protected person is likely to readily understand.

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[68] s 49(1)(b) *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

[69] Victorian Royal Commission into Family Violence, *Report and Recommendations* (March 2016) Recommendation 76.

[70] s 31(3) *Family Violence Protection Act 2008* (Vic).

Submissions

The Domestic Violence Legal Service and the Central Australian Aboriginal Legal Service recommended that section 43 should be amended to provide that police must give the protected person the same explanation of the DVO which they are required to give to the defendant under section 43(2). Additionally, the Central Australian Aboriginal Family Legal Unit submitted that section 43 should be amended to require police to explain:

- to both parties – their rights to obtain legal advice and to provide them with contact details for legal service providers; and
- to the defendant – that they are required to attend court (in accordance with their submission in relation to section 31), when and the consequences for not attending court.

The Central Australian Aboriginal Family Legal Unit recommended that section 89 'should provide a requirement that the issuing authority offer the parties who are present the opportunity to obtain legal advice and representation in the matter'.

The North Australian Aboriginal Justice Agency made the following submission:

> '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 [police DVO] that the notice was not explained in a language in which the defendant had a reasonable proficiency.

ALRC Recommendations

Recommendation 11-12

ALRC Recommendation 11-12 recommended that where appropriate, state and territory courts should provide defendants with information about relevant culturally and gender-appropriate rehabilitation and counselling programs.

This recommendation was supported by the Central Australian Aboriginal Family Legal Unit.

Observations

Police DVOs

The DFVA equivalents in Western Australia, Queensland and South Australia provide that where a police officer makes a police DVO, the officer must explain the notice to both the defendant and the protected person. The matters required to be explained, are as follows:

- Western Australia:
  - the purpose, duration, terms and effects of the police DVO;
  - the consequences that may follow if the defendant contravenes the police DVO; and
  - that counselling and support service may be of assistance, and where appropriate, the police officer is to refer the person to specific services;[71]

[71] s 30E *Restraining Orders Act 1997* (WA).

- Queensland:
    - the purpose of the police DVO;
    - the duration of the police DVO;
    - the conditions of the police DVO;
    - the consequences of the defendant contravening the police DVO;
    - that the protected person cannot consent to the defendant contravening the police DVO;
    - that the police DVO is taken to be an application for a court DVO made by a police officer;
    - that the hearing of the application for the court DVO will be heard at the local Magistrates Court for the defendant at the date and time stated in the police DVO; and
    - the right of the defendant or protected to obtain legal advice before attending court;[72] and
- South Australia:
    - the terms and effect of a police DVO and any associated order, including that the police DVO acts as a summons;
    - if relevant, the effect of section 16 (inconsistent *Family Law Act* or *Children's Protection Act* orders); and
    - that a protected person cannot give permission for contravention of an order, (but failure to do so will not make an order invalid).[73]

Court DVOs

As section 89 applies at the time a court DVO is made, confirmed or varied, it is unclear what benefit would be gained from amending that section to require the Court to offer the parties the opportunity to obtain legal advice and representation.

However, it is noted that section 151 of the *Family Violence Protection Act 2008* (Vic) provides that:

> '(1) A court hearing a proceeding under this Act may, on its own initiative or on the application of a party to the proceeding, adjourn the hearing of the proceeding to give a party a reasonable opportunity to obtain legal advice.
>
> (2) The court may resume the proceeding if it is satisfied that the party has had a reasonable opportunity to obtain legal advice, whether or not that advice has been obtained.'

Similarly, section 61 of that Act provides that the court must not proceed to hear a contested application for a final order on a mention date unless the court is satisfied, amongst other things, that the parties have had an opportunity to seek legal advice and representation.

[72] s 110(3) *Domestic and Family Violence Protection Act 2012* (Qld).

[73] s 17 *Intervention Orders (Prevention of Abuse) Act 2009* (SA).

Further, the Victorian Royal Commission has recommended amending the *Family Violence Protection Act 2008* (Vic) to, amongst other things:

- require the court to give protected persons and the respondent, on the making of an interim or final DVO, an explanation of how the DVOs interacts with any existing or new family law orders and child protection orders;
- permit the court to, when the parties are legally represented, request that the parties legal representatives provide the requisite explanation;
- if the parties do not appear before the court, require the relevant registrar to provide information in writing on the interaction between either an interim or final DVO and any applicable family law or child protection orders.[74]

5.29 Section 45 – Power of court if person guilty of related offence

Background

Section 45 of the DFVA provides as follows:

‘(1) A court before which a person pleads guilty to, or is found guilty of, an offence that involves domestic violence may make a domestic violence order under this Part against the person if it is satisfied a Local Court DVO could be made against the person.

(2) The court may make the order on its own initiative or on application by the prosecutor.

(3) If a DVO is already in force against the person, the court:

(a) must consider the DVO and whether, in the circumstances, the DVO needs to be varied, including, for example, by varying the date the DVO ends; and

(b) may vary the DVO if the court considers it needs to be varied.

(4) This section applies whether or not the court makes another order in relation to the person.’

Submissions

The Central Australian Aboriginal Family Legal Unit made the following recommendations:

- section 45(1) ‘should be amended to provide that a court, after dealing with an offence that involves domestic violence may make a DVO if satisfied a [Local Court DVO] could be made against that person, and remove the requirement that it is only upon a finding of guilt, given that a DVO can be made based on the lower burden of proof of the balance of probabilities’; and
- section 45(2) ‘should be amended to include that an application can be made by the victim of the offence or another person on the victim’s behalf, not just on the court’s initiative or on an application by a prosecutor’.

They also noted that they:

> ‘…support [section 45] being expanded to make it clear that immediately following the outcome of the criminal hearing, the Court may deal with an application by the protected person for a DVO, which isn’t police initiated, and that the court can rely on the evidence of the criminal matter just dealt with along with any additional evidence filed at the time in support of the DVO in determining the application.

[74] Victorian Royal Commission into Family Violence, *Report and Recommendations* (March 2016) Recommendation 132.

> For example earlier this year our service was assisting a victim with an application for a DVO and whilst the process was on-foot the defendant was charged with making a threat to kill the victim. The victim instructed us that she wanted a full non-contact DVO and that it needed to include an order that the defendant keep his dogs restrained. The police agreed to apply for a full non-contact DVO on the victim's behalf at the end of the criminal hearing, but not to apply for the additional order in relation to the dogs because it didn't form part of the evidence of the criminal hearing. By including the above amendment, it would have enabled the client to file a small affidavit setting out the grounds in support of the order in relation to the dogs only, as much of the other evidence was already before the court. This would have reduced any re-traumatisation of the victim, resulted in a more quick and efficient outcome for the victim and save court, police and legal resources.'

ALRC Recommendations

Recommendation 11-3

ALRC Recommendation 11-3 recommended that state and territory domestic violence legislation should include an express provision conferring on courts a power to make a DVO on their own initiative at any stage of a criminal proceeding and that where such an order is made prior to a plea or finding of guilt, it should be made on an interim basis until there is a plea or finding of guilt.

This recommendation was supported by the Central Australian Aboriginal Congress Targeted Family Support Service and Intensive Family Support Service, Central Australian Aboriginal Family Legal Unit and the Top End Women's Legal Service.

However, the Central Australian Aboriginal Congress Targeted Family Support Service and Intensive Family Support Service suggested that 'that there should be a statement advising that consultation should occur with the victim around the content of the protection order'. They also made the same suggestion in relation to ALRC Recommendations 11-4 and 11-5.

Recommendation 11-4

ALRC Recommendation 11-4 recommended that state and territory family violence legislation should expressly empower prosecutors to make an application for a DVO where a person pleads guilty or is found guilty of an offence involving family violence.

This recommendation was supported by the Central Australian Aboriginal Congress Targeted Family Support Service and Intensive Family Support Service, Central Australian Aboriginal Family Legal Unit and the Northern Territory Police Force.

Recommendation 11-5

ALRC Recommendation 11-5 recommend that state and territory legislation should provide that a court before which a person pleads guilty, or is found guilty of an offence involving domestic violence, must consider whether any existing DVO obtained under family violence legislation needs to be varied to provide greater protection for the person against whom the offence was committed.

The Central Australian Aboriginal Congress Targeted Family Support Service and Intensive Family Support Service, Central Australian Aboriginal Family Legal Unit, North Australian Aboriginal Justice Agency and the Northern Territory Police Force supported this recommendation.

However, the North Australian Aboriginal Justice Agency recommended that '[t]his 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'.

Observations

It is noted that section 36 of the *Family Violence Act 2004* (Tas) provides as follows:

> 'Where, in proceedings for a family violence offence, the court or a judge is satisfied on the balance of probabilities as to the matters set out in section 16(1), the court or judge may make an order under this Act in addition to any other order which the court or judge may make.'

Section 16(1) of that Act provides that a court may make a DVO if satisfied, on the balance of probabilities, that a person has committed domestic violence and may again commit domestic violence.

5.30 Section 48 – Who may apply for variation or revocation

Background

Section 48 of the DFVA sets out the persons who can apply for a variation, or the revocation, of a DVO (other than an interim DVO). These people include adults, persons aged between 15-18 in a domestic relationship, a police officer or persons acting for a protected person, the defendant and a person granted leave by the Court to make the application. While an application may be made by only one person it may be for the protection of more than one person.

The Court may only deal with an application by a defendant if it is satisfied there has been a substantial change in circumstances since the making of, or last variation of, the DVO.

Submissions

The Domestic Violence Legal Service noted that a 'young person' (between 15 and 18 years old) may apply under section 28(3) for a domestic violence order with the leave of the court. The court may grant leave only if satisfied:

- (a) 'the young person understands:
  - (i) the nature, purpose and legal effect of the application; and
  - (ii) the legal effect of the making of a DVO; and
- (b) the young person has the capacity to make the application'.

Section 48(1)(a) provides that a young person may apply to the court to vary or revoke a DVO. However, there is no requirement for a young person to seek the leave of the court when making such an application, unless they are the defendant.

The Domestic Violence Legal Service recommends amending section 48 'to require that where a young person makes an application to vary/revoke, they must first apply for leave of the court, using the same considerations set out in s 28(4)'.

In particular, the Domestic Violence Legal Service noted that this amendment is necessary 'because in many cases the young person will not be the original applicant for the DVO subject to the application to vary and therefore the Court will not previously have been satisfied as to the young person's understanding or capacity to make the application to vary or revoke'.

5.31 Section 57 – Referral of application to court

Background

Section 57 of the DFVA provides that if the registrar of the Court is not satisfied a DVO should be made or if the defendant does appear (despite not being summonsed) and does not consent, the clerk must refer the matter to the Court.

Submissions

The Central Australian Aboriginal Family Legal Unit submitted that 'section 57(1)(b) should be amended so that it applies to not only the defendant but any party who appears at the hearing of the application and does not consent to an order being made'.

5.32 Section 81 – Appearing at Hearing

Background

Section 28 provides that police may apply for a Local Court DVO. Section 29 provides Police or a child protection officer must apply for a DVO in certain circumstances.

Section 81 of the DFVA provides that a protected person may appear at the hearing of a proceeding. That section also provides that if the defendant has been summoned under section 44 or 71, then the Commissioner of Police is a party to the proceeding.

Section 52 provides that persons with a direct interest in a domestic violence order must be given a right to be heard prior to the revocation or variation. For an application on a Court order that is a police order confirmed under Part 2.10, the Commissioner has a right to be heard.

Submissions

The Domestic Violence Legal Service noted that the DFVA does not expressly provide that the Police are a party to the hearing of an application for a DVO under sections 28 or 29. Similarly, a child protection officer is not expressly a party to the hearing of an application for a DVO made under section 29.

The Domestic Violence Legal Service suggested that the wording of these sections can give rise to ambiguity regarding whether it can be accepted that Police act for a protected person where:

- the protected person engages legal services; or
- the protected person appears self-represented and indicates that Police do not act on their behalf.

The Domestic Violence Legal Service further stated that:

> 'we note that similar concerns in relation to standing will apply in relation to applications to vary orders originally initiated by Police or [a child protection officer], under Part 2.8. We do note there is provision here however for "persons who, in [the Court's] opinion, have a direct interest in the outcome". It is hard to predict in what circumstances the Court would determine if the Police or a [child protection officer] have a direct interest in the outcome. In circumstances where Police or Child Protection have made the application, it would be preferable that they have a clear right of appearance throughout the proceedings.'

Accordingly, the Domestic Violence Legal Service recommended that section 81 should be amended to include that if a police officer has applied for a DVO under section 28, the Commissioner is a party to the proceeding and, if a police officer or child protection officer has applied for a DVO under section 29, then the police officer or child protection officer is a party to the proceedings. They also suggested that a similar amendment to section 52 should also be considered given that it does not include police officers and child protection officers in relation to DVOs made under sections 28 or 29 of the DFVA.

5.33 Section 82 – Decision at hearing

Background

Section 82 of the DFVA provides that, at a hearing under Part 2.10, a Court may confirm the DVO or revoke it. However, before doing so, the Court must be satisfied that the defendant has been served with the copy of the domestic violence order and must have considered the evidence before it and any submissions in respect of the evidence.

Submissions

The Central Australian Aboriginal Family Legal Unit submitted that 'section 82 should provide the court with specific adjournment powers for the purposes of allowing the defendant to complete an approved rehabilitation program'.

The Domestic Violence Legal Service recommended a number of amendments to section 82. These are discussed below.

Interim variation of police DVOs by parties

The Domestic Violence Legal Service submitted there is no clear power under the DFVA to make an interim variation to a police DVO issued under section 41, except in urgent circumstances pursuant to Part 2.8 Division 2 (Variation of domestic violence orders in urgent circumstances).

Conversely, in relation to a Court DVO (being a DVO other than a police DVO), section 52A provides that the Court is empowered to make an interim variation order 'until the application is finally decided'.

As a result, despite the Court's daily practice of varying section 41 DVOs on an interim basis where there is consent, 'when there is no consent, Magistrates [now Local Court Judges] often find that they cannot amend even when it is their view that the evidence does not warrant the terms of the order or an order at all…'.

Accordingly, the Domestic Violence Legal Service recommended amending section 82 to clearly allow for variations to section 41 Police DVOs on an interim basis with the consent of the parties, noting the following benefits:

- Police DVOs are not always adequate and should be capable of being varied on an interim basis to ensure the safety of the protected person;
- sometimes Police DVOs are too restrictive and need to be relaxed, for example, to enable the defendant to contact his or her children, to avoid defendants being made unnecessarily homeless etc;
- to enable the defendant to attend a behaviour change program or similar.

However, they also suggested that:

> 'In providing a power for an interim variation to a section 41, regard needs to be had to under what circumstances this may occur. It seems unproblematic to say this may rightly occur with the consent of all of the parties (Police, protected person and defendant) and the imprimatur of a Court satisfied that the orders so varied will be appropriate having regard to the safety of the protected persons.'

Similarly, the Northern Territory Police Force noted the following in relation to Part 2.8 of the DFVA:

- Division 1 only provides for the variation of court issued DVOs; and
- Division 2 details requirements for variation in urgent circumstances, for court issued DVOs and police DVOs.

To this end, they recommended that '[b]oth these divisions should be reviewed in full to ensure that all types and aspects of DVOs are sufficiently covered. Currently, limitations exist that effect the operation and adaptability of police issued DVOs and applications for DVOs'.

Courts power to vary or revoke police DVOs

The Domestic Violence Legal Services submitted that the DFVA provides no clear power for a Court to vary or revoke a police DVO before hearing, even in circumstances where there is no material before the Court supporting the making of the order.

Conversely, section 35A (Court may refuse to hear application or order stay of proceeding) provides that the Court may refuse to hear an application or may order a stay of proceedings if satisfied that the application for a DVO is frivolous, vexatious or an abuse of process of the Court.

Accordingly, the Domestic Violence Legal Service recommended amending section 82, so that it is broadly consistent with section 35A(1), to provide that:

- on the first occasion a police DVO is before the Court, the Court must consider whether the order should continue in the terms made or with different terms; and
- where no grounds to make a DVO are disclosed or those grounds are manifestly inadequate, the Court may summarily revoke the police DVO.

In particular, the Domestic Violence Legal Service noted that shifting the power in relation to the continuation of police DVOs to the Court will assist to:

- ensure the police DVOs are in appropriate terms and provide the appropriate level of protection where it continues in force beyond the initial return date;
- promote robust and thorough police practices, ensuring victims receive the protection they require at the earliest possible time;
- increase the level of protection under a police DVO where they are insufficient and there are strong grounds for the increased protection;
- ensure offenders who have had a police DVO made against them, and the grounds for the order are manifestly inadequate, are not unnecessarily required to run a contested hearing in response to a matter that does not meet the bare threshold for the making of a DVO; and
- maintain community confidence in the DVO system.

Protected person's views in relation to the revocation of DVOs

The Domestic Violence Legal Service noted that section 82 does not require the protected person's views be considered in relation to the revocation of a DVO. While section 82(2) provides that the Court must not confirm a DVO unless it is satisfied the defendant has been given a copy of the DVO and it has 'considered any evidence before it and submissions of the parties', no similar requirement exists in relation to the revocation of a DVO.

They further noted that:

- they have been involved in and observed matters where Police DVOs have been made, revoked and varied without fresh regard to the wishes of the protected person; and
- decisions made about DVOs without reference to the wishes of the protected person can result in a range of potentially adverse outcomes, including persons in need of protection being left unprotected.

Accordingly, the Domestic Violence Legal Service recommended that 'section 82(2) be amended to include reference to revocation as well as confirmation, and consideration of inclusion of [a] sub section requiring the Court be satisfied the protected person has been given notice of the Court's intention to revoke the order'.

Similarly, the Alice Springs Sexual Assault Referral Centre submitted that there 'needs to be greater flexibility enabling the victims having input in to the protections orders and subsequent process to amend orders'.

Observations

Behaviour change programs before final order

While the majority of jurisdictions currently provide that the court may make an order for rehabilitation, such orders can generally only be made when making a DVO. However, it should be noted that in Western Australia, a police officer making a police DVO may also refer a person to counselling.[75]

5.34 Section 85 – Retrieval of defendant's personal property

Background

Section 85 of the DFVA provides that where a premises access order has been made, the defendant may return to the premise for the purpose of collecting their personal property accompanied by a police officer to retrieve that personal property. In these circumstances, the defendant is not in contravention of the DVO because of the entry to the premises.

Submissions

The Domestic Violence Legal Service noted that while section 85 of the DFVA provides for the retrieval of the defendant's personal property where a DVO includes a premises access order, the DFVA does not provide a similar right of retrieval to the protected person.

[75] s 30E(3) *Restraining Orders Act 1997* (WA).

To this end, the Domestic Violence Legal Service noted that it is not uncommon for a protected person to flee premises of the defendant, leaving behind property. Accordingly, they recommend including a similar provision enabling protected persons to retrieve belongings from the residence of the defendant with Police assistance.

The Central Australian Aboriginal Family Legal Unit recommended amending section 85(2) by inserting an additional subsection 'which requires reasonable prior notice to be given to the protected person before property is retrieved by the defendant'. They suggested this amendment is necessary to enable protected persons to make appropriate arrangements to not to be present at the property if necessary or to organise a support person to be present during the retrieval of the property.

ALRC Recommendations

Recommendation 16-11

ALRC Recommendation 16-11 recommended that state and territory domestic violence legislation should require courts, when considering whether to make personal property directions in proceedings for a DVO, to inquire about and consider any property orders under the *Family Law Act 1975* (Cth), or pending applications for such orders.

The Northern Territory Legal Aid Commission submitted that:

> 'Whilst an important inquiry to make, the considerations for exclusion/sole occupancy under both the [DFVA] and the injunction provision (s. 114) under the [*Family Law Act*] may not always be aligned. Payment of mortgage while one party resides in the former matrimonial home to the exclusion of the other, has child support implications (being 'non agency payments') and there are domestic violence exemptions to claim child support'.

The Northern Territory Police Force supported this recommendation.

Recommendation 16-12

ALRC Recommendation 16-12 recommended that state and territory domestic violence legislation should provide that personal property directions made in protection order proceedings are subject to orders made by a federal family court or other court responsible for determining property disputes.

The Northern Territory Police Force supported this recommendation.

Recommendation 16-13

ALRC Recommendation 16-13 recommended that state and territory domestic violence legislation should provide that personal property directions do not affect ownership rights.

The Northern Territory Police Force supported this recommendation.

Observations

The DFVA equivalents in other jurisdictions either enable protected persons to access premises to recover personal property,[76] require the defendant to return the protected person's property[77] or both.[78]

The Victorian legislation also provides that a DVO may include a condition directing that the defendant return to the protected person joint property that will enable the protected person's everyday life to continue with as little disruption as possible. [79] It also provides that where a DVO includes an exclusion condition, the court may also include a condition requiring furniture or appliances that enable the normal running of the home to remain in the residence.[80]

Similarly, the legislation in the Australian Capital Territory provides that where a DVO includes an exclusion condition it may also include a condition prohibiting the defendant from taking possession of particular personal property that is reasonably needed by the protected person or a child of the protected person.[81] These provisions are retained in the Family Violence Bill 2016 (ACT).[82]

5.35 Section 90 – Family law orders

Background

Section 90 of the DFVA provides that if there are any family law orders pending or in place regarding the defendant, the applicant of the DVO must inform the issuing authority.

If the applicant is a police officer, when considering making a Police DVO, they must make reasonable inquiries about the existence of any family law orders pending or in place and if they ask the person to inform them about such orders, they must do so. However, if there is a failure of a person to give such information, the decision of the issuing authority is not considered invalid.

Submissions

The Central Australian Aboriginal Family Legal Unit recommended that section 90(1) and (2) 'should be expanded to apply not only to family law orders but also to child protection orders which are in force or pending'.

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[76] s 37(2) *Crimes (Domestic and Personal Violence) Act* 2007 (NSW) and s 13(5) *Restraining Orders Act 1997* (WA).

[77] s 86 *Family Violence Protection Act 2008* (Vic) and s 48(3)(b) *Domestic Violence and Protection Orders Act 2008* (ACT).

[78] s 59(1) *Domestic and Family Violence Protection Act 2012* (Qld) and s 12(1)(j) and (k) *Intervention Orders (Prevention of Abuse) Act 2009* (SA).

[79] s 86(a)(ii) *Family Violence Protection Act 2008* (Vic).

[80] Ibid, s 86(b).

[81] s 48(3)(a)

[82] Clause 38(2)(k) and (l).

ALRC Recommendations

Recommendation 30-6

ALRC Recommendation 30-6 recommended that state and territory domestic violence legislation should require courts exercising jurisdiction under that legislation to inquire about existing parenting orders under the *Family Law Act 1975* (Cth), or pending proceedings for such orders.

Observations

As noted at Part 5.1.16 of this Report, a number of jurisdictions require consideration of child protection orders in making a DVO. It seems logical that if police are required to make inquiries as to the existence of family law orders, they should do the same in relation to child protection orders.

5.36 Chapter 3, sections 92 to 97 – External DVOs

Background

Chapter 3 of the DFVA provides for:

‘(a) the registration of external orders, and the variation of registered external orders, for their effective operation in the Territory; and

(b) the revocation of registered external orders; and

(c) the limited enforcement in the Territory of unregistered external orders.’

Submissions

A number of submissions were received from stakeholders in relation to the mutual recognition of DVOs in relation to Issues Paper 2.

Stakeholders either expressly supported,[83] or did not oppose,[84] the mutual recognition of domestic violence orders. The primary justifications cited by a number of stakeholders being the transient population of the Northern Territory and the cross-border affiliations between indigenous communities, particularly in Central Australia.[85]

Nevertheless, a number of stakeholders noted that there are inconsistencies between the domestic violence legislation of the different states and territories that would need to be addressed before such a scheme could be implemented.[86] In particular, both the Central Australian Aboriginal Legal Aid Service and the North Australian Aboriginal Justice Agency noted that the differences ‘can have the effect of an order being made in one jurisdiction, which includes conditions that are not permitted or enforceable elsewhere’.

[83] Central Australian Women’s Legal Service, Criminal Lawyers Association of the Northern Territory, Department of Children and Families, Law Society Northern Territory, Northern Territory Legal Aid Commission, Northern Territory Police Force, Relationships Australia and Top End Women’s Legal Service.

[84] Central Australian Aboriginal Legal Aid Service and North Australian Aboriginal Justice Agency.

[85] Central Australian Women’s Legal Service and Law Society Northern Territory.

[86] Central Australian Aboriginal Legal Aid Service, North Australian Aboriginal Justice Agency and Relationships Australia.

The Central Australian Aboriginal Legal Aid Service further noted that:

> 'Should 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.'

The Top End Women's Legal Service noted that it would also support extending mutual recognition to countries outside of Australia, such as New Zealand.

In response to Issues Paper 1, the Alice Springs Sexual Assault Referral Centre submitted that consideration is also required in relation to the national standardisation of DVOs, particularly given the mobility of people in the Northern Territory and across the country.

Observations

In the time since Issues Papers 1 and 2 were circulated, the Department of the Attorney-General and Justice has developed a draft Bill for the mutual recognition of external orders. This draft Bill was circulated to stakeholders during June 2016. It reflects model legislation developed by the Law, Crime and Community Safety Ministerial Council and agreed to for implementation by the Council of Australian Governments in December 2015.[87] It is likely to be considered by Government in the Northern Territory after the August 2016 election for the Legislative Assembly.

The model legislation has been structured so as to take account of differences in the substantive laws of each of the jurisdictions.

5.37 Section 104 – Part 4.1 Definitions

Background

Section 104 of the DFVA provides, for the purposes of Part 4.1, definitions of the terms 'audiovisual link', 'recorded statement' and 'vulnerable witness'.

Prior to March 2016, 'vulnerable witness' was defined as meaning:

(a) 'an adult who is the protected person named in a DVO; or

(b) an adult witness who suffers from an intellectual disability; or

(c) an adult witness who, in the Court's opinion, is under a special disability.'

In March 2016, the DFVA was amended by the *Justice Legislation Amendment (Vulnerable Witnesses) Act 2016*, which also amended the *Evidence Act* and the *Sexual Offences (Evidence and Procedure) Act* to:

- strengthen vulnerable witness provisions and protections thereby reducing the impact and trauma of court proceedings on vulnerable witnesses; and
- ensure that witnesses are more confident and comfortable giving evidence which will likely lead to more successful prosecutions.

[87] Legislation has been introduced in New South Wales, Victoria, South Australia, Tasmania and the Australian Capital Territory.

The *Evidence Act* was amended to:

- provide a list of factors to be considered by the court when addressing whether a witness is vulnerable including the relationship between witness and defendant;
- provide that vulnerable witnesses do not need to be present in a courtroom when their pre-recorded statement of evidence is played;
- expand its operations to the lower courts so it applies in serious violence and sexual offences heard by any Territory Court not just the Supreme Court; and
- provide that all efforts should be made to ensure that matters that could delay or interrupt a child's evidence are determined pre-trial.

The DFVA was amended to, amongst other things:

- adopt the definition of 'vulnerable witness' in section 21A(1) of the *Evidence Act*;
- adopt the definition of 'recorded statement' in section 21A(1) of the *Evidence Act*, thereby providing that a recorded statement is to be taken by an 'authorised person'; and
- clarify the definition of 'vulnerable witness' so it includes a protected person applying for a DVO.

Currently, section 104 provides that for the purposes of Part 4.1:

> '***audiovisual link*** means a facility (including closed-circuit television) that enables audio and visual communication between persons at different places.
>
> ***recorded statement***, see section 21A(1) of the *Evidence Act*.
>
> ***vulnerable witness*** means:
>
> (a) an adult who is a protected person; or
>
> (b) a vulnerable witness as defined in section 21A(1) of the *Evidence Act*.'

Pursuant to section 13 of the DFVA, a protected person includes a person for whose protection a DVO is sought or in force.

Section 21A(1) of the *Evidence Act* provides that 'vulnerable witness' means a witness in proceedings:

> '(a) who is a child; or
>
> (b) who has a cognitive impairment or an intellectual disability; or
>
> (c) who is the alleged victim of a sexual offence to which the proceedings relate; or
>
> (d) whom a court considers to be vulnerable.'

Observations

Felicity Gerry QC, Chair of Research and Training, School of Law, Charles Darwin University, the Domestic Violence Legal Service and Central Australian Aboriginal Congress Targeted Family Support Service and Intensive Family Support Service identified a number of problems with the previous version of section 104 of the DFVA. These have since been resolved by the amendments made by the *Justice Legislation Amendment (Vulnerable Witnesses) Act 2016*.

5.38 Section 105 – Application of Part 4.1

Background

Section 105 of the DFVA provides that Part 4.1 applies only to:

> '(a) a proceeding for the hearing of an application for:
>
> (i) a DVO; or
>
> (ii) the variation or revocation of a DVO;
>
> (b) a proceeding for the confirmation of a DVO.

Submissions

The President of the Criminal Lawyers Association of the Northern Territory, Russell Goldflam, made the following submission:

> 'Chapter 4 Part 4.1 of the Act includes Division 4 ("Evidence of Vulnerable Witnesses"), which provides that vulnerable witnesses are entitled to give their evidence from outside the courtroom by CCTV, and that they also be protected in other ways. However, section 105 of the Act limits the application of these protective provisions to proceedings in which an application for a DVO (or to confirm, revoke or vary a DVO) are being made. These protective provisions do **not** extend to the hearing of charges that a person has committed an offence by breaching a DVO. To be declared a vulnerable witness in such a case, the court must use its more limited powers under Part 3 of the *Evidence Act*, section 21A(1) of which defines 'vulnerable witness' as (among other things) a person who is "under a special disability". The courts have held that being the alleged victim of domestic violence does not it itself amount to having "a special disability".
>
> As a result, persons identified as 'protected persons' in a DVO application are automatically given the protection of being declared a vulnerable witness for the purpose of getting the DVO order made in the first place, but may not get that protection if required to give evidence in a case where the alleged perpetrator is charged with breaching the DVO. Such cases are both much more common and usually more serious than the cases currently covered by s105 of the DFVA.
>
> A remedy for this would be to amend s105 of the DFVA by adding something like this:
>
> "or; (c) a proceeding for an offence under this Act".'

Observations

Under the amendments made by the *Justice Legislation Amendment (Vulnerable Witnesses) Act 2016*, in deciding whether a witness to an offence (including a breach of DVO) is vulnerable, the court is required to consider 'any relationship between the witness and the defendant to the proceedings' (section 21A(1A) of the *Evidence Act*).

Both the Explanatory Statement and Second Reading Speech to the Justice Legislation Amendment (Vulnerable Witnesses) Bill 2015 made it clear that the inclusion of this provision was meant to ensure that the relationship of the parties would be a relevant factor, particularly in DV situations, when determining a witness's vulnerability and protections available to them when giving evidence.

The amendment to section 21A of the *Evidence Act* was designed to give guidance while still preserving judicial discretion. In order to do so, the decision was made to allow the court to

determine whether a witness was vulnerable (outside settled categories of child, cognitive impairment/intellectual disability and victim of sexual offence), rather than mandating this status.

It should also be noted that a victim of a sexual offence will automatically be classified as a vulnerable witness under section 21A(1) of the *Evidence Act*.

If section 105 of the DVFA was amended to include 'a proceeding for an offence under this Act', the protections available to witnesses to an offence (namely breach of DVO) would be significantly restricted as the protections available under the *Evidence Act* are more extensive than those available under the DVFA.

Victims of an offence are entitled to all the same protections under the *Evidence Act* and there does not seem to be any reason to provide different protections to a victim when the offence is 'Breach of a DVO' versus an assault occurring in a domestic relationship. A victim of an assault occurring in a domestic relationship would not be automatically classified as a vulnerable witness, yet the victim of a 'breach of DVO' would. This is particularly relevant when the breach may be minor (eg harassing text message, verbal abuse), yet a physical assault charged under the Criminal Code would be far worse.

5.39 Section 106 – When Court to be closed

Background

Section 106 of the DFVA provides that the Court must be closed if all of the protected persons are children. It must also be closed when a vulnerable witness (see definition in section 104) is giving evidence. However, the Court may order a proceeding, or part of it, be open to the public if it considers it is in the interests of justice to do so.

Even if the proceeding, or part of it, is open to the public, the Court may order a person (other than a party to the proceeding) to leave the courtroom where the proceeding is being conducted while a witness gives evidence.

Submissions

The Central Australian Aboriginal Family Legal Unit submitted that:

> '…section 106 should be amended to include a (1)(c) which provides the court with discretion to close the Court at such other times as the Court considers appropriate, including for the whole proceeding and that the section should include examples such as where the matter involves high profile parties, highly sensitive allegations or where the hearing is being heard as part of a bush or circuit court sitting where the court rooms are small and there are minimal safety measures available for protected persons and their families.'

The Domestic Violence Legal Service recommended amending section 106 to provide for the court to be closed where a young person is named as a defendant in a DVO or a DVO application.

They provided the following scenario in support of this recommendation:

> 'Karen and Philip are the parents of a troubled youth, Stephen, aged 15 years old. Stephen is exhibiting emotional and behavioural developmental issues, and it is suspected that he has borderline autism. At times, Stephen lashes out at his parents. On the most recent occasion he has assaulted his father and damaged property in the home. Police take out s41 DVO against Stephen, for the protection of his parents, Karen and Philip.'

In these circumstances, the Domestic Violence Legal Service submitted that 'it is clear that having an open court would cause immense distress to all parties involved and could not be seen as appropriate that a defendant youth and their parents should face open court in such circumstances'.

Observations

Under the Victorian legislation, if the court considers it necessary to do so to prevent an affected family member or protected person or a witness in a proceeding under the *Domestic and Family Violence Protection Act 2008* (Vic) being caused undue distress or embarrassment, the court may close the court for all or part of the proceeding under section 68(1)(a) of that Act.

Similarly, clause 58 of the Family Violence Bill 2016 (ACT), provides that the court is open unless a public hearing is not required[88] or a court hearing an application for a protection order is satisfied that it is in the interests of safety, justice or the public to close the court.[89]

Conversely, pursuant to section 158 of the *Domestic and Family Violence Protection Act 2012* (Qld), a court hearing an application under that Act is not to be open to the public unless otherwise ordered by the court.

5.40 Section 110 – How evidence of vulnerable witness given

Background

Section 110 of the DFVA provides that a vulnerable witness can give evidence outside the courtroom using an audiovisual link, or where an audiovisual link is not available or where the witness chooses, to give evidence using a screen, partition or one-way glass to obscure the witness's view of the defendant.

This clause operates subject to section 112 (Court's power relating to vulnerable witness giving evidence).

Submissions

The Alice Springs Women's Shelter noted that audiovisual links are rarely used in practice, especially in remote settings, as courts do not have the required facilities. While section 110(2) provides for the use of a screen or partition to block the witness from the view of the defendant in these circumstances, the Alice Springs Women's Shelter submits that such does not adequately protect witnesses, further re-victimising them and discouraging them from engaging with the court process.

The Central Australian Women's Legal Service made a similar submission and recommended that 'courts hearing applications for DVO's, PVRO's or hearing evidence in relation to family

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[88] clause 59.

[89] clause 60(1)(a).

violence must be equipped with facilities to allow witnesses to give evidence in accordance with s110(1) of the Act'.

5.41 Section 114 – Cross-examination by unrepresented defendant

Background

Section 114 provides that where a defendant is unrepresented the Court may order that any question put to the applicant or witness is put through an appointed person for the defendant. Prior to March 2016, questions by the defendant were put through the court.

Prior to the amendments to the DFVA by the *Justice Legislation Amendment (Vulnerable Witnesses) Act 2016*, the Court was required to put questions to the applicant.

Submissions

A number of stakeholders[90] noted that section 114 is is inadequate, narrow and unreasonably disadvantages witnesses when providing evidence, particularly as it does not prohibit self-represented defendants from putting questions to the protected person and other witnesses. To this end, it was recommended that section 114 of the DFVA should be replaced with vulnerable witness provisions equivalent to those in the *Family Violence Protection Act 2008* (Vic) (sections 70 and 71). In particular, sections 70 and 71 of that Act provides as follows:

> **'70 Special rules for cross-examination of protected witnesses**
>
> (1) The following persons are protected witnesses for the purposes of a proceeding under this Act—
>
> (a) the affected family member or the protected person;
>
> (b) a child;
>
> (c) any family member of a party to the proceeding;
>
> (d) any person declared under subsection (2) to be a protected witness for the proceeding.
>
> (2) The court may at any time declare a person to be a protected witness if the court is satisfied the person—
>
> (a) has a cognitive impairment; or
>
> (b) otherwise needs the protection of the court.
>
> (3) A protected witness must not be personally cross examined by the respondent unless—
>
> (a) the protected witness is an adult; and
>
> (b) the protected witness consents to being cross-examined by the respondent or, if the protected witness has a guardian, the protected witness' guardian has consented to the cross-examination; and
>
> (c) if the protected witness has a cognitive impairment, the court is satisfied the protected witness understands the nature and consequences of giving consent and would be competent to give evidence; and

[90] Alice Springs Women's Shelter, Central Australian Aboriginal Family Legal Unit, Central Australian Family Violence and Sexual Assault Network, Central Australian Women's Legal Service, North Australian Family Legal Service and Northern Territory Police Force.

(d) the court decides that it would not have a harmful impact on the protected witness for the protected witness to be cross-examined by the respondent.

(4) If a respondent who is prohibited from cross examining a protected witness under subsection (3) is not legally represented, the court must—

(a) inform the respondent that the respondent is not permitted personally to cross-examine a protected witness; and

(b) ask the respondent whether the respondent has sought to obtain legal representation for the cross-examination of a protected witness; and

(c) if satisfied the respondent has not had a reasonable opportunity to obtain legal representation, grant an adjournment on its own initiative or if requested by the respondent.'

71 Representation of respondent

(1) If the respondent does not obtain legal representation for the cross-examination of a protected witness after being given a reasonable opportunity to do so, the court must order Victoria Legal Aid to offer the respondent legal representation for that purpose.

(2) Despite anything in the *Legal Aid Act 1978*, Victoria Legal Aid must offer to provide legal representation in accordance with subsection (1).

Note: See section 8 of the *Legal Aid Act 1978* which provides that legal aid may be provided by Victoria Legal Aid by making available its own officers or by arranging for the services of private legal practitioners.

(3) However, Victoria Legal Aid may apply all or any of the conditions under section 27 of the *Legal Aid Act 1978* to the representation of the respondent as if the respondent had been granted legal assistance under that Act.

(4) If the respondent refuses the legal representation offered under subsection (1), or otherwise refuses to co-operate, the court must warn the respondent that if the respondent is not represented and not permitted to cross-examine the protected person about events relevant to the application the subject of the proceeding, neither the respondent nor the respondent's witnesses may give evidence about those events.'

These stakeholders further noted that:

- if this approach were adopted there would be an emphasised need for adequate resourcing to enable the necessary legal assistance to be provided to defendants;[91] and
- other good examples of provisions to support and protect victims of family violence during the court process can be found in *Intervention Orders (Prevention of Abuse) Act 2009* (SA), such as section 29. These would also be an improvement to the currently inadequate provisions in the NT legislation.[92]

[91] Alice Springs Women's Shelter, Central Australian Aboriginal Family Legal Unit, Central Australian Women's Legal Service and Northern Territory Police Force.

[92] Central Australian Women's Legal Service.

ALRC Recommendations

Recommendation 18-3

ALRC Recommendation 18-3 recommended that state and territory family violence legislation should prohibit the defendant in DVO proceedings from personally cross examining any person against whom the respondent is alleged to have used family violence.

The Central Australian Aboriginal Congress Targeted Family Support Service and Intensive Family Support Service, Central Australian Women's Legal Service, Northern Territory Police Force and the Top End Women's Legal Service supported this recommendation.

Observations

Neither of the recommended alternative provisions recommended by stakeholders are substantially different from section 114 of the DFVA. The main difference between the *Family Violence Protection Act 2008* and the DFVA is that an order under section 114(2) of the DFVA is discretionary as opposed to mandatory. However, such orders are also discretionary under section 29(1) of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA).

5.42 Section 115 – Procedural directions

Background

Section 115 of the DFVA provides that the Court may give procedural directions for the fair and expeditious hearing of a proceeding. Such directions may deal with the right of a party to appear at the hearing.

Submissions

The Central Australian Aboriginal Family Legal Unit submitted that 'evidence in DVO proceedings should be by way of affidavit, unless otherwise ordered by the court'.

5.43 Section 120 – Contravention of DVO by defendant

Background

Section 120 of the DFVA provides that it is an offence of strict liability for a person to contravene a DVO. However, the DVO must have been provided to the defendant.

ALRC Recommendations

Recommendations 12-1

ALRC Recommendation 12-1 recommended that state and territory legislation should provide that a person protected by a DVO under domestic violence legislation cannot be charged with or found guilty of an offence of aiding, abetting, counselling or procuring the breach of a protection order.

The Central Australian Aboriginal Family Legal Unit, Central Australian Women's Legal Service and the Top End Women's Legal Service supported this recommendation.

The Northern Territory Police Force did not support this recommendation. Instead they suggested that protected persons should still be able to be charged where they wilfully and deliberately contravene a DVO.

Central Australian Aboriginal Congress Targeted Family Support Service and Intensive Family Support Service noted that:

- there needs to be some acknowledgement that the defendant may not always be the instigator of the breach;
- in circumstances of continual deliberate breaches by the protected person, then possibly there does need to be a consequence of some form.

Observations

The DFVA is silent on this issue. As a result, the provisions of the Criminal Code regarding aiding, abetting counselling and procuring apply.[93]

5.44 Section 126 - Forms

Background

Section 126 of the DFVA provides that the Chief Judge must approve forms for the provisions of the DFVA requiring a document to be made in the approved form. The Chief Judge may also approve forms for other documents required for the DFVA.

Submissions

A number of stakeholders[94] recommended reviewing and amending Police and Court DVO forms.

Section 41 Police DVO Forms

The Domestic Violence Legal Service noted the following issues with section 41 Police DVO Forms:

- the "summons to defendant" section on the form is too small and is written in inaccessible and overly complicated language; and
- should the protected person wish to be heard in relation to the DVO, there is no indication on the form that they will need to attend court on the return date.

The Domestic Violence Legal Service noted that defendants and protected persons often overlook or do not understand the effect of the summons to show cause and suggested that this can result in:

- orders being confirmed in the absence of parties, depriving them of the opportunity to be heard;
- inappropriate orders being made; and
- increased applications to vary or revoke, placing an unnecessary burden on the parties, police, the Court and legal and support services.

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[93] s 43BG.
[94] Alice Springs Women's Shelter, Domestic Violence Legal Service and North Australian Aboriginal Family Legal Unit.

Accordingly, the Domestic Violence Legal Service recommended that section 41 Police DVO forms should be amended to 'explain more clearly and in larger font the effect of the summons of the Defendant to show cause'.

The Domestic Violence Legal Service also noted that, when completing a section 41 Police DVO form, police often select clause 3 of the section of the form which provides the various non-contact orders that can form part of a DVO. Clause 3 provides:

- that the defendant cannot approach, contact etc a protected party '[e]xcept via or in the presence of solicitor, family dispute resolution practitioner or nominated third party'; and
- a blank space for the insertion of the name of the nominated third party.

When selecting clause 3, the Domestic Violence Legal Service noted that this blank space, if often left open, potentially enables the defendant to unilaterally nominate a third party without regard to the wishes of the protected person.

Accordingly, the Domestic Violence Legal Service recommended that 'where police or protected person do not nominate a third party as provided in clause 3, then the reference to a nominated third party be deleted from the order (for example, by striking through) so that it does not become a part of a confirmed order under s82'.

They noted that a similar issue also exists in relation to clause 5 of the same section of the section 41 Police DVO forms.

Court DVO application forms

The Alice Springs Women's Shelter submitted that application forms for DVOs should clearly set out the types of conditions that a court may impose and enable applicants to indicate which conditions they seek. The forms should also allow for tailored conditions. For example, the Alice Springs Women's Shelter noted that some of their clients would like a 'no harm' and 'non-intoxication' DVO but with conditions of no-contact on certain days (such as known pay-days) and certain places (such as the workplace). While section 21 does provide for tailored conditions, some clients are unable to express their needs through the current DVO system. To this end, they noted that a simple solution may be to provide space on the forms for applicants to specify any other conditions.

They also suggested that, given the high rate of domestic violence perpetrated against Indigenous women 'there should be scope for conditions to reflect complex cultural, familial and gender norms within Indigenous communities, as well as taking note of the remoteness and isolation of these communities' They also suggested that conditions on applications should be in plain English, as many of their clients, and offenders, speak English as a second language.

The North Australian Aboriginal Family Legal Service recommended that Form 2 (Domestic Violence Application) be reviewed to make the process easier for non-Police applicants to understand. In particular, they suggested reformatting the form to accord with the Victorian Intervention Order Application form, by including:[95]

- '[t]hree sections to address: 1. The conditions sought in respect to preventing specified behaviour of the Defendant; 2. What is still permitted under the order; and 3. What the Defendant is required to do, under the order'.
- '[c]heck box options for conditions, in each of these sections, with a provision to specify any further condition sought, if required'.

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[95] Copies of these forms are annexed to the North Australian Aboriginal Family Legal Service at Annexure 4.

- '[s]pecific options that incorporate Aboriginal English terms (for example: The Defendant stop humbugging, or harassing the Protected Person)'.

The Domestic Violence Legal Service recommended that Forms 2 (Application for Domestic Violence Order), 3 (Application for Domestic Violence Order by Young Person) and 6 (Application for a DVO by a Police Officer) should be amended to 'align where appropriate with the Police section 41 Domestic Violence order form, with the layout, headings and wording designed to make selecting appropriate and effective orders more user friendly, but noting that this recommendation relies on some important changes being made to the Police Domestic Violence Order primarily at clauses 3 and 5, which provides for exceptions to allow contact.'

The Domestic Violence Legal Service also recommended that Forms 2, 3 and 8 should be redesigned so that an applicant may choose whether to withhold or disclose their address. This issue is discussed in further detail in relation to proposed amendments to section 30 of the DFVA at 5.1.22 of this Report.

Forms for registration of interstate DVOs

The Domestic Violence Legal Service noted that:

- inconsistent with section 93(2)(b)(ii) of the DFVA (which provides, amongst other things, that an application for the registration of an external order must be accompanied by evidence that the order has been given to the defendant), Form 12 'only states that "a copy of the order is attached hereto" and does not mention that the application must include "evidence the order has been given to the defendant"'; and
- inconsistent with section 95(2) of the DFVA (which provides, amongst other things, that when registering an external order, the clerk must not give notice of the registration of the order or a copy of the registered order to the Defendant without the consent of the applicant), Form 14 'does not make any reference to the prohibition against notice to the Defendant under section 95 and in fact, includes at the top a section for the Defendant's details'.

Accordingly, the Domestic Violence Legal Service recommended that:

1. Form 12 'be amended to state that "a copy of the order and *evidence the order has been given to the defendant* is attached hereto"'; and
2. Form 14 'be amended to state clearly that *"the clerk must not give notice of the registration of the order or a copy of the registered order to the defendant without the consent of the applicant"*'.

Other

The Domestic Violence Legal Service noted that when defendants and protected persons are given a Police DVO or served with a Local Court DVO application, they are not provided with:

- information on the nature and effect of the application;
- information about what may happen if they do not attend Court;
- their option to seek legal advice; or
- contacts for relevant legal services.

The Domestic Violence Legal Service believes that this can lead to defendants having orders being made against them without them understanding they have an opportunity to be heard on the matter, or understanding the reasons for the application and the nature of the orders then made or the consequences of breach of a DVO. Similarly, issues arise when Police section

28 applications or Police or defendant-initiated applications to vary are served on protected persons.

Accordingly, the Domestic Violence Legal Service recommended that 'a plain English guide containing relevant legal information and contacts for relevant legal services be attached to Police DVOs and CSJ DVO applications when served on the defendant AND protected person'.

ALRC Recommendations

Recommendation 11-7

ALRC Recommendation 11-7 recommended that DVO application forms in each state and territory should clearly set out the types of conditions that a court may attach to a DVO, allowing for the possibility of tailored conditions and should be drafted to enable applicants to indicate the types of conditions that they seek to be imposed.

This recommendation was supported by the Central Australian Aboriginal Congress Targeted Family Support Service and Intensive Family Support Service.

Recommendation 16-2

ALRC Recommendation 16-2 recommended that DVO application forms under state and territory domestic violence legislation should include an option for an applicant to request the court to revive, vary, discharge or suspend a parenting order.

This recommendation was supported by the Northern Territory Police Force.

Recommendation 16-7

ALRC Recommendation 16-7 recommended that DVO application forms under state and territory domestic violence legislation should include an option for applicants to indicate their preference that there should be no exception in the DVO for contact required or authorised by a parenting order made under the *Family Law Act 1975* (Cth).

The Northern Territory Legal Aid Commission made the following submission:

> 'This is a dangerous option and one which either may not be entirely understood by the applicant or used by an applicant to sever the child's relationship with the respondent in a jurisdiction which has limited resources to properly inquire as to whether this is justified, at least on a final basis. This is particularly so when such orders are subsequently made ex-parte or in absentia'.

This recommendation was supported by the Northern Territory Police Force.

Recommendation 16-10

ALRC Recommendation 16-10 recommended that DVO application forms under state and territory domestic violence legislation should clearly seek information about property orders under the *Family Law Act 1975* (Cth) or any pending application for such orders.

This recommendation was supported by the Northern Territory Police Force.

Recommendation 18-1

ALRC Recommendation 18-1 recommended that state and territory courts should ensure that DVO application forms include information about the kinds of conduct that constitute family violence.

This recommendation was supported by the Central Australian Women's Legal Service and the Top End Women's Legal Service.

Recommendation 18-2

ALRC Recommendation 18-2 recommended that DVO application forms under state and territory domestic violence legislation should require that applicants swear or affirm a statement incorporated in, or attached to, the application form, setting out the basis of the application. Where the applicant is a police officer, the application form should require the police officer to certify the form.

Observations

The matters raised by stakeholders have been referred to the Local Court for consideration, in due course, by the Local Court Judges.

Also, it is noted that the Victorian Royal Commission in Family Violence has recommended that the Magistrates' Court of Victoria consider revising the form and content of family violence intervention order court applications and documents to:

- ensure that when proceedings are filed with the court both the protected person and defendant are informed of the Magistrates' Court's jurisdiction under the *Family Law Act 1975* (Cth). Such information should be available to parties in self-initiated applications and proceedings initiated by a police DVO; and
- inform the applicant that the court may revive, vary, discharge or suspend a parenting order pursuant to section 68R of the *Family Law Act*.[96]

5.45 Regulation 12 - Requirement to provide sample of blood

Background

Regulation 12(1)(a)-(f) of the *Domestic and Family Violence Regulations* makes reference to regulation numbers for breath tests, breath analysis, saliva tests and urine tests.

Submissions

The Domestic Violence Legal Service noted that regulation 12 incorrectly cross-references other regulations.

Observations

These were corrected by the *Domestic and Family Violence Amendment Regulations 2015*.

[96] Victorian Royal Commission into Family Violence, *Report and Recommendations* (March 2016), Recommendation 135.

6 OTHER ISSUES ARISING OUT OF CONSULTATION

Stakeholders proposed a number of other general / additional amendments to the DFVA, but not in relation to any specific provisions. These are discussed below.

6.1 Providing evidence in chief via pre-recorded video statement

Submissions

The Central Australian Women's Legal Service submitted that it would support reforms to enable victims of domestic violence to give evidence in chief via a pre-recorded video statement. They suggested the following approach:

- the victim provide a recorded statement as soon as possible after the domestic violence offence, which would be available for viewing by prosecution and defence at the police station prior to the matter being heard;
- the statement could then be played in a closed court as a substitute to evidence in chief that would ordinarily be given in person; and
- at a contested hearing, cross examination about the evidence in chief could then be conducted with the victim who may or may not be physically present in court subject to vulnerable witness provisions.

The Central Australian Women's Legal Service suggested that giving evidence in this way could mitigate a victim's fear and apprehension of attending court as much of their evidence will be provided via pre-recording. Accordingly, they will spend less time giving oral evidence and will not be required to retell their story.

In relation to similar reforms in New South Wales brought about by the *Criminal Procedure Amendment (Domestic Violence Complainants) Act* 2014 (NSW), the Central Australian Women's Legal Services noted the following concerns raised by the Women's Legal Services NSW regarding the potential unintended consequences of this legislation:

- 'the risk of trauma compromising a victim's ability to recall all of the details of a domestic violence offence, and the adverse inferences that could be drawn as to a victim's credibility if all details are not included in the statement taken at that time';
- 'the risk of re-traumatisation in the event that a victim is present at court when the recorded evidence is being played';
- 'the risk that a video recording will focus primarily on physical injuries and damage to property, which could shift the focus away from psychological harm caused to the victim';
- 'the use of pre-recorded evidence in proceedings beyond the prosecution of a domestic violence offence or parallel proceedings to obtain a DVO – such as care and protection proceedings. Any legislative reforms should clearly indicate the parameters in which the recording can be used'; and
- 'unauthorised viewing or distribution of the recorded statement. It is essential that such a reform be accompanied by legislation setting out relevant offences for the misuse of recorded material – including threats to copy or distribute the recording'.

The Central Australian Women's Legal Service suggested that these risks would need to be considered if similar provisions were to be proposed in the NT.

Observations

As a result of amendments to the *Criminal Procedure Act 1986* (NSW) (the Act) by the *Criminal Procedure Amendment (Domestic Violence Complainants) Act* 2014 (NSW), which commenced in June 2015, a recorded video or audio statement of a domestic violence complainant is admissible as evidence in chief in criminal proceedings for domestic violence offences and in concurrent or related proceedings for applications for apprehended domestic violence orders under the *Crimes (Domestic and Personal Violence) Act* 2007. The recorded video or audio statement may also be used in committal and summary proceedings instead of a written statement.

Similarly, the *Crimes (Domestic and Family Violence) Legislation Amendment Act 2015* (ACT), which commenced in May 2016, amended the *Evidence (Miscellaneous Provisions) Act 1991* (ACT) to allow, amongst other things, police records of interview to be admitted as evidence in chief for family violence and all sexual offences.

6.2 Increased protections for domestic violence service providers

Submissions

The Alice Springs Women's Shelter recommended that domestic violence service providers should be afforded greater protection under Northern Territory legislation. In particular, they recommended that:

> 'when issuing a DVO, there should be scope for the Court to attach conditions excluding the defendant from approaching certain organisations or areas, such as approved specialised DFV services like [Alice Springs Women's Shelter]. This measure is adopted in sex offender legislation across Australia, whereby prohibiting child sex offenders from going within a certain distance from a school or playground'.

The Alice Springs Women's Shelter also submitted that it would like:

- offences that occur within, or towards the Alice Springs Women's Shelter (and presumably other service providers), to be treated as an extra circumstance of aggravation in property, stalking, harassment or assault offences;
- the introduction of a provision into the DFVA whereby the Court may declare a worker of a domestic violence service provider to be a vulnerable witness for a proceedings relating to Domestic and Family Violence.

The Alice Springs Women's Shelter submitted that such amendments are necessary to ensure the safety of the staff of domestic violence service providers and that these organisations are able to provide a safe space for women and children. To this end, the Alice Springs Women's Shelter noted that:

- unlike in other jurisdictions where specialised Domestic and Family Violence shelters are in secret locations, in the Northern Territory the locations are well known in the community, which poses an increased risk to both clients and staff;
- the Alice Springs Women's Shelter has had several major security issues over the last 2 years, which have threatened the viability of the service. For example, in 2013 a perpetrator breached security measures and forcefully kidnapped a client. In early 2014, there was an incident where a man with a knife trespassed inside the Alice Springs Women's Shelter;

- on a number of occasions perpetrators have approached the Alice Springs Women's Shelter and threatened or harassed clients and staff. In one instance, a perpetrator threatened to kill himself by running on the road to further intimidate and coerce his partner to return to him;
- men often make threats to their partners by saying that if they attend the Alice Springs Women's Shelter, they will just come and take them out again; and
- while the Alice Springs Women's Shelter has access to normal criminal and civil recourse against these actions, these provisions do not adequately cover the full extent and varied nature of domestic violence, and further protection must be afforded to domestic and family violence services.

Observations

Section 188A of the Northern Territory Criminal Code currently provides that it is an offence to assault a person who is working in the performance of his or her duties.

6.3 Information sharing

Submissions

The Alice Springs Women's Shelter noted that:

- while the *Care and Protection of Children Act* provides a significant information sharing framework, this is not paralleled under DFVA;
- under SupportLink, police can only make a referral with the consent from the victim. This has led to only a small percentage of the total number of possible referrals being made to the service;
- 'in practice women are not giving consent to be referred to [Alice Springs Women's Shelter] because the consequences of the referral may not be adequately understood by the victims themselves';
- 'there is a possibility that some of our clients maintain feelings of mistrust towards the Police force';
- 'even in situations where Police have referred clients onto our service, and when consent is given by our client to gain information, Police are still prevented from sharing information that would support [Alice Springs Women's Shelter] in rendering assistance. The information is treated as confidential belonging to the perpetrator. Without information as to even the whereabouts of the perpetrator, [the Alice Springs Women's Shelter] is unable to advise clients appropriately as to what potential risks they may face';
- '[r]evoking the need for consent in referrals may lead to victims of Domestic and Family Violence responding more positively to support services, as they are seen to be initiated by [Alice Springs Women's Shelter], as a separate service to the police services'; and
- '[a] mandatory referral framework would allow Alice Springs Women's Shelter to assess risk more accurately and identify patterns of abuse to better inform our crisis response both to individuals and to the community'.

To this end, the Alice Springs Women's Shelter recommended that Northern Territory legislation 'should expand provisions to increase the capacity of NT Police to share information with, and make mandatory referrals to specialist [Domestic and Family Violence] organisations to provide a better coordinated and effective response to [Domestic and Family Violence]'.

In particular, the Alice Springs Women's Shelter believe that:

> '…the Northern Territory [G]overnment should adopt the [Australian Capital Territory] model stipulated under sections 17 and 18 the *Domestic Violence Agencies Act 1986* (ACT), whereby approved crisis support organisations are able to receive any information from police regarding a domestic violence incident, if the information is likely to aid the delivery of service to the victim'.

They also noted that:

- 'along with these provisions, there must be clear guidelines put in place to require information to be shared in an effective, appropriate and timely manner, with the safety of the victim as a paramount concern. Legislation should ensure that appropriate privacy safeguards are put into place and guidelines established for agencies to better understand rules of information sharing. In turn, the [Domestic and Family Violence] agencies will support the police in identifying offences and gathering evidence. Together these measures would allow for improved coordination and effectiveness of service delivery to people experiencing [Domestic and Family Violence].'
- 'with the implementation of mandatory referrals, [Alice Springs Women's Shelter] may experience an uncontrolled increase in demand, and a mirrored increase in resources would be required to meet that demand'.

The Northern Territory Police Force noted similar concerns and recommended that:

> 'Legislated options should be explored to enable Police to provide a person's details to a support service without consent at Police discretion. This could include guiding principles around the circumstances to allow this, such as risk of serious harm, repeat victimisation and offence seriousness, and would require amendments to related legislation such as the *Information Act*. Mandated referral provisions should not be legislated.'

The Central Australian Family Violence and Sexual Assault Network recommended that 'the models of information sharing used in both Victoria and the ACT be investigated for their potential utility in the NT with a view to improving the referral of all parties to appropriate services following identification of Domestic and Family Violence'.

The Department of Education made the following submission regarding information sharing:

> '[a]nother issue relating to domestic and family violence relates to parenting and protection orders and their impact on the related child's school. School principals have reported the need for improved information sharing and advice where such orders are in place in order to appropriately work with parents and families. There may be provision under [ALRC] recommendation 30, regarding information sharing, to address this issue'.[97]

The Royal Australian College of Surgeons also recommended improving data collection by:

- 'adding a flag for family/domestic violence related deaths to the national Coronial Information System';
- 'bolstering efforts by health professionals to screen for domestic violence'; and
- 'supporting integrated care and collaboration between health care agencies'.

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[97] ALRC Recommendation 30 deals generally with information sharing.

ALRC Recommendations

Recommendation 29-1

Recommendation 29-1 recommended that the Australian, state and territory governments, in establishing or further developing integrated responses to domestic violence, should ensure that any such response is based on common principles and objectives, developed in consultation with relevant stakeholders.

The Department of Education and the Northern Territory Police Force noted their support for the current integrated response under the *Domestic and Family Violence Reduction Strategy 2014-17: Safety is Everyone's Right* and *Family Safety Framework* and improvements to information sharing within and outside of government.

This recommendation was supported by the North Australian Aboriginal Justice Agency.

Recommendation 29-2

ALRC Recommendation 29-2 recommended that the Australian, state and territory governments, in establishing or further developing integrated responses to domestic violence, should ensure ongoing and responsive collaboration between agencies and organisations, supported by:

‘(a) protocols and memorandums of understanding;

(b) information-sharing arrangements;

(c) regular meetings; and

(d) where possible, designated liaison officers.’

The Department of Children and Families made the following submission:

> ‘A shared understanding of the impact of domestic and family violence on families, in addition to common frameworks and goals, allows agencies and organisations to address the negative impact of service fragmentation on vulnerable children, adults, families and communities. [The Department of Children and Families] notes that this as a key outcome sought under the Northern Territory Domestic and Family Violence Reduction Strategy 2014-17: Safety is Everyone's Right, and a feature of several initiatives being lead under the Strategy, for example, the Family Safety Framework’.

Recommendation 30-13

ALRC Recommendation 30-13 recommended that state and territory domestic violence legislation and child protection legislation should expressly provide for information sharing among specified agencies in specified circumstances, and should include provision to allow information to be shared with specified private sector organisations.

This recommendation was supported by the Department of Children and Families.

Recommendation 30-16

ALRC Recommendation 30-16 recommended that federal family courts, state and territory magistrates courts, police, and relevant government agencies should develop protocols for the exchange of information in relation to domestic violence matters and that parties to such protocols should receive regular training to ensure that the arrangements are effectively implemented.

No submissions were received in direct response to this recommendation.

Observations

The Department of the Attorney-General and Justice is considering options, as part of its administration of the *Information Act*, for improving (or at least clarifying) capacities regarding the sharing of information.

6.4 Personal Violence Restraining Orders

Submissions

The Top End Women's Legal Service noted that it has previously sought that the Personal Violence Restraining Order (PVRO) provisions contained in the *Justices Act* be incorporated into a standalone Act or an Act dealing with both DVOs and PVROs.

Observations

In May 2016, the *Personal Violence Restraining Orders Act* was enacted. It repealed the PVRO provisions in Part IVA of the *Justices Act* and replicated them in a stand-alone *Personal Violence Restraining Orders Act*. The legislation commenced operation on 1 May 2016.

Following consultation with stakeholders, a number of additional new provisions were included in the Bill for *Personal Violence Restraining Orders Act*. Compared to the repealed legislation, the new provisions include:

- a more comprehensive definition of 'personal violence offence', similar to the definition of 'domestic violence' in section 6 of the *Domestic and Family Violence Act*. Conduct such as economic abuse, intimidation, harassment, stalking and damage to property are included in this definition;
- interim personal violence restraining orders and allowing the Court to make such orders ex-parte;
- an amendment to the *Firearms Act* to ensure the automatic suspension of a firearms licence, permit or certificate of registration on the making of an interim personal violence restraining order;
- an amendment to the mediation provision to enable the Court to hear an application without the need for mediation in circumstances where the Court considers mediation is 'not appropriate';
- the issue of an order prohibiting the publication of personal details of a protected person or witness in a proceeding if satisfied publication would expose the person to the risk of harm. The new section is based on section 26 of the *Domestic and Family Violence Act* which deals with the prohibition of publication of personal details. It is an offence to publish personal details in contravention of such an order; and
- the issue of orders for a defendant's identity and whereabouts where the person seeking protection has made reasonable inquiries but is unable to ascertain the identity or whereabouts of the defendant and another person may have information or a document or thing that will assist in ascertaining the identity or whereabouts of the defendant for the purposes of making an application for a personal violence restraining order.

6.5 Service of orders and notices

Background

Various provisions of the DFVA require the service of orders, notices and documents.[98]

Submissions

Despite these provisions, the Domestic Violence Legal Service noted that:

- it is their experience that many of these are seldom complied with, especially in relation to Police DVOs under section 41 and DVOs under section 28;
- they understand this lack of compliance occurs in part as a result of the Court administration having the belief that Police will attend to all service matters and police being of the view that it is the Court's responsibility to ensure service of notices and orders.

As a result, the Domestic Violence Legal Service sees clients:

- unaware of court dates, particularly when matters are adjourned for mention or hearing, depriving protected persons of the opportunity to be heard;
- unaware of the terms of the DVO and its duration; and
- seeking to apply for a DVO when one is already in place.

The Domestic Violence Legal Service recommended:

1. amending the DFVA to include a new Schedule 2 'containing a table consolidating the provisions in accordance with which a protected person must be served with orders, notices or documents; and
2. '[a]t a practice level, that the Court administration, in cooperation with Police, ensure compliance with the various provisions providing for notice etc to protected persons'.

Similarly, the North Australian Aboriginal Family Legal Service noted that:

- the court obtains the assistance of the bailiff to effect service of DVO applications in the Darwin area, and relies on an agreement with Police to attend to service in other areas, including remote communities;
- while Police have previously been very accommodating in effecting service of applications that have not otherwise been issued by Police (ie applications filed by individuals and legal services), due to a lack of resources, Police now require the payment of a fee in the vicinity of $138 to provide this service;
- the alternative of relying on a bailiff for service is unrealistic as bailiff fees can be in the vicinity of $2000 or more where the defendant lives in a remote area;
- bailiffs do not have resources to locate defendants who are (as is often the case) itinerant, which can result in delays in effecting service; and
- '[s]hould service requirements not be able to be readily facilitated by Police without payment of a fee, there is a real prospect of the legislative process for obtaining DVOs in all incidents other than when Police apply for DVOs, not being utilised and therefore failing to be effective'; and

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[98] The Domestic Violence Legal Service submission of 14 September 2015 contains a table outlining all of these provisions and summarising the requirements under each at page 27.

- '[i]f there are barriers to seeking a DVO at an early stage (for instance when there has been verbal and emotional instances of violence, and police have not yet been required to intervene), then there is a real prospect of such matters escalating to the point where more serious violence occurs and Police intervention is required'.

The North Australian Aboriginal Family Legal Service recommended:

- 'that the arrangements between the court and police for the service of all applications for DVOs, including applications to vary, be formalised in a publically available document ("the Agreement")';
- 'the Agreement specify that Police will not seek [a fee] for [the] service of applications for DVOs or applications to vary DVOs; and
- 'government consideration needs to be given to resource difficulties raised by police'.

Observations

The issues raised require further investigation.

6.6 Specialist domestic violence court

Background

The Local Court provides a dedicated list for seeking domestic violence protection orders on a nominated day per week in Darwin and Alice Springs. There is, however, no specialised court for criminal matters involving domestic violence, even where a protection order (or any other related order) is also sought between the same parties arising out of the same facts. Additionally, some applications for domestic violence protection orders are listed other than on the scheduled list day.

The Director of Public Prosecutions summary prosecutions section has carriage of all criminal matters in the Local Court. The Solicitor for the Northern Territory has carriage of police applications for domestic violence orders and for confirmation of police domestic violence orders under the *Domestic and Family Violence Act*. The Director of Public Prosecutions is not involved in these proceedings, but is always involved in related (Darwin) matters when a criminal offence is charged.[99]

It was suggested that such a specialist list may assist victims because:

- terms of protection orders will be compatible with bail conditions without having to liaise with two sets of lawyers acting for police;
- lawyers and judge will be familiar with issues surrounding domestic violence victims, including matters relevant to giving of evidence and safety while at the court;
- lawyers in criminal matters will understand the full details of each matter, including original assault charges and failure to comply with domestic violence order matters as well as the need for ongoing protection orders and how those would be best structured;
- support and legal services will be available to victims at the specified times; and

[99] This is because of the civilianisation of police prosecutions in Darwin in December 2013, which shifted from a model of a shared division of prosecution responsibilities between Police and the DPP was changed to one which gives the DPP complete prosecution responsibility for all charges which are laid by members of the Police within the summary prosecutions Darwin geographical area.

- lawyers in criminal matters will not enter into 'plea bargaining' or other arrangements without considering the effect upon victim safety, including the effect upon the likelihood of successfully obtaining a protection order.

It was also noted that establishing a specialist prosecution group will require additional resources allocated to the Director of Public Prosecutions and that amendment of the *Director of Public Prosecutions Act* may also be required.

Accordingly, Issues Paper 2 sought stakeholders' views in relation to whether:

- there should be a separate specialised list for criminal prosecutions involving domestic violence in the Local Court which would also deal with DVO applications; and
- it would be preferable for a group of specialist prosecutors to appear in both criminal and civil domestic violence matters to conduct criminal prosecutions involving domestic violence and to appear for police in applications for domestic violence orders.

Submissions

Stakeholders were generally supportive of both proposals. However, the Top End Women's Legal Service noted that its support for a specialist list was contingent upon judges presiding over the list being specifically trained in issues surrounding domestic and family violence.

The Criminal Lawyers Association of the Northern Territory noted that the list 'would clearly be unworkable in bush courts' and would be otherwise ineffective 'unless additional resources are provided to the [Office of the Director of Public Prosecutions] to enable the establishment and maintenance of specialist domestic violence prosecution positions'.

Similarly, the Law Society Northern Territory noted that a specialist list might create additional work where a defendant is charged with various offences, some of which do not involve domestic violence. Accordingly, they suggested that consideration would need to be given to whether all matters are heard together, or whether only domestic violence matters are heard in the specialised list.

They also suggested that:

> 'It would be preferable to have specialised group of prosecutors to conduct criminal matters involving domestic violence from the outset, and have that prosecutor take on any ongoing applications for domestic violence orders. This would ensure that prosecutors have the appropriate training to deal with victims of domestic violence, thus minimising trauma to the victims. In addition, it would allow victims to deal with a single lawyer, rather than multiple lawyers across the course of the matter.'

The Central Australian Women's Legal Service submitted that if criminal matters and DVO applications are to be dealt with in a single list, it is necessary to maintain the distinction in the onus of proving each matter, particularly as perpetrators may argue that a DVO should not be made where they are found not guilty of the criminal charge.

They also expressed concerned that a specialised court may lead to victims becoming lost in the court process. In particular, they submitted that:

> 'Protected persons are generally not required to attend court unless their criminal or domestic violence matters are contested and will in most cases not be present when a defendant enters a plea or when negotiations take place between the prosecutor and the defendant's lawyer. It is essential that victim legal processes are tailored and resourced to ensure that responses afforded to victims are appropriate, respectful and informed. In this

> regards [the Central Australian Women's Legal Service] recommends that consideration be given to separate legal representation and support being provided to the protected person through this process.'

Relationships Australia also noted that specialist courts and officers may be:

- better placed to recognise and successfully prosecute domestic violence matters where there is no physical violence towards victims;
- more aware, and accommodating, of the needs of self-represented parties in presenting their case.

They also noted that it is important that matters are listed quickly to reduce the stress and suspense experienced by victims.

The Central Australian Aboriginal Legal Aid Service submitted that:

- this list should include both applications for DVOs and criminal charges that arise in a context of domestic violence;
- it is essential that both parties have available legal representation to ensure that the legal process is accessible and that processes and outcomes are clearly understood; and
- the availability of therapeutic support to both parties would also be crucial to the effectiveness of such a specialist list.

Other issues

The Criminal Lawyers Association of the Northern Territory also stated that it is not apparent why the *Director of Public Prosecutions Act* would need to be amended given the breadth of section 21 of that Act. Instead this reform could be accomplished by way of Practice Direction by the Chief Judge.

ALRC Recommendations

Recommendation 32-1

ALRC Recommendation 32-1 recommended that state and territory governments, in consultation with relevant stakeholders, should establish or further develop specialised family violence courts within existing courts in their jurisdictions.

The Central Australian Family Legal Unit, North Australian Aboriginal Justice Agency and Northern Territory Police Force supported this recommendation.

The Northern Territory Police Force submitted that a specialised court would:

- increase efficiency in dealing with domestic violence matters from one location at a specific time, allowing legal and support services to structure their availability; and
- reduce trauma to victims.

The North Australian Aboriginal Justice Agency noted that:

> '[Domestic Violence Courts] 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 [Domestic Violence Courts], however, given the substantiated benefits listed above, this is not a reason to deny establishment.'

They further noted that:

- the Northern Territory and Tasmania are the only jurisdictions which are yet to introduce a specialist court;
- the jurisdiction which is most developed is the Australian Capital Territory, with their Family Violence Intervention Program;
- the success of the Australian Capital Territory's program is a result of the size of the jurisdiction; and
- despite the Territory being large and sparsely populated and having a different cultural and linguistic diversity, these challenges could be overcome by adopting open relationships between government and non-government organisations and delivering an adaptive, customisable model on a community by community basis.

Recommendation 32-2

ALRC Recommendation 32-3 recommended that state and territory governments should ensure that specialised domestic violence courts are able to exercise powers to determine:

- DVO applications;
- criminal matters related to domestic violence; and
- family law matters to the extent that family law jurisdiction is conferred on state and territory courts.

The North Australian Aboriginal Justice Agency submitted that:

> 'State and Territory legislation should make clear that where there are dual proceedings on foot regarding both the making of a [DVO] 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 [DVO]. 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'.

The Northern Territory Police Force supported this recommendation.

Recommendation 32-3

ALRC Recommendation 32-3 recommended that state and territory governments should ensure that specialised family violence courts have, as a minimum:

> '(a) specialised judicial officers and prosecutors;
>
> (b) regular training on family violence issues for judicial officers, prosecutors, lawyers and registrars;
>
> (c) victim support, including legal and non-legal services; and
>
> (d) arrangements for victim safety.'

This recommendation was supported by the Northern Territory Police Force.

Recommendation 32-4

ALRC Recommendation 32-4 recommended that state and territory governments should, where possible, promote the following measures in all courts dealing with family violence matters, including courts in regional and remote communities:

‘(a) identifying and listing on the same day, protection order matters and criminal proceedings related to family violence, as well as related family law and child protection matters;

(b) training judicial officers in relation to family violence;

(c) providing legal services for victims and defendants;

(d) providing victim support on family violence list days; and

(e) ensuring that facilities and practices secure victim safety at court.’

This recommendation was supported by the Central Australian Aboriginal Congress Targeted Family Support Service and Intensive Family Support Service and Northern Territory Police Force.

Observations

The Department of the Attorney-General and Justice is hosting an independently facilitated workshop in Alice Springs on 24 August 2016 for the purpose of developing options for court reforms relating to how courts deal with domestic violence. The proposed outcome of the workshop is expected to be a report from the independent facilitator to the Department by 1 October 2016.

6.7 Court processes and procedures

Submissions

The Domestic Violence Legal Service noted that:

- ‘Magistrates and Police representatives are not always alive to the importance of ensuring that protected persons are called when matters involving them are before the Court’; and
- it is not uncommon for matters to be dealt with by the Court without the protected person being called where the defendant and / or their representative are at the bar table.

The Domestic Violence Legal Services submitted that this can lead to the protected person not being given an opportunity to be heard. To this end, they recommend that ‘Court administration ensure matters are called using the defendant’s name when the protected person or their representative is not present’ and that this should be ‘carried out sensitively and with regard for the safety of the protected person’.

Observation

See Part 6.7 of this Report regarding the Alice Springs workshop for the purpose of developing options for court reforms relating to how courts deal with domestic violence.

6.8 Training of judges, police prosecutors and court staff

Submissions

The North Australian Aboriginal Family Legal Service recommended that Local Court, Police prosecutors and Court staff should regularly undertake family violence training and that such training should include:

‘(a) best practice in hearing domestic violence matters (including for instance the use of the vulnerable witness provisions, such as allowing evidence to be given by audio-visual link or from behind a screen);

(b) how the cycle of violence, trauma responses and welfare and development of children are all vital components relating to the impact of family violence in society;

(c) the impact of family violence in remote Indigenous communities; and

(d) the use of plain English in orders and in the court room’.

Noting that the Court operates in a professional, aware and respectful manner when addressing family violence issues, the North Australian Aboriginal Family Legal Service submitted that ‘an increased understanding of the dynamics of family violence, particularly in remote Indigenous communities, can only assist to improve court practice and outcomes’.

The Central Australian Aboriginal Family Legal Unit noted that it also supports the on-going training for Local Court Judges around domestic violence because:

(a) ‘[o]ne of our solicitors reported an incident earlier this year (prior to her employ with CAAFLU but whilst working for another domestic violence legal service in the NT) where she was appearing on behalf of a protected person and the presiding Magistrate requested that she provide the victim’s address to the police in open court for the service of court documents in circumstances where the defendant was present at court, the defendant didn’t know where the victim lived and the victim did not want to disclose her address for fears around her safety. The solicitor offered an undertaking to provide the information to the police outside of the Court but it was rejected by the Magistrate.

(b) ‘[a] CAAFLU solicitor earlier this year made an application for a non-publication order in relation to the media where the offender was a high profile person. Before granting the application the Magistrate made extensive and forceful comments about the fact that the perpetrator was a high profile person and should be made an illustration of publicly, in incomplete disregard for the victim and how it may impact on them. The magistrate did ultimately grant the non-publication order after further submissions’.

The Domestic Violence Legal Service also submitted:

> ‘[t]hat the NT Police should be adequately resourced in relation to their day-to-day and first response to [domestic and family violence] incidents, including by providing ongoing [domestic and family violence] training to General Duties, training and resourcing in responding to and dealing with breaches of DVOs and laying charges in relation to domestic violence offending. Finally, it is critical that sufficient resources are applied to provide for a strong NT-wide audit and oversight of the General Duties response to [domestic and family violence] and thus ensure effective implementation of law, policy and procedure in relation to [domestic and family violence]’.

ALRC Recommendations

Recommendation 8-2

ALRC Recommendation 8-2 recommended that:

> 'Police, prosecutors, lawyers and judicial officers should be given training about potential federal offences committed in a family violence context, including when such offences should be prosecuted or used as a basis for obtaining a family violence protection order.
>
> This training should be incorporated into any existing or proposed training about family violence that is conducted by, among others: state and federal police, legal professional bodies, directors of public prosecution (state and Commonwealth), and judicial education bodies.'

No submissions were received in direct response to this recommendation.

Recommendation 12-2

ALRC Recommendation 12-2 recommended that:

> 'Federal, state and territory police, and directors of public prosecution should train or ensure that police and prosecutors respectively receive training on how the dynamics of family violence might affect the decisions of victims to negate the existence of family violence or to withdraw previous allegations of violence.'

The Central Australian Women's Legal Service and the Top End Women's Legal Service supported this recommendation.

Recommendation 12-4

ALRC Recommendation 12-4 recommended that:

> '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'.

This recommendation was supported by the Central Australian Aboriginal Congress Targeted Family Support Service and Intensive Family Support Service and the Northern Territory Police Force. The Northern Territory Police Force also noted that it is entrenched in police policy and procedure that police should pursue the prosecution of domestic violence related offences, or make application for a DVO, without the consent of the victim, where reasonable grounds exist to indicate there is a risk of ongoing domestic violence.

The Central Australian Aboriginal Congress Targeted Family Support Service and Intensive Family Support Service also submitted that '[w]here there is clear evidence of a violent incident having occurred police should be able to lay charges'.

The North Australian Aboriginal Justice Agency submitted that 'Police General Orders should clarify police obligations to obtain facts in an objective manner without influencing protected persons'.

Recommendation 16-9

ALRC Recommendation 16-9 recommended that state and territory governments should collaborate to provide training to practitioners involved in DVO proceedings on state and territory courts' jurisdiction under the *Family Law Act 1975* (Cth).

The North Australian Aboriginal Justice Agency and Northern Territory Police Force supported this recommendation.

Recommendation 26-3

ALRC Recommendation 26-3 recommended that

> 'Federal, state and territory governments and relevant educational, professional and service delivery bodies should ensure ongoing and consistent education and training for judicial officers, lawyers, prosecutors, police and victim support services in relation to the substantive law and the nature and dynamics of sexual assault as a form of family violence, including its social and cultural contexts.'

This recommendation was supported by the Alice Springs Sexual Assault Referral Centre and the Central Australian Women's Legal Service.

Recommendation 32-5

ALRC Recommendation 32-5 recommended that state and territory police should ensure, at a minimum, that:

> '(a) specialised family violence and sexual assault police units are fostered and structured to ensure appropriate career progression for officers and the retention of experienced personnel;
>
> (b) all police—including specialised police units—receive regular education and training consistent with the Australasian Policing Strategy on the Prevention and Reduction of Family Violence;
>
> (c) specially trained police have responsibility for supervising, monitoring or assuring the quality of police responses to family violence incidents, and providing advice and guidance in this regard; and
>
> (d) victims have access to a primary contact person within the police, who specialises, and is trained, in family violence, including sexual assault issues.'

This recommendation is supported by the Northern Territory Police Force.

Observations

See Part 6.7 of this Report regarding the Alice Springs workshop for the purpose of developing options for court reforms relating to how courts deal with domestic violence.

6.9 Safe rooms in Courts

Submissions

A number of stakeholder[100] recommended that safe rooms should be provided for protected persons and vulnerable witnesses to ensure they are not intimidated or influenced by the defendant during hearings relating to domestic violence.

In particular, the Central Australian Women's Legal Service noted that:

> 'Whilst the [DFVA] makes provision to protect vulnerable witnesses from being seen by the defendant whilst giving evidence, there are no protections in the Act for vulnerable witnesses before or after giving evidence. Vulnerable witnesses and protected persons are often required to share waiting areas with defendants. This allows scope for the defendant to further intimidate the vulnerable witness or protected person. The operation of a designated safe room for vulnerable witnesses and protected persons is a simple practical measure to improve the safety of the court process for vulnerable witnesses and protected persons'.

They also noted that in Queensland, safe rooms have been established in Courts hearing such matters, with the QLD Courts Domestic Violence Protocols 2012 providing the following guidance on operation of said safe rooms:

> 'The maintenance of the safe room is the responsibility of the registrar; however the day to day running of the safe room should be managed in consultation with [domestic violence] prevention workers.
>
> It is the responsibility of the registrar to ensure the safe room is available for women at the Court whether they are the aggrieved or the respondent and to ensure the best use of facilities available to accommodate a male aggrieved or respondent appropriately.
>
> If the aggrieved and the respondent in a proceeding are both female, only the aggrieved should be accommodated in the safe room.
>
> It is up to the party to decide if they require the use of the safe room and is not up to court staff or security officers.
>
> If the courthouse does not have a designated safe room, another room within the courthouse should be used. For example, an interview room, jury room or witness room.
>
> If the courthouse does not have any rooms available, the registry must create a private and safe space within the courthouse. This may mean allowing access to a registry area to wait such as the break room. If possible, a screen or partition should be used to provide the parties with some privacy.
>
> Registrars should liaise with police, local domestic violence services and DV prevention workers to develop safety protocols suited to the local environment.
>
> It may be necessary for the aggrieved to wait at the police building close by and be escorted over to the courthouse.'

To this end, the Central Australian Women's Legal Service strongly advocates for 'the provision of a safe room for vulnerable witnesses and protected persons in the NT at Courts hearing applications for [DVOs], [PVROs] or hearing evidence in relation to family or sexual violence'.

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[100] Alice Springs Women's Shelter, Central Australian Aboriginal Family Legal Unit and Central Australian Women's Legal Service.

The Central Australian Aboriginal Family Legal Unit submitted that courts need to be better equipped to deal with DVO applications:

> ‘particularly around safety measures for protected people and their families but also by ensuring adequate audio visual links are installed and available at the Courts, as many victims are forced to proceed without them especially in regional courts, simply due to the audio visual links not being available and the alternative would have been an adjournment, further prolonging the victim’s anxiety and safety concerns’.

Observations

See Part 6.7 of this Report regarding the Alice Springs workshop for the purpose of developing options for court reforms relating to how courts deal with domestic violence.

6.10 Police and SupportLink

Background

SupportLink provides an integrated referral system to police and other emergency services and enables early intervention by facilitating the referral of victims of family violence (by consent) to various government and non-government agencies for assistance. These agencies are linked into the SupportLink system and are required to make contact with the victim within a specified period of time.

Submissions

The North Australian Aboriginal Family Legal Services stated that it understands that there is no mandatory obligation on Police to use SupportLink. To this end, they recommend that Police policies and procedures should require police to:

a) ‘explain the benefits of the SupportLink system to victims;

b) seek a victim's consent to be referred to services by SupportLink;

c) make relevant referrals when consent is given; and

d) record when consent is withheld’.

6.11 Northern Territory Victims Register

Background

The Victims Register is a Northern Territory Government initiative that was established to address the concerns of victims of crime. The Victims Register is a database which enables the Crime Victims Services Unit to provide victims of violent and sexual crimes, or other concerned persons with certain information about the offender(s). The register is established under the *Victims of Crime Rights and Services Act*.

Submissions

The Central Australian Aboriginal Family Legal Unit submitted that:

> ‘victims of domestic violence should be able to be placed on the Northern Territory Victims Register to receive information relating to the parole/release date of a defendant, regardless of whether the defendant’s incarceration relates to that particular victim, as long as a DVO exists between the parties’.

The Northern Territory Police Force submitted that '[o]ptions for the establishment of a register for 'repeat' domestic violence offenders could be explored, noting that repeat offenders comprise a large proportion of all domestic violence offenders'.

6.12 Domestic Violence Disclosure Scheme - Clare's Law

Background

In England, Clare's Law, or the Domestic Violence Disclosure Scheme (DVDS), requires the English Police to disclose the prior violence-related criminal history of a person if:

a) they receive a request for disclosure from a person who believes they may be at risk of harm; or

b) they receive a request for disclosure from any person who believes another person may be at risk of harm.

Submissions

Issues Paper 2 sought submissions in relation to the following three questions regarding the introduction of a DVDS as a response to domestic violence in the Northern Territory.

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?

The views of stakeholders on this issue were mixed. The Central Australian Aboriginal Legal Aid Service, Northern Territory Police Force and the Top End Women's Legal Service were each of the view that a DVDS would not succeed in the NT.

The Criminal Lawyers Association of the Northern Territory, North Australian Aboriginal Justice Agency and the Northern Territory Legal Aid Commission each raised concerns in relation to the establishment of a DVDS in the Northern Territory, but declined to speculate as to whether or not the DVDS would be successful on the basis that there has been no comprehensive evaluation of Clare's Law or DVDSs elsewhere.

The Central Australian Women's Legal Service and Relationships Australia each indicated potential benefits that may come from the introduction of a DVDS, but did not expressly indicate whether or not they believed that a DVDS would be successful.

The Top End Women's Legal Service noted that they did not support the proposal.

Stakeholders' Concerns

Benefits of DVDS

A number of stakeholders submitted that the benefits of a DVDS are unclear.[101] For example, a confidential submission noted that while the introduction of a DVDS may protect potential victims of domestic violence, a DVDS would most likely benefit people entering new relationships, not repeat victims in longstanding relationships.

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[101] Central Australian Aboriginal Legal Aid Service and two confidential submissions.

The Top End Women's Legal Service submitted that:

- '[s]mall and remote communities tend to know the backgrounds and histories of their residents and do not require further specific information from Police'; and
- while evidence of past violence by a partner may enable some people to make informed decisions about their ongoing relationships, a DVDS does nothing to guarantee the safety of victims who chose remain with violent partners.

The Criminal Lawyers Association of the Northern Territory suggested that the Domestic and Family Violence Reduction Strategy (DFVRS) may obviate the need to introduce a DVDS.

Relationships Australia submitted that a DVDS would provide further protection for those at risk from domestic violence, but noted that the guidelines for release of information would need to be well considered and monitored.

The Central Australian Women's Legal Service was of the view that a DVDS may encourage people to develop safety plans and / or to leave violent relationships. They also suggested that knowledge of a partner's previous violent behaviour may encourage victims not to blame themselves or excuse violent behaviour.

Victim blaming

Both the Central Australian Aboriginal Legal Aid Service and the North Australian Aboriginal Justice Agency expressed concern that the introduction of a DVDS would place greater responsibility on victims and lead to 'victim blaming' of persons who maintain relationships with partners who they are aware have a history of violence.

Privacy and misuse of information

A number of stakeholders were concerned that allowing third parties to access information about a person has clear privacy implications and could result in the misuse of information.[102] No specific examples of misuse were provided.

The Top End Women's Legal Service expressed concern that enabling third parties to make applications for information about a person does not support the aim of empowering individuals to make decisions about their own relationships.

The Central Australian Aboriginal Legal Aid Service noted the potential for issues in Indigenous communities arising from the expansive nature of family connections, such as the possibility of sensitive information being sought by a large range of people.

A confidential submission noted that there may be difficulties explaining the consequences of disclosing information without consent to people with a limited understanding of the law.

Legal implications

The Central Australian Aboriginal Legal Aid Service and the North Australian Aboriginal Justice Agency expressed concern that victims of domestic violence who fail to act on information about a partner's violent history could be prejudiced in other legal matters such as protection proceedings and applications for victims of crime assistance.

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[102] Central Australian Aboriginal Legal Aid Service, North Australian Aboriginal Justice Agency and Northern Territory Legal Aid Commission.

The Northern Territory Legal Aid Commission and the North Australian Aboriginal Justice Agency also noted that a DVDS could impact on a defendant's decision to consent to a DVO if it can later be disclosed or taken into account by their future partners. The Northern Territory Legal Aid Commission also suggested that the Government should seriously consider whether the risk of increased defences is in the best interests of victims.

False sense of security

A number of stakeholders were concerned that people might be lulled into a false sense of security in circumstances where the DVDS discloses no history of violence about their partner.[103] In particular, the North Australian Aboriginal Justice Agency noted that 'a great deal of family and domestic violence is undisclosed and / or not prosecuted'. Northern Territory Police Force was also concerned that a DVDS could have legal implications in circumstances where a person has been investigated for family violence, but not prosecuted.

Significant resources better spent elsewhere

The majority of stakeholders noted that a DVDS would likely require significant resources which would be better spent on the expansion and continued operation of existing services and initiatives.[104]

Do you think that there are any specific factors that should be considered or modifications to Clare's Law that would be required in the Northern Territory context?

Cultural, linguistic and geographical issues

A number of stakeholders cited various cultural, linguistic and geographical factors as potential impediments to the successful operation of a DVDS in the Northern Territory.[105]

The Top End Women's Legal Service noted that communities across the Northern Territory have an extremely limited police presence and no services which could provide information and education about the use of a DVDS. Female police officers may also not be available to attend remote locations, which may lead to issues with women not being comfortable making applications through male officers.

A confidential submission noted that Clare's Law in the United Kingdom requires applicants to provide proof of identity and may give rise to problems given that some Indigenous people in the Northern Territory have difficulties obtaining and / or providing suitable identity documents.

Relationships with police

The Top End Women's Legal Service noted that many of the clients assisted through outreach services in remote communities and in the Darwin Correctional Precinct report that they do not have good relationships with Police and therefore may be unwilling to seek assistance from police.

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[103] Central Australian Aboriginal Legal Aid Service, North Australian Aboriginal Justice Agency and Northern Territory Police Force.

[104] North Australian Aboriginal Justice Agency, Northern Territory Legal Aid Commission Northern Territory Police Force, Top End Women's Legal Service,

[105] Northern Territory Legal Aid Commission and Top End Women's Legal Service.

Other issues

The Criminal Lawyers Association of the Northern Territory suggested that any DVDS trialled or implemented in the Northern Territory should be undertaken within the framework of the Domestic and Family Violence Reduction Strategy.

Do you consider that there are other alternatives which would better achieve the aim of protecting people at risk of domestic and family violence from someone with a history of violent behaviour?

The majority of stakeholders noted that a DVDS would likely require significant resources which would be better spent on the expansion and continued operation of existing services and initiatives.[106]

The Top End Women's Legal Service submitted that in many cases a person making an application for information from a DVDS is likely to have already been the victim of violent behaviour which has triggered concern. Accordingly, education, counselling and legal advice are more appropriate responses and would empower individuals to make decisions about their situations.

The Northern Territory Legal Aid Commission suggested that resources should be directed towards specialist domestic violence services including legal services, Police and shelters as well as the continued implementation of the Domestic and Family Violence Reduction Strategy.

Relationships Australia suggested that a register could be introduced for those who reoffend and breach domestic violence orders on an ongoing basis. For example, a person may be included on the register if they have three or more relevant convictions. They could be removed from the list after 5 years without reoffending.

The Northern Territory Police Force emphasised the effectiveness of the Family Safety Framework and SupportLink over a DVDS.

6.13 Domestic violence death review process

Background

Domestic violence death review processes (DVDRP) exist in Victoria, Queensland, New South Wales, South Australia and Western Australia. While the coronial system of the Northern Territory does provide a process for reviewing deaths, each incident is dealt with individually, whereas the DVDRPs seek to identify and consider commonalities among domestic fatalities. To this end, the functions of DVDRPs are generally to:

- examine the context in which domestic violence deaths occur;
- identify risk and contributory factors associated with domestic violence;
- identify trends or patterns in domestic violence related deaths;
- consider systemic responses to domestic violence; and
- make recommendations to government and non-government organisations involved in domestic violence prevention aimed at reducing domestic fatalities by improving service provision and systemic responses to domestic violence.

[106] North Australian Aboriginal Justice Agency, Northern Territory Legal Aid Commission and Top End Women's Legal Service.

Submissions

A number of stakeholders[107] submitted that, given the disproportionately high rates of domestic and family violence in the NT, it is crucial that a formal domestic violence death review process is established. In particular, stakeholders noted that, given that domestic violence related deaths often occur following predictable patterns of violence and abuse, such a review would enable systemic issues to be identified along with gaps in service provision and barriers to accessing those services. Findings could then inform recommendations as to how any shortcomings could be addressed, with a view to improving responses to domestic and family violence and preventing similar fatalities from occurring.

While the Department of Children and Families agreed, it noted that 'the establishment of such reviews beyond existing coronial processes, may require significant initial and ongoing resourcing'.

Stakeholders also:

- noted that the Territory remains one of the few jurisdictions in Australia where such a process does not exist; and
- referred to the article 'Reducing domestic fatalities in the NT: Why the Territory needs a formal death review process', jointly authored by the Central Australian Women's Legal Service and the Top End Women's Legal Service. That article concludes that:

> 'In a jurisdiction with the highest rate of homicide in the country, and unacceptable levels of domestic violence, it is time to give serious consideration to the introduction of a domestic violence death review process in the Northern Territory.
>
> A vital first step would be to convene a working group comprised of representatives from the government and non-government agencies working within the domestic violence sector to conduct a review into models appropriate for implementation in the Northern Territory, addressing elements such as location, scope and definitions, and reporting and recommendatory roles.
>
> The need for such a review process is undeniable. If we are serious about eradicating domestic violence, and specifically domestic fatalities, we must learn from the tragic deaths of those who die in such circumstances. We owe no less to the victims and their families than to prevent such deaths from occurring in the future'.[108]

ALRC Recommendations

Recommendation 31-6

ALRC Recommendation 31-6 recommended that state and territory governments should undertake systemic and ongoing reviews into deaths resulting from family violence.

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[107] Alice Springs Sexual Assault Referral Centre, Central Australian Family Violence and Sexual Assault Network, Central Australian Women's Legal Aid Service and the Criminal Lawyers Association of the Northern Territory.

[108] This article is attached to the Central Australian Women's Legal Service submission dated July 2015..

Observations

The Victorian Royal Commission into Family Violence has recommended that the Victorian Government establish a legislative basis for the Victorian Systematic Review of Family Violence Deaths and provide adequate funding to enable the Coroners Court of Victoria to perform this function [within 12 months].[109] Currently, the Victorian Systematic Review of Family Violence Deaths (VSRFVD) operates as a subset of the Coroners Court, assisting with coronial investigations into domestic violence related deaths, and requires further funding to reach its full potential. The Commission suggests that with adequate funding the VSRFVD will be able to ensure the most efficient and meaningful approach to examining family violence–related deaths in Victoria.[110]

6.14 Intersections with the *Care and Protection of Children Act* and the *Family Law Act*

Submissions

A number of stakeholders suggested that there was a need for increased synergy between the DFVA, the *Care and Protection of Children Act* and the *Family Law Act 1975* (Cth).[111]

Child Protection

The Alice Springs Women's Shelter and the Central Australian Family Violence and Sexual Assault Network noted that the child protection system often treats parents who are victims of domestic violence as complicit in the abuse of the child, resulting in reluctance by victims of domestic violence to disclose incidents where their children have witnessed or been the victim of violence for fear that they will be 'investigated and held responsible for failing to keep the child safe.

Accordingly, Central Australian Family Violence and Sexual Assault Network recommends 'a move away from ideas that both parents are complicit in the damage to the child and that measures are put into the legislation that the perpetrator be investigated and removed, not the mother or the child'.

The Alice Springs Women's Shelter also recommended that 'the legislation should acknowledge that the paramount concern should not only be the safety of children, but also of adult victims of [domestic and family violence].'

The Department of Children and Families submitted that:

> '…it could be argued that the [DFVA], the [*Care and Protection of Children Act*] and [the Department of Children and Families'] current strategic frameworks and policies do not sufficiently recognise domestic and family violence as a child protection, parenting and family support issue, and do not sufficiently focus DCF policy and practice responses on domestic and family violence. Increasing the number and substance of references to children in the [DFVA] could be one means to bridge this gap.'

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[109] Victorian Royal Commission into Family Violence, *Report and Recommendations* (March 2016) Recommendation 138.

[110] Ibid, vol IV, 238.

[111] Alice Springs Women's Shelter, Central Australia Family Violence and Sexual Assault Network, Dr Sarah Holcombe, ARC Future Fellow, School of Archaeology and Anthropology, College of Arts and Social Sciences, Australian National University, National Association for Prevention of Child Abuse and Neglect, Northern Territory Legal Aid Commission.

Family Law Act

The Northern Territory Legal Aid Commission submitted that:

> 'Synthesis between the *Family Law Act* and state & territory legislation is required to enable Judges in the Federal Family Law Courts to make domestic and family violence orders during family law proceedings, as the Commonwealth laws purport to convey jurisdiction on the state/territory courts where there is an intersection of issues between the jurisdictions.
>
> While there is an attempt to empower Magistrates dealing with domestic and family violence matters with interwoven family law issues, Federal Family Law Courts should have the same powers with respect to domestic and family violence orders…
>
> *Cross Recognition*
>
> It is questionable whether the NT Local Court, empowered to make domestic violence orders, can revive, vary, discharge or suspend any orders or injunctions made under the FLA. On one reading of section 68R of the FLA it confers jurisdiction to a state or territory court that has power in relation to Part VII of the FLA (dealing with children's matters), which, in the NT's case is the Supreme Court (see s. 69H(3) – "Subject to section 69K, jurisdiction is conferred on the Supreme Court of the Northern Territory in relation to matters arising under this Part.") This would need to be amended if [ALRC] Recommendation 16 could be adopted by the NT.
>
> Even if the power did exist, we hold concerns about any change to final parenting orders made by a Territory Court on a final basis. The objects and principles underpinning the two Acts are different although aligned in parts, where it concerns the safety of children and their families.
>
> Under the FLA, there is an extensive list of considerations in determining what is in a child's best interest being the paramount consideration. Being protected from harm (which includes exposure to family violence) is but one consideration, albeit probably the most important. The *Domestic and Family Violence Act* is much narrower and limits the judicial officer in determining how to change family law parenting orders on a final basis. If the power did exist, it would be preferable for only interim orders to be made to ensure the safety of the child/ren and victim with referral powers to the family law courts for orders to be changed by way of an own motion.
>
> This could be complicated further where a respondent is not served or fails to partake in the proceedings and orders are made in absentia. It could have long-term and possibly unintended consequences on the child/ren particularly where there has been an intractable conflict between the parties and parental estrangement from the child.'

6.15 Service Mapping

Submission

The Domestic Violence Legal Service made the following recommendation:

> '… the [Northern Territory Government] conduct service mapping of [domestic and family violence] services and supports in the NT and implement a process (and the concomitant funding) to assist agencies to identify, monitor and report to Government on the gaps in legal and other services in relation to reducing and preventing DFV.

> Gaps in legal services for victims and protected persons, as well as defendants, remain an ongoing issue. In the Top End, the increase of communities serviced by the North Australian Aboriginal Family Legal Services is a welcome development, but only goes part way to filling the gaps.
>
> Outside of the major centres, there remains a lack of services in remote areas, for persons in need of protection who have previously been a defendant or perpetrator and may not meet the NAAFLS guidelines for assistance; for male victims in areas where there are only women's specific DV legal services; for non-indigenous victims of DFV outside of the major centres; and, across both urban and remote NT, meaningful and holistic legal and support services for defendants in DVO and related criminal matters.'

6.16 Safe houses

Background

Safe houses, also referred to as women's shelters and refuges, provide safe accommodation to women and children experiencing domestic violence. Some safe houses provide a range of other services, including counselling and outreach and court support.

There are currently 30 safe houses operating across the Territory in the following 25 locations:

- Alice Springs
- Ali Curung
- Angurugu
- Borroloola
- Darwin / Palmerston
- Elliott
- Gove / Nhulunbuy
- Gunbalanya (Oenpelli)
- Kalkarindji
- Katherine
- Lajamanu
- Maningrida
- Milikapiti
- Nauiyu (Daly River)
- Ngukurr
- Ntaria (Hermannsberg)
- Peppimenarti
- Ramingining
- Tennant Creek
- Ti Tree
- Wadeye
- Wugularr (Beswick)
- Wurrumiyanga (Nguiu)
- Yarralin
- Yuendumu

Twelve of these are operated by the NTG through the Department of Local Government and Community Services. These were established as part of the Northern Territory Emergency Response and have operated since 2009. Another 14 are funded by the NTG, and have operated for various periods of time. For example, the Alice Springs Women's Shelter has operated for approximately 40 years. The four remaining safe houses are operated by non-government organisations.

Submissions

A number of stakeholders[112] commented on the need for safe houses in remote communities. The Central Australian Aboriginal Family Legal Unit Service noted that:

[112] Central Australian Aboriginal Legal Aid Service, North Australian Aboriginal Family Legal Service, North Australian Aboriginal Justice Agency, Top End Women's Legal Service.

> 'a prominent issue for many of our clients is the lack of safe houses particularly in regional and remote areas. Safe houses are crucial to managing the immediate risk of domestic violence for victims. Safe houses must be adequately funded and properly operational with agreed operational standards. Many of our clients instruct that they do not want to leave their community when they are at risk of violence, however with the lack of safe house facilities in their own community, they are left with little option but to leave. Safe houses would enable victims of domestic violence to proactively seek measures to ensure their own safety and that of their children, without having to travel long distances to access refuges when they are at risk of domestic violence'.

The North Australian Aboriginal Family Legal Service also noted that, for example, Milingimpi and Numbulwar in East Arnhem Land do not have Safe Houses. Therefore, it is 'very difficult for women to seek refuge due to family and other members of the community often feeling compromised. Overcrowding in houses also lends to difficulties in assisting others who are seeking refuge from family violence in their home'.

In response to Issues Paper 2, the Top End Women's Legal Service recommended that short-term safe houses in remote communities would be effective at removing victims from situations of immediate danger. They suggested that these could be associated with existing women's centres and would provide secure accommodation until transport to crisis accommodation can be arranged or the situations resolves.

6.17 Victim and offender supports

Background

There are currently a number of domestic violence and related services which operate across the Territory, including:

- legal and court support services;
- counselling, education and behaviour change programs;
- sexual assault trauma services
- witness assistance services; and
- crisis accommodation and safe houses.

Submissions

Stakeholders generally noted that there is a need for additional legal and support services for victims and perpetrators of domestic violence and their families.

Victim supports

Legal services

The Domestic Violence Legal Service recommended that the Northern Territory Government consider the need for additional resources for legal services for victims and protected persons. In particular, they noted that their service 'has consistently been operating beyond maximum capacity in recent months, with wait lists for appointments at times up to two weeks'. This can leave vulnerable people at risk of continuing exposure to violence. Alternatively, 'the victim may lose momentum to seek help…'.

In addition, the Domestic Violence Legal Service noted that 'when DV legal services are confined to advice and casework there is a reduction in the ability to carry out cross-agency

and community legal education and in the ability to share specialised and practical knowledge of DV law and processes with other agencies working in the field. This deficit ultimately limits the information and support available to victims'.

Court supports

(a) General

The North Australian Aboriginal Family Legal Service made the following recommendations regarding court support services:

> 'the Northern Territory [G]overnment prioritise funding for the provision of, and access to, culturally appropriate victim support services for victims of family violence in all courts hearing DVO applications, including Courts sitting in remote Indigenous communities'.

(b) Expansion of Witness Assistance Services

The Witness Assistance Service is a service provided through the Department of the Attorney-General and Justice. The main aim of the service is to provide assistance to victims and witnesses during the criminal court process. Noting that he service is limited in the assistance it can provide, and that it is intended to expand the scope of the service, Issues Paper 2 sought comments in relation to how the scope of the service might encompass a greater number of victims of domestic violence.

The Top End Women's Legal Service recommended the expansion of the Witness Assistance Service encompass:

> '(1) increased engagement with NGO support services providing counselling, legal and financial assistance;
>
> (2) greater support for Culturally and Linguistically Diverse victims and witnesses, beyond simply assisting with booking interpreters;
>
> (3) increasing outreach programs to remote and regional communities; and
>
> (4) allocation of an officer to every case before court.'

The Central Australian Women's Legal Service suggested establishing a victim's advocate position with the Witness Assistance Service whose role is to provide duty services at court and ongoing case services through the court process.

Relationships Australia noted that in Alice Springs victim support and advocacy services are provided by non-government organisations as a component of the Alice Springs Integrated Response to Family and Domestic Violence. Accordingly, they queried whether this would change with the expansion of the Witness Assistance Service.

The Northern Territory Police Force also noted that:

- the existing engagement with SupportLink may provide the ability to trial a more targeted and more intense support service for victims with a view to exploring the effectiveness of a broader rollout;
- the 'outreach' model has achieved positive results through the integrated response to domestic violence by a court support officer; and
- outreach can occur as an early or late intervention model, both having been found to have positive impacts upon victims and provide enhanced service delivery and protection to women.

The Northern Territory Legal Aid Commission highlighted the fact that the Witness Assistance Service cannot service its existing clientele.

In response to Issues Paper 1, the North Australian Aboriginal Family Legal Service recommended:

> 'that a similar service [to the Witness Assistance Service] be developed for Protected Persons who do not receive the assistance of [the Witness Assistance Service]. This could arise, for instance, where an application for a DVO is listed in court sitting in a remote community and there are no related criminal charges. In such instances, the Protected Person should still be afforded the support of a culturally appropriate court support worker, who can assist the Protected Person in understanding the court process, support them when at court, assist them to engage with appropriate services (such as interpreter and legal services), and provide them with relevant referrals (for instance, for counselling)'.

Victim programs

The North Australian Aboriginal Family Legal Service recommended the establishment of a victim-oriented program, to run concurrently with the Men's Behaviour Change Program they proposed in their submission, which provides support and education for victims, for example:

- informing them as to the nature of the Men's Behaviour Change Program;
- assisting them in understanding the cycle of family violence and the impact family violence has on the development and welfare of children; and
- supporting them to engage in relevant support services and counselling.

They also recommended '[t]hat there be a follow-up procedure implemented in respect to both perpetrators and victims of family violence, so that relevant additional services can be offered as required'.

Offender supports

A number of stakeholders noted that there is a need for more legal and support services for offenders.

Both the Domestic Violence Legal Service and the Central Australian Aboriginal Family Legal Unit recommended that the government consider funding a duty legal service to assist defendants with DVO applications, including to assist them to link with services and programs aimed at behaviour change and the prevention of further domestic violence. The Central Australian Aboriginal Family Legal Unit suggested that the duty service should be responsible for informing the court about the outcome of any such enquiries.

The Northern Territory Legal Aid Commission was supportive of the proposal, noting that a duty service advising and appearing for defendants would:

- greatly assist the speedy disposition of matters;
- reduce potential breaches;
- free up Court and legal assistance services and importantly;
- increase the overall safety of victims; and
- ensure appropriate orders are made.

They also noted that such a service could ensure that obligations are explained to defendants and refer them to other services to address their behaviour and substance abuse. The Domestic Violence Legal Service made similar remarks, noting that, given many perpetrators and victims have children together and will continue to have some form of contact because of the children or because their relationship continues, responses must extend beyond the making of DVOs.

The Northern Territory Legal Aid Commission noted that it is supportive of services which represent offenders by providing advice in relation to relevant processes and, where possible, negotiating consent orders, but in a way which does not re-traumatise victims.

Other supports

The North Australian Aboriginal Family Legal Service noted that remote Indigenous communities are severely under resourced in respect of services such as counselling, drug and alcohol programs and refuge accommodation for women fleeing violence. Accordingly, they recommended that, 'in considering what support services are required for remote Indigenous communities, consultation occur with community members to determine what particular resources are best suited for each particular community', including the provision of family violence counselling, assistance with drug and alcohol abuse and the provision of Safe Houses.

Similarly, the Central Australian Aboriginal Family Legal Unit submitted that 'a more thorough engagement and consultation with communities and service providers within communities, is needed by the Northern Territory Government to ensure that services are relevant and consistent with the particular needs and goals of each community'.

They also submitted that:

> 'there should be more security measures in place to enable Territory Housing to support tenants who are victims of domestic violence. Appropriate safety measures are important to deter and prevent the further commission of domestic violence, which can include the provision of security cameras, safe rooms and duress alarms where appropriate'.

The Royal Australian College of Surgeons also noted that it 'supports programs that help to identify and support violence victims, including training programs that improve the confidence and competency of health professionals to identify and care for people experiencing domestic violence'.

Rainbow Territory noted that there is a lack of appropriate programs and services for lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI) couples and individuals and that it is imperative that the Northern Territory Government provide further funding for evidence based rehabilitation and counselling programs aimed at addressing and preventing domestic violence in LGBTQI relationships.

National Seniors Australia Northern Territory noted that the National Seniors Northern Territory Policy Advisory Group, in its 2015-16 Budget Submission to the Territory Government, recommended:

- '[t]he Government fund the extension of the elder Abuse research/survey to be undertaken by the Darwin Community Legal Service in 2015 and provide support to ensure the methodology is robust'.
- '[p]rotocols for the Northern Territory are developed to build on experience from other jurisdictions including the public sector, NGOs and the retail and service sectors'.

- '[f]unding be set aside for the establishment of suitable service responses, sensitive to the needs of the clients and cultures identified'.[113]

ALRC Recommendations

Recommendation 9-3

ALRC Recommendation 9-3 recommended that:

> '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.'

This recommendation was supported by the Alice Springs Sexual Assault Referral Centre, Central Australian Women's Legal Service, North Australian Aboriginal Justice Agency, Northern Territory Police Force, North Australian Aboriginal Justice Agency and the Top End Women's Legal Service.

The Alice Springs Sexual Assault Referral Centre also suggested that this group of persons should also include:

- persons of low literacy;
- disabled persons;
- cognitively impaired persons; and
- geographically isolated persons.

The North Australian Aboriginal Justice Agency also suggested that '[s]ervices 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 11-12

ALRC Recommendation 11-12 recommended that, where appropriate, state and territory courts should provide persons against whom DVOs are made with information about relevant culturally and gender-appropriate rehabilitation and counselling programs.

This recommendation was supported by the Central Australian Aboriginal Family Legal Unit.

6.18 Domestic and family violence education

Submissions

The North Australian Aboriginal Family Legal Service noted that it is often approached to provide community legal education to young children and teenagers regarding issues such as 'sexting', accessing pornography on the internet, sexual assault, and family violence.

The North Australian Aboriginal Family Legal Service has generally declined providing such legal education to children on the basis that:

[113] A copy of this recommendation is attached to National Seniors Australia Northern Territory's submission.

- 'it is vital such education be provided in conjunction with relevant supports being made available to the children, youth and their families (such as appropriate counselling)'; and
- 'in Indigenous communities, significant consultation with elders and families is often required at the outset to minimise any negative response to providing such education as part of a legal service'.

The North Australian Aboriginal Family Legal Service recommended that family violence prevention education and respectful relationships programs, such as the Love Bites Program offered by the National Association for Prevention of Child Abuse and Neglect, be delivered in primary and secondary schools throughout the Northern Territory, commencing in the first year of school and progressing in an age appropriate manner, throughout each child's schooling years.

The Royal Australian College of Surgeons also highlighted the need to '[c]onduct ongoing education campaigns on domestic violence that are community driven and culturally sensitive'.

Observations

The Victorian Royal Commission into Family Violence has recommended that:

> 'The Victorian Government mandates the introduction of respectful relationships education into every government school in Victoria from prep to year 12. Implementation should be staged to ensure school readiness and to allow for ongoing evaluation and adaptation. It should be delivered through a whole of-school approach and be consistent with best practice, building on the evaluation of the model being tested by the Department of Education and Training through Our Watch [within five years]'.[114]

6.19 Alcohol reduction

Submissions

The Royal Australian College of Surgeons noted that it is a strong advocate for the reduction of alcohol related harm and that their position on reducing the harm recommends:

- '[r]estricting the physical availability of alcohol, by reducing trading hours and outlet density';
- '[r]estricting the economic availability of alcohol, by introducing a volumetric tax on alcohol';
- '[r]educing exposure to alcohol advertising and promotions'; and
- '[f]urther investigation of how a suitable Screening and Brief Intervention program could be implemented in Australian Hospitals'.

They also recommended:

- implementing community-led and comprehensive alcohol controls in communities where a need has been identified and agreed; and
- investing in research to expand the evidence base about which interventions are effective in different contexts, and how they can be adapted.

[114] Victorian Royal Commission into Family Violence, *Report and Recommendations* (March 2016), Recommendation 189.

6.20 Sexual Offences - Intimate medical imaging

Submissions

Both the Alice Springs Sexual Assault Referral Centre and the Central Australian Family Violence and Sexual Assault Network submitted that there is a need for specific legislation regarding the use of photographic and video medical imaging of intimate body areas used to diagnose and interpret harm caused from sexual assault.

In particular, the Central Australian Family Violence and Sexual Assault Network suggested that 'there be clearer articulation in the legislation of the purpose of medical imaging of injuries (ie not for court use, or subpoena - only for medical specialist interpretation of injury)'.

Observations

It appears that what is being suggested is that, rather than having to tender medical images of intimate areas of a person as evidence, evidence of injuries to such areas must be made by an expert with access to the images.

6.21 Domestic violence offender programs and parole

Background

It has been suggested that there should be a more direct link between the completion or non-completion of domestic violence offender programs by prisoners and the granting of parole.

The Parole Board already has the ability to take rehabilitation measures into account when deciding whether parole should be granted. The *Parole Act* also provides a specific ability to attach conditions to the parole order, which could include conditions requiring participation in rehabilitation programs. The participation of an offender in rehabilitation programs, either while in prison, or when on parole, is subject to adequate service availability.

The overarching framework for parole decisions in the NT is provided by the *Parole Act*. The Department of Correctional Services has responsibility for the *Parole Act* and all programs available in custodial correctional facilities and youth justice facilities.

The *Parole Act* does not provide a statutory test to be applied when making a parole decision, except in the case of offenders serving life imprisonment for murder. In this instance, a 'public interest' test is applied.

The Policy and Procedures Manual, which provides information to members of the Parole Board, advises that the primary consideration should be given to 'the risk or likelihood of the prisoner re-offending while on parole and the level of danger created by the prisoner being granted parole'.[115]

Submissions

Issues Paper 2 sought submissions in relation to the following two questions regarding the relationship between domestic violence offender programs and parole.

[115] Parole Board of the Northern Territory, *Policy and Procedures Manual*,14.

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?

A number of stakeholders noted that the Parole Board generally has regard to offenders' participation in rehabilitation programs.[116] However, only the Central Australian Aboriginal Legal Aid Service and the Chairperson of the Parole Board, His Honour Justice Southwood, expressed a view specifically in relation to the current ability of the Parole Board to consider the completion, or non-completion, of domestic violence offender programs by prisoners. In their view, the current ability of the Parole Board to consider these matters is sufficient.

In particular, the Chairperson of the Parole Board noted that the Parole Board:

- considers whether an offender, who has committed a crime involving domestic violence, has completed a domestic violence offender program before releasing the offender on parole;
- for domestic violence offenders, generally makes parole orders which contain a condition that the offender is not to engage in conduct which may give rise to a DVO; and
- where appropriate, sets parole conditions that the offender shall:
  - not contact the victim either directly or indirectly;
  - not enter an exclusion zone around the victim;
  - be electronically monitored;
  - undertake further rehabilitation programs in the community; and
- may revoke the offender's parole where the offender breaches parole.

Other issues

In response to this question, stakeholders also raised a number of other relevant issues.

The North Australian Aboriginal Justice Agency (NAAJA) submitted that the Parole Board considerations around DVOs could be improved. Specifically:

> '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 DVOs currently in place (which might allow contact in limited circumstances).'

Stakeholders also noted that:

- there is a lack of effective and culturally appropriate domestic and family violence perpetrator behaviour change programs, both inside and out of Northern Territory correctional facilities;[117]
- there are currently not enough family and domestic violence programs in prison;[118]
- poor access to programs, including large wait lists, significantly inhibits access to parole for many prisoner;[119]

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[116] Criminal Lawyers Association of the Northern Territory, Central Australian Aboriginal Legal Aid Service and Northern Territory Legal Aid Commission.

[117] Central Australian Aboriginal Legal Aid Service and North Australian Aboriginal Justice Agency.

[118] North Australian Aboriginal Justice Agency.

[119] Ibid.

- programs are delivered without interpreters, which significantly reduces their effectiveness;[120]
- the Violent Offender Program and the Sex Offender Program have been discontinued in the Alice Springs Correctional Centre;[121]
- a best practice domestic violence perpetrator program, such as the Men's Behaviour Change Program run by the Tangentyere Council, needs to be reintroduced in the Alice Spring Correctional Centre as a matter of urgency;[122]
- to avoid prejudice, the Parole Board should be able to take into account that the failure of a person to undertake a rehabilitation program may have been solely because it was not available to the person.[123]

If you think a more direct link should be made between the completion of domestic violence programs and parole, what methods do you think would best achieve this? For example, some jurisdictions include a statutory test to capture the key aspects of the parole decision, such as a 'public interest' or 'safety of the community' test and/or list matters to be considered.

The Criminal Lawyers Association of the Northern Territory and the Northern Territory Legal Aid Commission noted that the introduction of a statutory test requiring the consideration of such matters would unduly fetter the discretion of the Parole Board.

Similarly, the Top End Women's Legal Service was opposed to the introduction of a statutory test and instead suggested establishing guiding principles similar to those contained in the Tasmanian *Corrections Act 1997* (TAS), namely:

'(a) The community is entitled to an appropriate level of protection from illegal behaviour by people subject to this Act;

(b) People who are subject to this Act retain their normal rights and responsibilities as citizens, except as these are limited in accordance with law;

(c) Services and procedures should be fair, equitable and have due regard to personal dignity and individuality, as far as is consistent with the need for appropriate levels of security and control;

(d) Individuals are capable of change; and

(e) People subject to this Act continue to be members of the community and should be assisted to become socially responsible. Whilst their liberty is restricted to various degrees, demonstrated social responsibility should lead to less intrusive control and intervention.'

It is the view of the Top End Women's Legal Service that these principles would allow for greater discretion than a statutory test and enable consideration of the rights of the offender and the safety of the community. They also suggested that these principles would:

[120] Northern Territory Legal Aid Commission.

[121] Central Australian Aboriginal Legal Aid Service, Criminal Lawyers Association of the Northern Territory, North Australian Aboriginal Justice Agency, Northern Territory Legal Aid Commission.

[122] Central Australian Aboriginal Legal Aid Service, Criminal Lawyers Association of the Northern Territory, Northern Territory Legal Aid Service and the Law Society Northern Territory.

[123] Central Australian Aboriginal Legal Aid Service, Criminal Lawyers Association of the Northern Territory and the Northern Territory Legal Aid service.

- 'encourage a link between parole and demonstrated social responsibility – which could include completion of domestic violence programs'; and
- 'make explicit the responsibility of correctional services to assist in rehabilitation by providing programs'.

The Chairperson of the Parole Board noted that there is a sufficiently direct link between the completion of domestic violence programs and parole and that no amendment to the *Parole Act* is required. That submission contains a rather extensive list of reasons in support of this view, including:

- there is no evidence to suggest that victims of domestic violence are being put at risk as a result of the current parole process or the decision making framework of the Parole Board; and
- restricting the Parole Board's discretion by the introduction of prescriptive legislation is unlikely to provide any more rigour around an already robust process.

Other issues

The Chairman of the Parole Board also submitted that:

> '[t]he Parole Board would like to see the Department of Correctional Services be given significantly greater funding to increase the capacity of Corrections to provide domestic violence programs to prisoners in the Northern Territory. To require offenders who have committed crimes of domestic violence to complete violent offender treatment programs before being granted parole when access to programs is limited or unavailable because of inadequate resources is *Kafkaesque*.'

6.22 Electronic monitoring

Background

The *Correctional Services Act*, the *Parole Act* and the *Bail Act* contain very broad provisions relating to the use of approved monitoring devices.

Issues Paper 2 sought comments in relation to the use of electronic monitoring as a response to domestic violence.

Submissions

Stakeholders were generally supportive of electronic monitoring.

Benefits

The Central Australian Aboriginal Legal Aid Service noted that electronic monitoring might reduce the risk of flight and encourage stricter compliance with bail conditions regarding association and attendance at certain premises.

Northern Territory Legal Aid Commission noted that electronic monitoring of domestic violence offenders convicted of stalking may serve as a deterrent for further offending and increase the safety of victims. Similarly, Relationships Australia noted that electronic monitoring may be offenders do not approach victims in their home or elsewhere.

Concerns

The Criminal Lawyers Association of the Northern Territory noted reservations about the use of electronic monitoring for youths. They also suggested that there was a risk that the increased use of electronic monitoring would result in the 'general "ratcheting up"' of intrusive surveillance measures.

The Central Australian Aboriginal Legal Aid Service and the North Australian Aboriginal Justice Agency noted that it is essential that electronic monitoring not be regarded as a replacement for the therapeutic supports.

The North Australian Aboriginal Justice Agency also expressed concern that the overuse of electronic monitoring might result in more Aboriginal people being returned to custody for conditional breaches that do not necessarily impinge community safety.

The Northern Territory Police Force noted that while electronic monitoring is an effective tool in major centres, the technology is dependent upon access to a constant stable power supply and Next G coverage, making it difficult to manage and monitor in remote locations. They also noted that electronic monitoring is resource intensive as it must be monitored by police and must be supported by structured protocols for the reporting of breaches and referral to police for appropriate action when required.

Observations

It is noted that following the circulation of Issues Paper 2, the *Bail Amendment Act (No. 2) 2015* amended the *Bail Act* to allow the Youth Justice Court to consider the use of an electronic monitoring device as a condition of a bail conduct agreement.

6.23 Serious Sex Offenders Act for violent offenders

Background

The *Serious Sex Offenders Act* allows the Attorney-General to apply for a continuing detention order or a supervision order for a qualifying serious sexual offender. The primary object of the scheme is to enhance the protection and safety of victims of serious sex offences and the community generally by allowing for the control, by continued detention or supervised release, of offenders who have committed serious sex offences and pose a serious danger to the community.[124]

Some people have suggested that a similar scheme allowing the Attorney-General to apply to the Supreme Court for a continuing detention order, or for a supervision order, for a qualifying offender who is in the last 12 months of their sentence, should be available for serious violent offenders.

The *Sentencing Act* already allows the Supreme Court to impose an indefinite sentence on an offender convicted of a violent offence.[125] Violent offences are defined to include a crime where some form of violence was used or was attempted to be used and for which an offender

[124] *Serious Sex Offenders Act* (NT), s 3(1).

[125] *Sentencing Act* (NT), pt 3 div 5 sub-div 4.

may be sentenced to life imprisonment. The Supreme Court may not impose an indefinite sentence unless it is satisfied that the offender is a serious danger to the community.[126]

Submissions

Issues Paper 2 sought submissions in relation to the following two questions regarding whether a scheme similar to that under the *Serious Sex Offenders Act* for violent offenders should be implemented in the Territory.

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 majority of stakeholders were of the view that the current indefinite sentencing regime is adequate and should not be extended.[127] In particular, the Criminal Lawyers Association of the Northern Territory noted that:

> 'the Court of Criminal Appeal has carefully considered and applied Division 5 Subdivision 4 of the *Sentencing Act* in cases such as *Murray v R* [2006] NTCCA 9, without suggesting that these provisions are in need of reform.'

The Northern Territory Legal Aid Commission and the Northern Australian Aboriginal Justice Agency each made a similar submission.

While the Top End Women's Legal Service noted that the *Sentencing Act* allows the Supreme Court to impose indefinite sentences on offenders convicted of a serious violent offence, they made no submission as to the adequacy of the current regime on the basis that they do not provide criminal legal advice.

Northern Territory Police commented that '[p]erhaps additional safety measures for victims of domestic and family violence related crimes could be achieved through legislation allowing for the provision of supervision or control orders beyond parole periods'.

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?

The majority of stakeholders opposed the introduction of a serious sex offender type scheme for violent offenders.[128]

The Criminal Lawyers Association of the Northern Territory, North Australian Aboriginal Justice Agency and the Northern Territory Legal Aid Commission noted that the principles in the *Sentencing Act*, coupled with judicial discretion and the role of the Parole Board, provide sufficient checks and balances.

The Central Australian Aboriginal Legal Aid Service, with whom the North Australian Aboriginal Justice Agency agreed, noted that post-sentence preventative detention of sex offenders has

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[126] Indefinite sentences may also be imposed by the Supreme Court in some other circumstances involving serious harm, or sexual penetration or gross indecency involving a child under 16, or a child over 16 if the child is under special care and sexual penetration or gross indecency without consent. See *Sentencing Act* (NT), s 65.

[127] Central Australian Aboriginal Legal Aid Service, Criminal Lawyers Association of the Northern Territory, North Australian Aboriginal Justice Agency, Northern Territory Legal Aid Commission, Relationships Australia.

[128] Central Australian Aboriginal Legal Aid Service, Criminal Lawyers Association of the Northern Territory, North Australian Aboriginal Justice Agency, Northern Territory Legal Aid Commission, Relationships Australia and Top End Women's Legal Service.

been held by the United Nations Human Rights Committee to be a breach of international human rights law.

Additionally, they noted that:

- the Criminal Lawyers Association of the Northern Territory has described the ability of 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 under section 23 of the *Serious Sex Offenders Act* 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*.'; and

- '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'.

The Top End Women's Legal Service noted that allowing the Attorney-General to make applications for the continuing detention of an offender is not consistent with a clear separation of powers.

Observation

Though the Department raised this as a matter within the framework of domestic violence the resolution of the issue is much broader matter for criminal justice – and is not likely be resolved as part of domestic violence reforms.

6.24 Flash Incarceration

Background

'Flash incarceration' relates to a policy operational under the HOPE program in the United States. The program is also under consideration in the United Kingdom. The policy has two main elements:

(a) a new type of sentence order called a Behaviour Change Order. This order would be available for offences including unlawful entry, robbery, vandalism, shoplifting, car theft, breach of a domestic violence order and minor drug possession. The order would have a number of mandatory conditions, such as electronic monitoring and drug and/or alcohol testing; and

(b) mandatory incarceration for a period not exceeding 48 hours for any breach of a condition of a Behaviour Change Order.

Evaluations of the Hawaii HOPE program indicated that probationers participating in the HOPE program had large decreases in positive drug tests and rearrests. [129]

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[129] Philip Bulman, 'In Brief: Hawaii HOPE' (2010) 266 *National Institute of Justice* <http://www.nij.gov/journals/266/Pages/hope.aspx#note1>.

The aim of the HOPE program, and similar programs that use ‘flash incarceration’, is to address some of the problems with probation supervision, in particular that probation officers lack the capacity to detect violations of the rules as well as the ability to ensure a quick and consistent response to the violations detected. It tries to address the idea that deferred and low-probability threats of severe punishment are less effective than immediate and high-probability threats of mild punishment.[130]

A report released in March 2015 by RMIT University on effective ways to intervene to prevent family violence recommended that courts provide clear advice to perpetrators about the escalation of sanctions they should expect, should they fail to comply with relevant orders and that this should include developing protocols for ‘swift and certain’ sanctioning, such as consideration of ‘flash incarceration’ for 24 hours upon non-compliance.[131]

The Behaviour Change Order appears to be similar to Community Custody Orders.[132] Community Custody Orders are applicable in the Territory where a person is convicted of a prescribed offence and sentenced to a term of imprisonment of 12 months or less. In such a case, the court can order the term of imprisonment to be served by way of a Community Custody Order and there is broad discretion regarding the type of conditions that can be prescribed. The *Sentencing Act* does not mandate terms of imprisonment for breaching an order and it is not an offence to breach the order.

Submissions

Issues Paper 2 sought submissions in relation to the following three questions regarding the potential application of flash incarceration in the Territory.

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

Stakeholders were generally supportive of the need for clear and predictable sanctions for breaches of Community Custody Orders.

Clarity and Predictability of Current Sanctions

The Criminal Lawyers Association of the Northern Territory, North Australian Aboriginal Justice Agency and the Northern Territory Legal Aid Commission each noted that section 48L(2) of the *Sentencing Act* currently provides clear and predictable sanctions for breaches of Community Custody Orders. That section provides that the court ‘must’ impose imprisonment if a Community Custody Order is breached, unless it would be unjust to do so because of exceptional circumstances which have arisen since the order was imposed.

The need for judicial discretion

The Top End Women’s Legal Service noted that while it supports clear and predictable sanctions for breaching Community Custody Orders, ‘this should not be considered support for flash incarceration. Incarceration should be reserved for serious offences where the

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[130] Angela Hawken and Mark Kleiman, Managing Drug Involved Probationers with Swift and Certain Sanctions: Evaluating Hawaii’s HOPE (2009) 6-7 <https://www.ncjrs.gov/pdffiles1/nij/grants/229023.pdf>.

[131] Centre for Innovative Justice, RMIT University, *Opportunities for Early Intervention: Bringing perpetrators of family violence into view* (March 2015) 92. See also Lorana Bartels, ‘Swift and certain sanctions: Is it time for Australia to bring some HOPE into the criminal

justice system?’, (2015) 39 *Criminal Law Journal* 53.

[132] *Sentencing Act* (NT) Prt 3 Div 5 Sub-division 2A.

offender poses a continuing risk to the community, and should be imposed only after exercise of appropriate judicial discretion'.

Similarly, Relationships Australia noted that 'the breach needs to be determined and the penalty applied by the courts as many factors impact and need full consideration to protect all parties'.

Other issues

In response to this question stakeholders raised a number of other relevant issues.

A confidential submission noted that Community Custody Orders are not permitted to be used in relation to violent or sexual offences and thus are likely to have limited application to domestic violence offending in the absence of legislative amendment enabling the use of Community Custody Orders for violent offences.

The Criminal Lawyers Association of the Northern Territory and the Northern Territory Legal Aid Commission expressed concern that the resources required to enable Community Custody Orders to be implemented are unavailable in some remote communities in which offenders reside who would otherwise be eligible for this sentencing disposition.

The North Australian Aboriginal Justice Agency submitted that:

> 'In NAAJA's experience, [Community Custody Orders] are not accessible for Aboriginal people. We urge the Government to consider allowing [Community Custody Orders] to be utilised by courts for violent offending. [Community Custody Orders] 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 [Community Custody Orders] for Aboriginal people and to make [Community Custody Orders] a viable alternative to prison for Aboriginal people.
>
> Aboriginal men reside at Wulgunggo Ngalu to complete their [Community Custody Order]. 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 [Community Custody Orders] at Wulgunggo Ngalu is excellent, at around 76% instead of 54% in the mainstream justice system.5 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.'

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

Stakeholders were either generally opposed to the concept of flash incarceration[133] or of the view that it would have limited deterrent effect in isolation of other therapeutic measures.[134]

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[133] Central Australian Aboriginal Legal Aid Service, North Australian Aboriginal Justice Agency and Top End Women's Legal Service.

[134] Central Australian Women's Legal Service, Criminal Lawyers Association of the Northern Territory and Northern Territory Legal Aid Commission.

The need for therapeutic measures

The Central Australian Aboriginal Legal Aid Service submitted 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…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.'

The Criminal Lawyers Association of the Northern Territory and the Northern Territory Legal Aid Commission acknowledged the impressive outcomes of the HOPE program and would welcome a trial of a similar initiative in the NT. However, both organisations noted that flash incarceration is only one aspect of the HOPE program and that it is essential that sufficient resources are provided to enable intensive case management by specially trained probation officers, which is an essential feature of the program.

A confidential submission noted that the prevalence of non-intoxication DVOs and alcohol related violent offending suggests a corresponding need for interventions targeting alcohol misuse.

Opposition to 'flash incarceration'

The Central Australian Women's Legal Service expressed concern that 'this concept would not be an effective deterrent and is likely to cause greater congestion within the prison system and only catch those perpetrators who come in direct contact with police following a breach'. Instead, the Central Australian Women's Legal Service suggested that 'a specialised domestic violence court with [specialised] prosecutors, magistrates and court staff would be better placed to deal with breache[s] of orders and offer a holistic approach to sentencing a perpetrator for type of offending'.

The Central Australian Aboriginal Legal Aid Service submitted that flash incarceration would amount to mandatory imprisonment, which undermines judicial discretion and the separation of powers. Additionally, they noted that 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.

The Central Australian Aboriginal Legal Aid Service also submitted 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 noncompliance 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.'

To this end, the Central Australian Aboriginal Legal Aid Service noted while they do not support flash incarceration, they are aware that the HOPE program includes a range of therapeutic measures which may positively impact on the rates of domestic violence in the Northern Territory.

The North Australian Aboriginal Justice Agency submitted that it was opposed to flash incarceration and mandatory sentencing. It also noted that it was not convinced that, where so many Aboriginal people are being sentenced to imprisonment for short, sharp sentences, that flash incarceration represents the fundamentally different approach that the NT so urgently needs to break the cycle of offending.

They go onto note that, given the Northern Territory's already high incarceration rates, the cost of any model which proposes to increase incarceration should be considered against the cost of providing rehabilitation and early intervention programs that might prevent crime.

The Top End Women's Legal Service submitted that it does not support flash incarceration.

Other issues

In response to this question stakeholders raised a number of other relevant issues.

The Central Australian Women's Legal Service expressed concerns regarding the effectiveness of 'flash incarceration' in keeping women and children safe long term. In particular, holding a perpetrator accountable for a maximum of 48 hours provides victims with only a very short period of relief.

The Criminal Lawyers Association of the Northern Territory and the Northern Territory Legal Aid Commission both noted that the therapeutic aspects of the HOPE program are similar to those under the CREDIT Court, SMART Court and the Alcohol Court, which were trailed and discontinued. Accordingly, if the HOPE program is trailed in the Northern Territory it should be given a fair go. Similarly, the Law Society Northern Territory also noted that '[t]he Credit Court NT and Drug Court were disbanded, and more is needed to address drug and alcohol related offending in Northern Territory'.

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?

While a number of stakeholders made submissions regarding modifications to the HOPE model to suit the Northern Territory, the North Australian Aboriginal Justice Agency and the Northern Territory Police Force expressed the view that the information contained in Issues Paper 2 regarding the HOPE program was insufficient to respond to the question.[135] To this end, the North Australian Aboriginal Justice Agency requested that the Northern Territory Government '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'.

The Criminal Lawyers Association of the Northern Territory submitted that if a decision is made to establish a HOPE model in the Northern Territory, 'it should be commenced on a pilot basis in a single location, supported and guided by a reference group or steering committee to enable appropriate modifications to be made to meet local circumstances and needs'.

Application of flash incarceration to broader range of offending orders

Issues Paper 2 notes that 'Behaviour Change Orders' under the HOPE model appear to be similar to Community Custody Orders. In response to this point, a confidential submission submitted that while the current legislative scheme may allow for a HOPE like sanction model

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[135] However, it is noted that the submissions made by the Northern Territory Police Force in relation to the related questions do identify issues to be considered if a HOPE model were to be introduced into the Northern Territory.

to be used on offenders subject to a suspended sentence of imprisonment (including home detention), legislative change would be required if such a scheme were to be applied to offenders subject to parole and Community Custody Orders, and orders without an underlying period of imprisonment such as community based orders and bonds.

The Law Society Northern Territory also noted that:

> 'there may be scope for some aspects of the HOPE scheme to operate in the Northern Territory in relation to an offender who has committed an act of domestic violence and s/he is on a suspended sentence of imprisonment with a period of supervision/ condition of supervision. If the offender breached the conditions of the suspended sentence they could be dealt with under a scheme similar to HOPE.'

Inability to act swiftly

An confidential noted that the inability for the justice system to act swiftly in some cases may limit the program's expansion through the whole of the Northern Territory.

Trivialisation of domestic violence offending

The Northern Territory Police Force noted that it was their understanding that the HOPE model has been primarily used for drug related offences. Accordingly, they submitted that adopting a blanket maximum 48 hour incarceration period for breaches of DVOs may lead to the trivialisation of breaches of such orders. Further, they submitted that offenders incarcerated for such brief periods 'may form the belief that the matter has been dealt with and therefore it may not act effectively as a deterrent or incentive to change behaviour'. To this end, the Northern Territory Police Force suggested that consideration be given to such breaches attracting sanctions of greater than 48 hours.

The need for judicial discretion

The Top End Women's Legal Service noted that while it supports clear and predictable sanctions for breaching Community Custody Orders, 'this should not be considered support for flash incarceration. Incarceration should be reserved for serious offences where the offender poses a continuing risk to the community, and should be imposed only after exercise of appropriate judicial discretion'.

Similarly, Relationships Australia noted that 'the breach needs to be determined and the penalty applied by the courts as many factors impact and need full consideration to protect all parties'.

Victim blaming

The Law Society Northern Territory noted its concern to ensure that victims of domestic violence are not blamed by offenders if the offender is incarcerated due to a breach.

Geographical, demographic, language and cultural considerations

The Northern Territory Legal Aid Commission's submission identified the following considerations as relevant to the Northern Territory in considering the viability of programs such as HOPE:

- 'Geographical considerations (distance/remoteness/accessibility);
- Demographic, language and cultural consideration;
- Disability and cognitive impairment;

- Service bases/availability and resource considerations, including access to appropriate rehabilitation programs;
- Appropriate police responses; and
- Time frames necessary to bring perpetrators before the justice and corrections systems which may militate against the length of incarceration envisioned for flash incarceration'.

The Top End Women's Legal Service is concerned that behaviour change programs similar to the HOPE model would not be effective in the Northern Territory for the following reasons:

- many regional and remote communities currently have limited or no access to already existing programs and services related to behaviour change; and
- given the high rate of language diversity in the Northern Territory, language barriers may limit access to programs.

To this end, they recommended that:

- priority be given to increasing access to existing support services before requiring mandatory participation of offenders in behaviour change programs; and
- resources should be used to increase education and to facilitate a genuine desire for behavioural change.

The Top End Women's Legal Service also noted that the HOPE model was developed in Hawaii, which has a higher population density, and is geographically much smaller than the Northern Territory.

Observations

The Department of Correctional Services has developed a swift, certain and fair model known as the COMMIT program (Compliance Management or Incarceration in the Territory). The program commenced on 27 June 2016, on a trial basis, and will run for 12 months.

The trial will include approximately 30-50 offenders who are subject to a suspended sentence. The target group of the program are high risk offenders (where management is focussed on case management and behaviour change), particularly offenders with a history or alcohol or drug related offending (a criminogenic risk factor) and / or a history of breaching conditions (to engage with the offender early and help reduce risk of non-compliance). The assessment criteria also considers imprisonment history and level of offending as imprisonment is a sanction of the program and makes the offender accountable for their actions and decisions (there is no discretion where there is non-compliance and the matter is returned to court, an offender must therefore fully comprehend instructions and obligations).

As at 28 July 2016, 20 COMMIT orders have been made (since October 2015, though the program did not officially commence until 27 June 2016). Of the 20 orders made 17 orders have been made in the Supreme Court and 3 in the Local Court. There are currently 17 active orders, with 2 completed and 1 default due to non-compliance.

Though the Department of the Attorney-General and Justice raised this as a matter within the framework of domestic violence, the resolution of the issue is a much broader matter for criminal justice – and is not likely be resolved as part of domestic violence reforms.

6.25 Proximity alarms and personal safety devices.

Background

Proximity alarms are electronic devices which would provide a warning to victims of domestic violence when a perpetrator is within a specified distance. A proximity alarm would require the perpetrator to be wearing a device and for that device to be linked with an alarm in the possession of the protected person.

Personal safety devices are electronic devices which enable an alarm to be triggered in a police station when a protected person is at risk.

Submissions

Issues Paper 2 sought submissions in relation to the following two questions regarding the use of proximity alarms and personal safety devices as responses to domestic violence.

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?

The majority of stakeholders who responded to this question did not express a firm view either way. While some stakeholders acknowledged that the use of alarms may achieve the proposed aim,[136] each of them expressed various concerns in relation to the use of such devices.

The Northern Territory Legal Aid Commission stated that it was unable to comment due to a lack of supporting evidence. Similarly, the Central Australian Aboriginal Legal Aid Service noted that, 'in the absence of an evidence base, it is difficult to comment on whether this technology would reduce occurrences of domestic violence'.

To this end, a number of stakeholders[137] referred to trials being conducted in other jurisdictions (both nationally and internationally), such as New South Wales and Victoria, and suggested that further information could be obtained from these trials.

The Central Australian Aboriginal Legal Aid Service also submitted that any trial of such technology in the NT would need to be thoroughly evaluated to establish whether such mechanisms are effective.

Potential Benefits

The Law Society Northern Territory was the only stakeholder to discuss the possible benefits of alarms. In particular, they submitted that alarms would:

- provide victims with sense of security, as a potential breach would automatically be reported to police; and
- enable the police to quickly respond to a breach of a Domestic Violence Order or threat to a victim, possibly more quickly than to a call.

They also noted that the use of alarms may act as a deterrent on the following grounds:

1. they would be inconvenient and possibly also uncomfortable for the perpetrator;

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[136] Criminal Lawyers Association of the Northern Territory, Law Society Northern Territory, Northern Territory Police Force and Top End Women's Legal Service.

[137] Criminal Lawyers Association of the Northern Territory, and the Northern Territory Police Force.

2. they would indicate to the public that there is a Domestic Violence Order in place; and
3. they would deter perpetrators coming within a specified distance of victims as the police would immediately be alerted.

The also suggested that they may reduce the evidentiary burden on the police to prove a breach of Domestic Violence Order.

Stakeholder Concerns

No Guarantee of safety

The Top End Women's Legal Service noted that the use of alarms cannot guarantee a person's safety and may not be useful for 'young children, those who may forget to carry their alarms, or those who value privacy over participation in an alarm program' and only supports their use 'where individual victims will gain a sense of security from their use'.

Remoteness

A number of stakeholders suggested that further consideration is required in relation to the impacts of remoteness on the use of alarms.[138] In particular, how will alarms operate in regional and remote communities given the close proximity of residents and given that not all communities have a police presence.

In relation to the former, the Central Australian Aboriginal Legal Aid Service submitted that 'even in a regional centre such as Alice Springs, issues could arise given the limited options available for shopping and other amenities'.

In relation to the latter, a confidential submission noted that, even in two person stations, the ability of police to respond will be limited. That submission also noted limitations arising from inadequate mobile coverage would need to be considered.

When would alarms be used

A number of stakeholders noted a lack of clarity regarding the circumstances in which it is proposed alarms should be used and whether the consent of the victim is required.[139] In relation to the former, the Central Australian Women's Legal Aid Service noted the use of alarms assumes that a full non-contact order would be in place, and as such would apply in relation to only a limited number of domestic and family violence matters.

In relation to the latter, both the Central Australian Aboriginal Legal Aid Service and the North Australian Aboriginal Justice Agency suggested that the use of alarms should not be permitted without the consent of the victim. The Central Australian Aboriginal Legal Aid Service noted that the need consent was particularly necessary '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'.

The need for additional conditions

The Northern Territory Police Force submitted that the use of alarms would need to be supported by appropriate conditions, such as the requirement to maintain a minimum distance

[138] Central Australian Aboriginal Legal Aid Service and Northern Territory Police Force.

[139] Central Australian Aboriginal Legal Aid Service, Central Australian Women's Legal Service and North Australian Aboriginal Justice Agency.

from the protected person. They noted that currently such orders are not sought in relation to DVOs.

Similarly, a confidential submission noted that the use of this technology must be supported by an integrated response framework and the development of police practices and procedures.

Stigmatisation

The Central Australian Aboriginal Legal Aid Service and the North Australian Aboriginal Justice Agency expressed concern that alarms may cause victim stigmatisation. The Central Australian Aboriginal Legal Aid Service also noted that wearing a visible device also has the potential to be stigmatising for defendants and obstructive to their rehabilitation and reintegration into the community. Accordingly, the Central Australian Aboriginal Legal Aid Service suggests that if implemented, 'it would be preferable for the device to be as visibly discrete as possible'.

Other

The Northern Territory Police Force submission assumes that the use of alarms and safety devices would be 'limited to bail conditions and not based on DVOs or post sentencing'. If this is the case, they submitted that the use of proximity alarms would depend on GPS and electronic monitoring capabilities and would require enhancements to the electronic requirements for a person on bail.

The Central Australian Aboriginal Legal Aid Service noted that it is concerned that the use of alarms may cause confusion for victims in terms of how to seek police assistance or report a matter. For example, whether activation of the device will be a substitute for requesting police assistance over the phone.

Do you think that a proximity alarm or a personal safety device would be a more effective control tool?

Only Relationships Australia and the Law Society Northern Territory expressed a firm view either way. The Northern Territory Legal Aid Commission stated that it was unable to comment due to a lack of supporting evidence.

Proximity Alarms

The Law Society Northern Territory submitted that proximity alarms are preferable. However, they also noted that as there may be funding restrictions, 'it may be best to utilise proximity alarms in the most severe cases (repeat offenders or sever domestic and family violence), and personal safety devices could be rolled out in other cases'.

The Northern Territory Police Force submitted that proximity alarms would only deter 'honest' offenders as offenders who are intent on approaching victims 'would either ignore the fact that they are wearing a device, or simply cut the device off'. Further, they suggested that proximity alarms could be used against victims by offenders purposely attending permitted areas which may trigger the alarm, causing fear and stress to the victim.

Personal Safety Devices

Relationships Australia expressed the view that personal safety devices would be more effective, but provided no further details as to why.

The Top End Women's Legal Service noted that while personal safety devices offer more functions than proximity alarms, such as GPS tracking, those functions are limited to areas with

internet coverage. As a result, the devices are likely to have limited effect in many Northern Territory communities. They are also more expensive than proximity alarms. Accordingly, the Top End Women's Legal Service believes that funding would be better used to offer more support services to victims of domestic and family violence.

The Law Society Northern Territory noted that the use of personal safety devices effectively puts the onus on victims as they have to activate them, as opposed to the proximity alarm, which inconveniences the perpetrator and works automatically. They also noted that it was unclear whether the proposed personal safety devices will transmit GPS data and audio, similar to the duress cards being piloted in Victoria. If not, this could be an option.

The Northern Territory Police Force commented that the use of personal safety devices would come with the risk of managing expectations. However, they did not provide any further detail on this point.

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

The Law Society Northern Territory submitted that the use of CCTV cameras in victim's homes, monitored by police, could be an alternative option, but provided no further detail in relation to the proposal.

Other suggestions included:

- restorative justice;[140]
- increasing existing victim support services such as counselling and legal services and crisis accommodation;[141]
- increasing offender supports and access to behaviour change programs;[142]
- increasing police resourcing.[143]

6.26 Increasing bail programs for domestic violence offenders

Background

Issues Paper 2 suggested the expansion of behaviour change programs to cover offenders who are bail or remand as a possible response to domestic violence.

The Family Violence Program accepts referrals for offenders on bail.[144] The *Bail Act* contains provisions relating to conditions that can be imposed on a bail undertaking.[145] These provisions are very broad and conditions must be imposed 'that appear necessary to minimise risks to the safety or welfare of others, or to the proper administration of justice, that may result from releasing the accused person on bail'.[146] Some stakeholders have suggested that expanding the behavioural change programs and programs that target domestic and family violence would be beneficial and may assist in reducing re-offending.

[140] North Australian Aboriginal Justice Agency.

[141] Central Australian Aboriginal Women's Legal Service, Law Society Northern Territory and Top End Women's Legal Service.

[142] Central Australian Women's Legal Service, Northern Territory Legal Aid Commission and Relationships Australia.

[143] Central Australian Women's Legal Service.

[144] For a description of the Family Violence Program see Appendix C of Issues Paper 2.

[145] *Bail Act* (NT), ss 27, 27A and 28.

[146] Ibid, s 28(1).

Submissions

Issues paper 2 sought stakeholders' views in response to the following questions.

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

The overall consensus of stakeholders was that expanding behavioural change programs that target domestic and family violence would be beneficial in helping reduce domestic and family violence. However, a number of stakeholders noted that such programs should only be expanded if they are effective, evidence based, in accordance with best practice models and appropriate in the Northern Territory context.[147]

The Criminal Lawyers Association of the Northern Territory noted:

> 'the evidence that such programs are effective in reducing domestic violence is patchy, and it would be unrealistic and unfair to burden such programs with a requirement that to continue to attract funding they demonstrate that domestic violence in their community has been significantly reduced. At best, perpetrator programs can only be expected to change the behaviour of a small number of offenders, and even amongst program participants, it is inevitable that many will re-offend.'

Relationships Australia noted that while the expansion of such programs may be beneficial, to affect long term change a more holistic approach is required which addresses other issues faced by individuals. Similarly, a confidential submission noted that programs targeting alcohol misuse may have as great or greater impact for some individuals. Relationships Australia also highlighted a need for such programs to incorporate services for partners and children.

The Law Society Northern Territory also posited the following questions needing fuller consideration in the context of behaviour change programs:

- 'Does extension mean providing access to services in remote communities while people are bailed and remanded?
- What is the current reach of the program and what are the statistics on recidivism for people who have already been through the program?
- If the service is delivered by stakeholders in community how the bail conditions are being met recorded and monitored?
- What measures would be in place to ensure that offenders have access to programs in community while they are bailed/remanded so that they aren't in breach of their conditions. If the services aren't intended to be run by the Department of Correction and Services
- Is it possible to extend access to the Family Violence Program so that defendants of DVOs can be referred to the program?
- What happens if the bail conditions finish before the program finishes? E.g. if the person is then sentenced? Does the program continue with the person? Is the program continued from within the prison?

[147] Criminal Lawyers Association of the Northern Territory, Northern Territory Legal Aid Commission and Northern Territory Police Force.

- How will the Department of Correctional Services be funded to extend the program?
- I understand that usual jail term for family violence offences is often less than 30 months. Can the violent offender treatment program be accessible to offenders who serve less than 30 months? What is the waiting period to get on the program within jail? How often do they run?'

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?

Stakeholders were generally supportive of the expansion of behavioural change programs to prisoners on remand. In particular, the Northern Territory Police Force noted that prisoners on remand do not have access to the same programs available to sentenced prisoners. However, a number of stakeholders expressed reservations regarding the effectiveness of the proposal.

The Criminal Lawyers Association of the Northern Territory and Northern Territory Legal Aid Commission (with whom the North Australian Aboriginal Justice Agency agreed) both submitted that while prisoners on remand should be given access to such programs, they are far less likely to change their behaviour than defendants on bail who engage in such programs in the community because:

- 'prison is a relatively poor learning environment'; and
- 'best practice perpetrator programs involve engagement with the participant over a lengthy period of many months, and also include collateral engagement with victims. During the program, the participant has the opportunity to put into effect the lessons he is learning. That cannot easily occur in prison'.

The North Australian Aboriginal Justice Agency and the Central Australian Aboriginal Legal Aid Service submitted that '[a] more proactive approach should be taken to encourage engagement with behavioural change programs at an early stage, even before a plea is entered'. While this would require increased resourcing of behavioural change programs, this is also something that could be facilitated through the establishment of a dedicated domestic violence court list.

Both organisations also referred to the following passage from the RMIT Centre for Innovative Justices 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.'

The Central Australian Women's Legal Service 'would like to see programs created which involve long term and systematic change and which are able to address behaviours which have often been occurring over extensive period of time'.

Other issues

Stakeholders also noted that there are issues with the availability of programs to prisoners serving short sentences of imprisonment (between 3 and 6 months).[148] While the Top End Women's Legal Service suggested that behavioural change programs should be made available

[148] Northern Territory Police Force and Top End Women's Legal Service.

to prisoners serving short sentences, the Chairperson of the Parole Board noted that it is impossible for many prisoners serving short term sentences to be assessed and undertake an appropriate violent offender treatment program because:

> ‘(1) the existing demand within the prison system for such programs exceeds the capacity of Corrections to provide these programs (with priority being given to the most violent offenders); and
>
> (2) the length of time required to complete these programs is incompatible with the short terms of imprisonment given to many offenders.’

The Central Australian Aboriginal Legal Aid Service also noted that:

- the Men’s Behavioural Change Program being run by Tangentyere Council is not available at the Alice Springs Correctional Centre;
- it is their understanding that the violent offender program offered to prisoners serving sentences is now only available in Darwin;
- the availability of these programs at a local level would enhance participants’ prospects of rehabilitation and reintegration into the community; and
- for meaningful behavioural change to be encouraged and sustained, it is essential that these service gaps are addressed.

The North Australian Aboriginal Justice Agency submitted that:

> ‘In the context of parole, Aboriginal people already people 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.’

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

In response to this and other questions posed by the Issues Paper 2, stakeholders consistently referred to the Men’s Behaviour Change program run by Tangentyere Council. The North Australian Aboriginal Justice agency also named the Family Violence Program being run by the Department of Correctional Services.

Noting a dire shortage of relevant programs, the North Australian Aboriginal Justice Agency also urged that the Northern Territory Government partner with Danila Dilba on the basis that that organisation ‘would be ideally placed to deliver family violence prevention education to Aboriginal people in the Darwin Correctional Centre’.

Relationships Australia noted that, while there is a definite need for programs focusing on offender rehabilitation, these programs need to be supplemented by preventative programs which invite men to take responsibility for their actions and encourage them to be more respectful of women. In particular, they submitted that:

- ‘when these programs are successful, they contribute to the overall safety of women and children in the NT, and reduce the need for criminal justice response and its associated expense’; and
- ‘they also serve to highlight for the wider community the range of behaviours which constitute domestic violence (e.g. verbal or emotional abuse, financial control), in addition to the emphasis on physical or sexual violence which characterises a criminal justice response…’.

To this end, Relationships Australia noted that it operates a course called ‘In Pursuit of Respectful Relationships’, a 12 week preventive program which has run in Darwin for the past 10 years, and for the past 5 years in Alice Springs.

No other specific programs were identified by stakeholders,[149] however, many stakeholders provided comments and suggestions in relation to the kinds of programs required, including:

- programs focusing on perpetrators taking responsibility for changing their own behaviour, and understanding the impact that their violence and controlling behaviour has on their partners, children and communities;[150]
- programs directed to managing the availability and misuse of alcohol;[151]
- a combined approach utilising a range of programs, for example peer, counselling and professionally facilitated sessions;[152]
- culturally appropriate behaviour change programs developed in consultation with relevant communities;[153] and
- programs that address the underlying factors, such as alcohol, poverty, housing and disadvantage.[154]

The Chairman of the Parole Board also submitted that:

> ‘Another factor which regularly arises in cases of domestic violence in the Northern Territory is the notion of ‘jealousing’. This notion is little understood and research involving anthropologists, psychiatrists and psychologists should be urgently undertaken to find out what is the cultural significance of this notion. Cases involving this notion tend to demonstrate that a display of violence is sometimes required in order to show to the offender’s community his or her strength of attachment to their partner. Consideration needs to be given to teaching and learning other ways of displaying attachment.’

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[149] Central Australian Aboriginal Legal Aid Service, Criminal Lawyers Association of the Northern Territory, Central Australian Women’s Legal Service, Northern Territory Legal Aid Commission, Northern Territory Police Force, Relationships Australia and the Top End Women’s Legal Service.

[150] Confidential submission.

[151] Chairperson of the Parole Board, His Honour Justice Southwood..

[152] Northern Territory Police Force.

[153] Top End Women’s Legal Service.

[154] Central Australian Aboriginal Legal Aid Service.

6.27 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 circumstances of aggravation for assault

Background

Section 188(2) of the Criminal Code sets out the circumstances in which a common assault (maximum penalty of 12 months imprisonment) becomes an aggravated assault (maximum penalty of five years imprisonment).

While the majority of assaults that occur in a domestic violence context are captured by current circumstances of aggravation, assaults that occur 'in the presence of a child under the age of 16 years and assaults that occur 'in a domestic and family relationship' are not specifically covered. It is intended to amend section 188(2) to incorporate these two matters.

There was a proposal being considered in 2015 regarding the possible amendment of section 188(2) to incorporate these matters. In light of that proposal (which has not progressed), Issues Paper 2 sought comments from stakeholders.

Submissions

Support for proposal

A number of stakeholders were supportive of the proposed amendments.[155] A confidential submission noted that the proposed amendments would be a strong mechanism for sending a message that domestic violence is a more serious breach of the 'social contract' than offending against strangers. Relationships Australia noted that '[t]he underlying public policy considerations of the proposal are in line with the recent changes to the *Family Law Act* on family and domestic violence'.

The Central Australian Women's Legal Service noted that while the issue of children witnessing family violence does need to be addressed, in order to provide a detailed response in relation to this issue, they would require further information in relation to:

- what penalties may apply under the Criminal Code; and
- how the circumstances of aggravation will effect sentencing.

They would also welcome the opportunity to discuss the issues in more detail with other victims' advocacy services.

A confidential submission noted that as the *Care and Protection of Children Act* defines a child as a person under the age of 18 years, implications of extending the age limit from 16 to 18 years may need to be considered.

The Top End Women's Legal Service noted that the meaning of 'in the presence of a child' is not sufficiently clear because:

'(a) 'children' could mean any child under 16 who is in a public place while an assault occurs, and who has no connection to the victim or offender; and

(b) 'in the presence of' could include children who are infants, asleep, or otherwise unaware of the assault despite being in proximity'.

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[155] Central Australian Women's Legal Service, Northern Territory Police Force and Relationships Australia.

The Top End Women's Legal Service did not expressly support or oppose the proposed amendments.

Opposition to proposal

A number of stakeholders opposed the proposed amendments on the basis that they are unnecessary and unlikely to confer any benefit.[156]

In particular, the Criminal Lawyers Association of the Northern Territory and the Northern Territory Legal Aid Commission both made the following identical submission:

> 'Almost every charge of assault is already accompanied by a circumstance of aggravation, elevating the matter from a simple offence with a maximum penalty of two years to a crime with a maximum penalty of five years. Adding to the list of aggravating circumstances would achieve nothing. Courts already have regard to a comprehensive list of circumstances as set out in section 5 of the *Sentencing Act*, including: the nature of the offence and how serious the offence was, including any physical, psychological or emotional harm done to a victim; (s5(2)(b)). Although in many cases a violent offence may be more serious because it is committed in the context of a domestic or family relationship that is not always the case. In some matters, for example, where the perpetrator has herself previously been the victim of domestic violence by her partner, the fact the victim was her abusive husband may well be a mitigating circumstance.'

The Central Australian Aboriginal Legal Aid Service stated that:

- as it stands, section 5 of the *Sentencing Act* allows the circumstances of offending to be taken into account by a Judge 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;
- the proposed amendments would also potentially undermine judicial discretion, which in our view would be a further cause for concern; and
- the proposed amendments may expose child witnesses to a greater risk of cross-examination if the aggravating factor is an element of the offence and is not admitted.

Other issues

The Chairperson of the Parole Board noted that:

- perpetrators of domestic violence are usually dealt with by the criminal justice system on the basis of the discrete episodes of offending which, amongst other things, precludes the perpetrators from being sentenced for the course of conduct that they have engaged in and for the total harm that they cause;
- the criminal records of many offenders reveal an ongoing strategy of violence that often persists for a number of years; and
- 'As the gravamen of the more serious cases of domestic violence involves a deliberate strategy to engage in and the perpetration of a pattern of violent behaviour over an extended period of time for their advantage, it may be that the applicability of a number

[156] Criminal Lawyers Association of the Northern Territory, North Australian Aboriginal Justice Agency and Northern Territory Legal Aid Commission.

of important sentencing principles needs to be reconsidered when sentencing offenders for these kinds of crimes. Those principles include:

- The objective circumstances of the offence do not include the antecedent criminal history of the offender except where legislation prescribes prior criminality as an aggravating component of the offence. Proportionate sentencing prohibits enlarging the punishment of the current offence beyond what its gravity requires because of previous convictions.[192]
- The principle of loss of entitlement to leniency does not resolve the issue because the loss of entitlement occurs within the outer limits of the objective seriousness of a single episode of the offending, not the objective seriousness of the course of conduct which occurs over a number of years.
- The weight given to the principle of community protection or protection of the victim cannot be such as to result in the imposition of a sentence which exceeds the outer limits of the objective seriousness of the single episode of offending which is before the court.[193]
- Deterrence must give way to proportion in respect of the single episode of offending which is before the Court.
- While specific deterrence may operate to reduce the effect of factors which would otherwise lead to greater leniency, the sentence imposed cannot exceed the objective seriousness of the single episode of offending which is before the court. There is also a limit to how far a court can negative legitimate mitigating factors by reference to the need to achieve a deterrent effect.[194]'
- Strictly applied, these sentencing principles may preclude some perpetrators of domestic violence from being sentenced for their true crime (engaging in a persistent and deliberate pattern of violent behaviour over an extended period of time for the purpose of totally controlling the victim's life).'

Noting that the strict application of these principles may preclude some perpetrators of domestic violence being sentenced for their true crime (extended persistent and deliberate violence for the purpose of controlling the victim's life), the Parole Board suggested that consideration be given to amending section 6A of the *Sentencing Act* by adding the following aggravating factors to which a court must have regard in sentencing an offender:

- 'In relation to an offence involving domestic violence, the offender has a prior conviction for a crime involving domestic violence.
- The offence was committed during an ongoing course of conduct involving domestic violence.'

6.28 Ochre Cards

Submission

Relationships Australia Northern Territory recommended that 'the NT Government give consideration to ensuring that the issue of Ochre (Working With Children) Cards is subject not only to a criminal history check, but also a Domestic Violence Order check and notes any other matters an applicant may have before the courts'.