North Australian Aboriginal Legal Service

Proposed Reforms to the Justice Legislation Amendment (Domestic and Family Violence) Bill 2019

SUBMISSION

3 February 2020

1. Introduction

The North Australian Aboriginal Family Legal Service ("NAAFLS") makes this submission in response to the Justice Legislation Amendment (Domestic and Family Violence) Bill 2019 ('The Bill') currently before the Economic Policy Scrutiny Committee.

NAAFLS generally supports the proposed amendments put forward by The Bill. Our comments or recommendations for further amendments relate to specific provisions in order to properly capture the experiences and issues confronting Aboriginal people, especially those living in remote settings and their lawyers trying to navigate systems and processes that do not always accommodate the particular challenges.

2. Our Organisation

NAAFLS is a government funded Aboriginal organisation and National Association of Community Legal Centres ('NACLC') accredited community legal service. We provide professional, comprehensive and culturally safe assistance and advice to Aboriginal victims of family violence (including men), in over 40 remote Top End communities in the Northern Territory, including Katherine. This involves our lawyers working in conjunction with an Aboriginal Client Service Officer to provide support to clients.

NAAFLS provides the following services:

a) legal advice and assistance in areas of Family Violence, Care and Protection of Children, Victims of Crime Compensation, Family Law, Housing and Debt Management;

b) information, support and referral services;

c) community legal education and family violence prevention initiatives; and

d) law reform activities.

3. Context of Our Submission

Our submission is informed by our experiences and expertise in providing legal advice and advocacy for Aboriginal people in remote communities in the Top End of the Northern Territory which includes representation in bush courts. NAAFLS has found that the legal systems (family law, care and protection of children and involving seeking and enforcing a domestic violence order) are not adequately equipped to address the needs and issues of our clients nor provide adequate protection in domestic and family violence situations.

Our clients, especially Aboriginal and Torres Strait Islander women experience higher rates and more severe forms of family violence compared to non-Aboriginal women. Statistics show that: 'Aboriginal women are 34 times more likely to be hospitalised from family violence [1] and almost 11 times more likely to be killed as a result of violent assault.' [2]

[1] The Australian Productivity Commission (2014) Overcoming Indigenous Disadvantage—Key Indicators 2014, 4.93 table 4A.11.22

[2] Australian Institute of Health and Welfare (2006) Family Violence Among Aboriginal and Torres Strait Islander people, Cat. no. IHW 17, p.71

The unique challenges for people living in remote communities include the ability to access legislative provisions intended for their protection and programs and services designed to change the offending behaviour and break the cycle of violence. It is not surprising then that Aboriginal women have been 'identified as the most legally disadvantaged group in Australia.' [3]

Case Study A

In 2015 NAAFLS acted in a matter that involved significant delays because the Defendant was unable to be served with the Court Interim DVO. After numerous unsuccessful attempts to contact local Police, the Police claimed at the next hearing they could not effect service due to operational reasons. The Presiding Magistrate considered this to be a matter of great concern. She agreed to discuss the difficulties that were arising for Police with the Attorney-General. Moreover, the Magistrate highlighted that agencies must work together on the DV strategies in place to combat the serious issue of DV in the NT. Despite the attention drawn to the issue in this case, NAAFLS continues to experience difficulties and delays with effecting service on a regular basis. This experience is not unique to NAAFLS and shared by other legal services.

It is NAAFLS experience applicants often withdraw their application even after an interim order is made. This is due to fear and pressure from the Defendant and their family, from the Court process itself, the cultural and community pressure to remain in violent relationships even though they are scared and need the protection of the DVO. Withdrawals often result in the Applicant later being abused again, when the Defendant no longer has any DVO to comply with. Even where the applicant is finally able to break free from the abusive relationship, the offending behaviour has not stopped and may continue, especially where young children are involved or are transferred to a new partner. NAAFLS has also seen the intergenerational trauma of abuse result in children growing up in an abusive household eventually become perpetrators themselves.

The Defendants often object without having any regard to the impact of violence on the Applicant and more importantly, children exposed directly or indirectly to that violence. Any program should ensure that this and children's wellbeing are central to it. In Aboriginal Communities, this then frequently results in Territory Families involvement, and the expectation that due to the protected person's (mostly the mother's) failure to appropriately protect her children rather than pass this responsibility to the offender.

When the trauma and experience of the abuse is fresh, women seek the protection of a DVO either through our service or police (if they wish to have police involvement). For vulnerable young women with young children, no family support of their own, in struggling to parent their own children in their environment, they sometimes elect to remain/return to an abusive relationship (hoping things will

[3] Aboriginal and Torres Strait Islander Commission (ATSIC) (2003) Submission to the Senate Legal and Constitutional References Committee, Parliament of Australia, Inquiry into Legal Aid and Access to Justice, 13 November 2003, p.4

change and the violence will stop) for the support and security to co-parent their children and prevent humbugging by other men in the community. Options are slim and even slimmer in remote communities. Where there is a local safe house, because communities are small, are sometimes the family members of their partner, so maybe reluctant to seek the protection of the safe house or feel pressure to return.

4. Comments and Responses to the Proposed Amendments

Clause 9- Definitions

- It is noted that the definition of a 'rehabilitation program' is not fixed and at the Minister's discretion and subject to change. Therefore, this is suggestive that a rehabilitation program could vary over time and appears to encompass either a clinical or therapeutic program.

Clause 10- section 23 amendment -Order for Replacement Tenancy

- NAAFLS supports the amendment to section 23 however recommend that this provision should also be mirrored in the Residential Tenancies Act (RTA). Currently there is no such provision in the RTA in which DFV is a ground to terminate/replace a lease. Having such mirror provisions in the RTA provides clarity and contains the rights and responsibilities of a landlord/tenant in one single piece of legislation, rather than leaving it open for the victim of DFV to have to argue their rights to alter the tenancy agreement based on the provision in the DFV Act. This adds a layer of burden on the victim and assumes that landlords/agents are familiar with not only the RTA but the DFV Act in so far as it relates to a residential tenancy agreement.

- Further, it also enables the NT Civil and Administration Tribunal (NTCAT) as the jurisdiction assigned to determine tenancy disputes to consider and deal with these issues where a DVO is not in place but alternate evidence is available to establish a DFV relationship and safety concerns are present.

- Additionally, unlike in other jurisdictions such as WA[4], section 23 of the NT DFV Act requires that as a prerequisite to changing their tenancy arrangement, the victim has to have firstly obtained a DVO. In the NT, especially in Katherine and remote locations this would preclude many victims from accessing this provision where the service of DVO's and DV applications is already difficult and as a consequence, proceedings can be protracted.

By adopting provisions similar to the WA Residential Tenancies Act below[5] where alternate documentary evidence such as the following can be provided in place of a DVO (either for a final or interim order) to alter/replace a tenancy agreement:

A notice under this section must be accompanied by a document, applicable during the tenancy period, comprising 1 of the following —

[4] Residential Tenancies Act 1987, (WA), Division 2A.
[5] Residential Tenancies Act 1987, (WA), section 71AB (2).

(a) a DVO;

(b) a Family Court injunction or an application for a Family Court injunction;

(c) a copy of a prosecution notice or indictment containing a charge relating to violence against the tenant or a court record of a conviction of the charge;

(d) a report of family violence, in a form approved by the Commissioner, completed by a person who has worked with the tenant and is 1 of the following —

(i) a person registered under the *Health Practitioner Regulation National Law (Western Australia)* in the medical profession;

(ii) a person registered under the *Health Practitioner Regulation National Law (Western Australia)* in the psychology profession;

(iii) a social worker as defined in the *Mental Health Act 2014* section 4;

(iv) a police officer;

(v) a person in charge of a women's refuge;

(vi) a prescribed person or class of persons.

- Section 22(2) of the Domestic and Family Violence Act requires the Court to consider the effect of making a premises access order on the accommodation of the persons affected by it. Our clients reside in remote communities where, by and large, public housing is the only housing available (unless their housing is provided through their employment). In most remote communities, there is a shortage of public housing with long application wait times (upwards of 4 years in many areas). In NAAFLS' experience, the public housing authority is reluctant to intervene without an order from the Court (a full non-contact DVO or a DVO including a premises access order). We consider this may be due to the lack of alternate housing available in remote communities. In our view, the protected person's right to live free from violence and harm ought to trump the Defendant's right to remain residing with the protected person. It would be helpful if this were made clear in the legislation. Further, where this situation arises, all possible accommodation options for the Defendant, including living with other family members, or moving outside of community, ought to be considered when the Court is weighing up the competing interests.

Case Study B

A client we had been assisting for many years in relation to DFV perpetrated by her husband, sought our assistance in applying for a DVO with an Exclusion Order to remove her husband from the premises. The client and her husband reside in a remote, small community. The husband had other places he was able to stay, however refused to leave the property. Our client would often be forced to stay at the safe house located in the community to escape the violence. The client felt that if the perpetrator was able to be removed from the home she would have increased safety particularly in a circumstance where he would be served with her DVO application.

The Judge refused to grant an Exclusion Order on an interim basis, as the tenancy agreement was in both the husband and wife's name, and no evidence was provided by the applicant in relation to damage that had been caused to the premises. Both the Police and the housing provider/landlord refused to take any action in relation to the tenancy agreement for the same reason. These circumstances saw our client being put at an increased risk of violence whilst trying to protect herself from it.

The Judge also explicitly stated that they were concerned that granting an Exclusion Order would result in the husband simply being ejected from the house by Police without having anywhere else to stay which their Honour thought may put our client at further risk. This concern in particular highlights how the lack of housing in remote communities puts victims of DFV at further risk.

Clause 6 Amendments to the criminal code- to insert section 186AA to include choking, strangling or suffocating in a domestic relationship

- It is noted that by inserting section 186AA after section 186A, it places it in Division 4A that relates to genital mutilation which is unrelated to the new provision.

- We recommend creating a separate category for this (which appears to be what was intended to recognise the seriousness of these offences) in view that Division 4A relates exclusively to female genital mutilation. It is regarded that "Non-lethal strangulation is a significant form of domestic violence offending designed to exert physical and psychological control over victims.' [6] Further, non-lethal strangulation is an indication of escalation/severity of violence and a predictor of of future violence, including homicide. [7]

- We recommend expanding this proposed provision similar to the NSW Criminal Act[8] to include more than just the required 'intention' to commit an offence under this

[6] NSW Parliamentary Research Service report: *Issues Backgrounder, No. 3*, September 2018, page 2.
[7] NSW Parliamentary Research Service report: *Issues Backgrounder, No. 3*, September 2018, page 3.
[8] Crimes Act 1900 (NSW) s.37.

provision, but also '*is reckless as to rendering the other person unconscious, insensible or incapable of resistance*.' [9]

In addition, we recommend including a 'recklessness' component where the defendant did not care or was indifferent as to whether the victim consented or not. However, if this is the case, then the onus should remain on the defendant to prove consent not a reverse onus for the victim to prove that they did not consent. Whilst this provision may recognise sadism-masochism behaviour between consenting adults, where actual harm has occurred such as through the use of excessive force or long term application (for e.g.) where a party loses consciousness, this would then deem any consent to have been withdrawn. The NSW provision also makes it an offence where a person '*chokes, suffocates or strangles another person so as to render the other person unconscious, insensible or incapable of resistance*, *and does so with the intention of enabling himself or herself to commit, or assisting any other person to commit, another indictable offence.'* [10]

Clause 11- Section 24 amendment- rehabilitation

- We recommend including in section 24 (1A) the best interest of children who may be exposed to the DFV and not just children of the relationship or to the parties to take into account kinship care arrangements or other children present in the household at the time as a factor to be considered by the court when making such as order for rehabilitation under subsection (1).

Clause 14- Declaration of rehabilitation programs- Part 2.11A section 85A (2)

- In terms of the examples for subsection (2) regarding what the requirements of the program to be specified in the notice, we note that whilst this is only a suggestion/guide, we recommend independent checks to be undertaken on the safety of the protected person and any children in the care of the protected whilst the defendant is in rehabilitation. It should not be a requirement that the defendant has to agree in order for this to occur. By eliminating this, it would enable a 'check in' on the wellbeing of the protected person and might also address the pressures by family or community members upon the protected person.

Case Study C

Our client from a remote community was in an abusive relationship with her partner, he himself a product of being raised in a violent household. Pregnant, and largely unsupported she took her young daughter and fled to a women's safe house. His family knew her whereabouts and harassed her and her family until she was worn down and facing the prospect of having no family support, she returned to her husband's community. She now faces the risk of having her daughter and child once born removed by Territory Families.

[9] Crimes Act 1900 (NSW) s.37 (1) (b).
[10] Crimes Act 1900 (NSW), s.37 (2) (a) & (b).

The proposed Bill is silent on the application of this provision in relation to repeat offenders or those who have attended multiple programs seemingly unsuccessfully. Is there a threshold test to say enough is enough- (for example) where the defendant did not participate in or meaningfully engage with the program? If for example, the defendant participated only once a week and not in a residential program then the court might need to consider raising participation threshold to include the Defendant now been ordered to participate in an alternate, more intensive or residential program

Particular Challenges for Remote Aboriginal Clients and Offenders:

- Accessibility to and suitability of rehabilitation programs in remote communities that are culturally appropriate.
- Understanding the impacts of cultural norms, pressures, expectations and dynamics present in different remote Aboriginal communities.
- Not all communities have a safe house, a police station or nearby or with limited operational hours.
- Police and other services under resourced and over stretched.
- Long court lists with little time and pressure to dispense with matters often results in the court lacking opportunity to explore why a protected person wishes to withdraw an application, especially where there are young children involved and whether the DVO is necessary for their protection.
- How will the check-in provisions on the safety and wellbeing of the protected person/and their children occur in remote communities.
- No cooling off facilities exist for perpetrators, where they can be removed to de-escalate the violence or prevent it from happening and provide wraparound support and behaviour change programs.

5. Summary and Recommendations

1. The RTA is amended to reflect and mirror the proposed reforms to the DFV Act to reduce the burden on victims of DFV.
2. A DVO is not a prerequisite to altering or replacing a tenancy similar to that in WA so long as alternative evidence is provided as prescribed.
3. The new offence of choking, strangling or suffocating in a domestic relationship to be inserted in a separate standalone provision rather than as Section 186AA after section 186A, which places it in Division 4A that relates to genital mutilation, an unrelated provision.
4. Children who may be exposed to DFFV which can include other children present in the household and not just of the relationship or the parties to take into account kinship care arrangements as a factor under s24 (1A) to be considered by the court when making a rehabilitation order under s24 (1).
5. The Defendant's permission is not required in order for independent checks to be undertaken on the safety of the protected person or children in the care of the protected person
6. Consideration as to the ongoing participation into rehabilitation programs for repeat offenders where they have participated unsuccessfully previously, and whether increasing participation levels to a residential rehabilitation program or an alternate program as an option.

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