

EXPLANATORY STATEMENT

Justice Legislation Amendment (Domestic and Family Violence) Bill 2019

SERIAL NO. 113

LEGISLATIVE ASSEMBLY OF THE
NORTHERN TERRITORY

ATTORNEY GENERAL AND MINISTER FOR JUSTICE

GENERAL OUTLINE

The purpose of the Justice Legislation Amendment (Domestic and Family Violence) Bill 2019 (the Bill) is to improve responses to domestic and family violence by:

- removing a disincentive for defendants in domestic violence proceedings to attend rehabilitation programs by providing that the completion of a program is an exceptional circumstance for the purpose of mandatory sentencing;
- creating a new offence of choking, suffocation and strangulation in a domestic relationship in recognition of the seriousness of this conduct; and
- clarifying that, as part of a domestic violence order, a tenancy agreement can be terminated without being replaced and that the permanent breakdown of a relationship is not required.

The Bill is expected to improve the safety of victims and increase the accountability of offenders and the impetus for them to change their behaviour.

The Bill:

- (a) amends the *Sentencing Act 1995* so that, for the purpose of mandatory sentencing for violent offences, it may constitute an exceptional circumstance if the defendant has satisfactorily

completed a rehabilitation program and made a genuine effort to change his or her behaviour; and makes associated amendments to:

- i. the *Domestic and Family Violence Act 2007* to provide that the paramount consideration for making an order to attend a rehabilitation program is the safety of the protected person and to provide for the creation of a new Part of the Act to provide for rehabilitation programs; and
 - ii. the *Bail Act 1982* to provide that rehabilitation programs declared by Minister under *Domestic and Family Violence Act 2007* are included amongst the programs that can rebut the presumption against bail that applies for certain offences;
- (b) amends the Criminal Code so that it is an offence with a maximum penalty of five years imprisonment for a person to intentionally choke, strangle or suffocate someone with whom they are in a domestic relationship; and
- (c) amends the *Domestic and Family Violence Act 2007* to avoid any doubt that the court can terminate a tenancy agreement without creating a replacement agreement and to remove the requirement that the relationship must be broken down permanently before a tenancy order can be made.

NOTES ON CLAUSES

Part 1 Preliminary matters

Clause 1 Short title

This is a formal clause which provides for the citation of the Bill. The Bill when passed will be cited as the *Justice Legislation Amendment (Domestic and Family Violence) Act 2019*.

Clause 2 Commencement

This clause sets out that the Act will be commenced by notice given by the Administrator in the Northern Territory Government Gazette.

Part 2 Amendment of Bail Act 1982

Clause 3 Act amended

This is a formal clause providing that this Part amends the *Bail Act 1982*.

Clause 4 Section 7A amended (Presumption against bail for certain offences)

This clause repeals and replaces section 7A(2A) of the *Bail Act 1982* to insert rehabilitation programs declared by the Minister under section 85A(1) of the *Domestic and Family Violence Act 2007*.

The purpose of this amendment is to ensure that if a defendant is assessed as suitable to participate in rehabilitation program declared under the *Domestic and Family Violence Act 2007* it rebuts the presumption against bail that applies for certain offences in section 7A(2) in the *Bail Act 1982*.

Part 3 Amendment of Criminal Code

Clause 5 Act amended

This is a formal clause providing that this Part amends the Criminal Code.

Clause 6 Section 186AA inserted

This clause amends Part VI, Division 4 of the Criminal Code by inserting new section 186AA to provide for an offence of intentionally choking, suffocating or strangling a person in a domestic relationship.

186AA Choking, strangling or suffocating in a domestic relationship

The offence requires that the person subjected to the choking did not consent and the alleged offender is reckless to that circumstance.

The offence requires that there is a 'domestic relationship' between the two people as defined under the *Domestic and Family Violence Act 2007* (with a fault element of strict liability).

The offence has maximum penalty of five years imprisonment.

To avoid any doubt the section provides that this offence constitutes 'domestic violence' under section 5 of the *Domestic and Family Violence Act 2007*.

The amendment provides a definition for 'chokes, strangles and suffocates' to include applying pressure, to any extent, to a person's neck or obstructing or interfering, to any extent, with a person's respiratory system or accessory systems of respiration.

The amendment defines 'domestic relationship' in accordance with section 9 of the *Domestic and Family Violence Act 2007*.

Clause 7 Schedule 1 amended (Provisions of Code to which Part IIAA applies)

This clause amends Schedule 1 of the Criminal Code to insert the new section 186AA in the list of provisions to which Part IIAA applies.

Part 4 Amendment of Domestic and Family Violence Act 2007

Clause 8 Act amended

This is a formal clause providing that this Part amends the *Domestic and Family Violence Act 2007*.

Clause 9 Section 4 amended (Definitions)

This clause amends section 4 of the *Domestic and Family Violence Act 2007* to omit the current definition of 'rehabilitation program' and insert new definitions.

'Perpetrator's program' is defined as provided for in section 78H(1) of the *Sentencing Act 1995* to mean a program declared by the Minister under section 78J of the *Sentencing Act 1995*.

'Rehabilitation program' is defined as a program declared by the Minister under section 85A(1) of the *Domestic and Family Violence Act 2007*.

'Program facilitator' is defined as a person who provides a rehabilitation program or a perpetrator program or who provides assessment, support or case management associated with a program.

Clause 10 Section 23 amended (Order for replacement tenancy agreement)

Subclause (1) amends section 23 of the *Domestic and Family Violence Act 2007* to omit the words 'for replacement' and insert 'regarding' in the heading so it reads 'Order regarding tenancy agreement'.

Subclause (2) omits and replaces section 23(2) and (3) to make it clear that there can be separate orders concerning:

- a) an order terminating the tenancy agreement; and
- b) an order terminating the tenancy agreement and creating a new tenancy agreement.

These orders can be made independently of each other. It makes it clear that the Court has power to terminate a tenancy agreement without creating a replacement agreement.

A consequential amendment is made to section 23(3) as some of the paragraphs only apply to a replacement agreement.

Clause 11 Section 24 amended (Order for rehabilitation program)

Sub-clause (1) omits and replaces section 24(1) so that the Court has power to include an order requiring a defendant to attend a rehabilitation program when making or varying a domestic violence order.

A new subsection (1A) is inserted in section 24 so that the safety and protection of the protected person must be the paramount consideration when the Court is making an order that the defendant attend a rehabilitation program under section 24(1).

Subclause (2) amends section 24(2)(a) and (3) so that the word 'court' starts with a capital letter. This is a technical amendment required for drafting purposes.

Clause 12 Section 48 amended (Who may apply for variation or revocation)

This clause amends section 48(5)(b) to add the words 'or a perpetrators' program'.

This is technical amendment to ensure consistent terminology so that for the purposes of granting the defendant leave to vary or revoke a domestic violence order, a substantial change in circumstances may arise if the defendant satisfactorily completes either a rehabilitation program declared under the *Domestic and Family Violence 2007* or a perpetrator's program declared under section 78J of the *Sentencing Act 1995*.

Clause 13 Section 65 amended (When application may be made)

This clause amends section 65(3)(b) to insert the words 'or a perpetrators' program'.

This is technical amendment to ensure consistent terminology so that for the purposes of varying a domestic violence order in urgent circumstances, a substantial change in circumstances may arise if the defendant satisfactorily completes either a rehabilitation program declared under the *Domestic and Family Violence 2007* or a perpetrator's program declared under section 78J of the *Sentencing Act 1995*.

Clause 14 Part 2.11A inserted

This clause inserts a new Part 2.11A in *Domestic and Family Violence Act 2007* to provide for rehabilitation programs. The new Part is inserted after section 85.

The heading of the new Part 2.11 A is 'Rehabilitation Programs'.

The new Part includes the following Divisions and provisions.

85A Declaration of rehabilitation programs

This section provides that the Minister may declare a program to be a rehabilitation program by Gazette notice and the notice must specify the requirements of the program. Examples are provided of program requirements.

85B Satisfactory completion of rehabilitation program

This section defines what is required for the satisfactory completion of a rehabilitation program. Satisfactory completion requires the Court to receive a completion notice from the program facilitator and that the defendant did not breach a Domestic Violence Order in force, did not commit further domestic violence, and did not commit further violent offences.

The new section provides that despite this criteria, the Court has discretion to find that the defendant satisfactorily completed the program, if it would be unjust in the circumstances to find that the defendant had not satisfactorily completed the program. To avoid any doubt, the new section provides that a Court may find a program has been satisfactorily completed, even if the Court has received one or more non-compliance notices from a program facilitator. The new section provides that if the Court uses this discretion, it must state its reasons.

85C Failure to comply with rehabilitation program

This section provides that failure to comply with a requirement of a program does not constitute a contravention of a DVO under section 120 of *Domestic and Family Violence Act 2007*.

This is to ensure that minor non-compliance with program requirements is not a criminal offence.

85D Notification obligations of Program facilitator

This section requires the program facilitator to notify both the police and the Court if the facilitator becomes aware of the defendant committing domestic violence or breaching a domestic violence order while subject to an order to attend a rehabilitation program. There is a requirement that the notice be in writing and include any particulars of the defendant's conduct of which the program facilitator is aware.

The section also requires program facilitators to notify the Court when a defendant has completed the requirements of a program (a completion notice), failed to comply with a program requirement (a non-compliance notice) and, if requested by the Court, to provide a summary of the defendant's participation in the program (a participation notice).

85E Bringing defendant before Court for review

This section provides that the Court may require the defendant to appear before it, from time-to-time, for a review of the defendant's progress in the rehabilitation program. The Court may request the program facilitator to provide a participation notice prior to the Review.

The section also provides that if the Court receives a non-compliance notice from a program facilitator, the Court must require the defendant to appear before it for a review.

85F Additional power to bring the defendant before Court

This section provides that the Court may issue a summons or a warrant for the defendant's arrest if the defendant fails to attend a review, fails to comply with a program requirement, or the Court believes the defendant may present a risk to the safety of the protected person or any other person. Under this section the Court may issue a summons to the defendant to appear before Court or, if satisfied that the defendant may not appear, issue a warrant for the defendant's arrest. The summons or the warrant may be issued on the Court's own initiative or on application.

85G Revocation of order for rehabilitation program

The section provides that the Court has power to revoke a rehabilitation order if satisfied, on the balance of probabilities, that the defendant is unlikely or unable to make further progress, or there is an unacceptable risk to the safety or welfare of the protected person or any other person.

Part 5 Amendment of Sentencing Act 1995

Clause 15 Act amended

This is a formal clause providing that this Part amends the *Sentencing Act 1995*.

Clause 16 Section 78CA amended (Offence levels)

This clause amends section 78CA of the *Sentencing Act 1995* so that the new choking offence (proposed section 186AA of the Criminal Code) is subject to mandatory sentencing for violent offences at the same level as assault with aggravating features (section 188(2) of the Criminal Code).

The amendment makes the proposed choking offence a level 5 offence, for the purposes of mandatory sentencing, if it involves an offensive weapon, or the victim suffers physical harm as a result of the offence. Level 5 offences have a mandatory minimum sentence of three months actual imprisonment for the first offence and 12 months actual imprisonment for second or subsequent offences.

Otherwise the new offence is a level 3 offence. For level 3 offences, a term of actual imprisonment must be imposed for a first offence and there is a three month mandatory minimum for a second or subsequent offence.

Clause 17 Section 78DI amended (Exceptional circumstances exemption)

This clause amends section 78DI of the *Sentencing Act 1995* so that, for the purposes of mandatory sentencing for violent offences, a Court may consider the circumstances of the case to be exceptional if a court orders the defendant to attend a rehabilitation program under section 24(1) of the *Domestic and Family Violence 2007*, the offender satisfactorily completes the program, and the Court is satisfied that the offender has taken responsibility for their conduct and made a genuine effort to change their behaviour.

This amendment also provides that the term 'domestic violence' is as defined in the *Domestic and Family Violence 2007*, namely any of the following conduct committed by a person against someone with whom the person is in a domestic relationship:

- (a) conduct causing harm (example of harm is sexual or other assault);
- (b) damaging property, including the injury or death of an animal;
- (c) intimidation;
- (d) stalking;
- (e) economic abuse; or

(f) attempting or threatening to commit conduct mentioned in paragraphs (a) to (e).

Part 6 Repeal of Act

Clause 18 Repeal of Act

This is a technical clause which repeals the amending Act on the day after it commences.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with the Thirteenth Assembly Sessional Orders (part 12.3) as adopted on 24 August 2017.

Justice Legislation Amendment (Domestic and Family Violence) Bill 2019

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

Overview of the Bill

This Bill makes amendments in three key areas to improve responses to domestic and family violence in the Northern Territory. Together they aim to improve the safety of victims and increase the accountability of defendants and provide greater impetus for defendants to change their behaviour.

Completion of a rehabilitation program may constitute exceptional circumstances for mandatory sentencing

The Bill amends the *Sentencing Act 1995* to make clear that for the purpose of mandatory sentencing for violent offences it may be an exceptional circumstance if the defendant has successfully completed a rehabilitation program ordered as part of a Domestic Violence Order.

This will provide an incentive for offenders to agree to undertake a rehabilitation program to change their behaviour. If the offender pleads guilty and takes responsibility for his conduct the Court may order attendance at a rehabilitation program, place the offender on bail to undertake the program, and defer sentencing for a period of time to allow the program to be completed. If the program is satisfactorily completed the Court may take this into account in sentencing and is not required to impose the mandatory minimum sentences for violence offences that would otherwise be required under Part 3 Division 6A of the *Sentencing Act 1995*. A term of actual imprisonment is still required but the Court will determine the appropriate sentence in the circumstances of the case.

Associated amendments have also been made to:

- the *Domestic and Family Violence Act 2007* to provide that the paramount consideration for making an order to attend a rehabilitation program is the safety of the protected person and to provide for the creation of a new Part of the Act to provide for rehabilitation program orders; and
- the *Bail Act 1982* to provide that rehabilitation programs declared by Minister under *Domestic and Family Violence Act 2007* are included amongst the programs that can rebut the presumption against bail that applies for certain offences.

This amendment is important for the implementation of the Specialist Approach to Domestic Violence at the Alice Springs Local Court and will remove a disincentive for offenders to consent to participate in rehabilitation programs.

New criminal offence of choking, suffocation or strangulation in a domestic relationship

The Bill amends the *Criminal Code Act 1983* so that it is an offence with a maximum penalty of five years imprisonment for a person to choke, strangle or suffocate a person with whom they are in a domestic relationship.

Choking, suffocation and strangulation have been identified as high risk factors for serious harm and lethal outcomes in domestic violence situations but it has often not been taken seriously enough. The creation of a new offence will ensure greater recognition of this conduct in the investigation and prosecution of domestic violence related offending.

Orders to terminate a tenancy agreement in domestic violence situations

The Bill amends the powers in the *Domestic and Family Violence Act 2007* in relation to tenancy agreements so that:

- a relationship doesn't have to be permanently broken down for the Court to make an order to terminate or replace a tenancy agreement; and
- it is clear that the Court has power to an order a tenancy agreement to be terminated without a replacement tenancy agreement being made.

Human rights implications

This Bill engages several of the applicable rights or freedoms.

- The Bill engages Article 3 of the Convention on the Elimination of All Forms of Discrimination against Women because protection from domestic and family violence is necessary for women to exercise and enjoy human rights and fundamental freedoms on an equal basis with men. By providing greater impetus for offenders to consent to rehabilitation programs it is hoped to reduce the high rate of domestic violence offending in the NT. The recognition given to choking as an offence in domestic settings aims to prevent further serious harm and death to women by violent partners. It is noted that Article 6 of the International Covenant on Civil and Political Rights (ICCPR) provides that 'Every human being has the inherent right to life.'
- The Bill engages with Articles 3 and 19 of the Convention of the Rights of the Child which requires Governments and Courts to take measures necessary for the care and protection of children and have their best interests as a primary consideration. Article 19 requires states to protect children from all forms of physical or mental violence, injury, abuse or neglect. By providing greater incentives for offenders to attend rehabilitation programs it is intended to reduce the exposure of children of violence. By enabling Courts to terminate a tenancy agreement as part of a domestic violence order even if a replacement agreement cannot be made, the Bill enables families to secure safer living arrangements and prevents children from being exposed to domestic violence. Although the right of landlords is impinged upon by potentially leaving them without an agreement, this property right is outweighed by safety considerations for families. In some circumstances there is no replacement agreement that can safely be made by the Court. There is a fundamental need to ensure that protected persons and their children are not forced to remain in unsafe living arrangements because a tenancy agreement cannot be terminated as part of a domestic violence order.

- The Bill engages with Articles 9, 10 and 14 of the ICCPR. Everyone has a right to liberty except as required by law and to be treated with humanity if incarcerated. The Bill provides a framework within which domestic violence offenders are provided with greater incentive to engage in rehabilitation programs to help them stop offending and reduce incarceration. However, the safety of the victim remains the paramount consideration in making an order for an offender to attend a rehabilitation program.
- The Bill engages with the Convention on the Elimination of all Forms of Racial Discrimination by providing an option for offenders to participate in rehabilitation in the community, if it is safe for them to do so. High rates of incarceration prevent Aboriginal Territorians from enjoying human rights and fundamental freedoms on an equal basis with other Territorians. The Bill may help Aboriginal offenders to change their behaviour and reduce the incarceration of Aboriginal people in the NT. In this respect the amendments align with the objectives of the Draft Northern Territory Aboriginal Justice Agreement released for consultation in 2019.

Conclusion

This Bill is compatible with human rights as it enables offenders to be treated fairly in accordance with the law and to have greater incentives to undertake rehabilitation in the community to change their violent and controlling behaviour, but only where that is compatible with the safety and wellbeing of protected persons and their children. The right of victims/protected persons to live safely and free of violence is the paramount consideration in making a domestic violence order and any order to attend rehabilitation.