Northern Territory
Legal Aid Commission

NORTHERN TERRITORY LEGAL AID COMMISSION SUBMISSION TO NORTHERN TERRITORY LEGISLATION SCRUTINY COMMITTEE INQUIRY INTO *JUSTICE LEGISLATION AMENDMENT (DOMESTIC AND FAMILY VIOLENCE) BILL 2019*

1. Introduction

The Northern Territory Legal Aid Commission (the Commission) provides services to a broad range of clients affected by domestic and family violence, including perpetrators, victims and their families. The Commission maintains a criminal practice across the Territory which advises, assists and represents over a thousand people each year who are charged with domestic violence and associated offences. The Commission also operates the Domestic Violence Legal Service (DVLS) in the Darwin Region, a specialist service providing referrals, social support, advice, and legal representation to people experiencing domestic and family violence in relation to proceedings under the *Domestic and Family Violence Act*. In addition, the Commission operates the Respondent Early Assistance Legal Service (REALS), which provides advice and duty lawyer representation for defendants. The Commission's Family Law Section frequently represents clients who have experienced or are currently experiencing family violence and may be navigating proceedings relating to this offending concurrently with family law/child protection proceedings and over a significant period of time in some instances because of how long it takes to resolve matters on a final basis where there needs to be ongoing assessment of risk.

Given the broad range of services it provides to the community, the Commission is required to act for both victims and perpetrators of domestic and family violence.[1] However, throughout the Commission, from its executive officers to the lawyers and support staff who provide services directly to clients, there is a strong commitment to urgently reduce the unacceptably high levels of domestic and family violence across the Territory.

The Commission welcomes the opportunity to contribute to the Inquiry into this Bill, which is a significant component of the Northern Territory Government's Domestic, Family and Sexual Violence Reduction Framework 2018 – 2028 (the DFSV Framework).

[1] The Commission, it should be noted, does so with appropriate policies and procedures to ensure compliance with the applicable standards of professional conduct to avoid conflicts of interest.

The Commission submits that key elements of the Bill will facilitate the implementation of outcomes of the DFSV Framework's Action Plan 1 (2018 – 2021), including:

Outcome 3.3:	Improve the criminal justice system so that the safety and wellbeing of victims is the first priority and they are not re-traumatised.
Outcome 4.3:	Refocus the justice system on the rehabilitation and restoration of perpetrators to violence-free families.
Outcome 5.1:	Ensure policy and legislation works toward reducing DFSV.

2. Amendment of *Bail Act 1982*

The Commission supports the proposed amendment to the *Bail Act*, the clear purpose of which is to broaden judicial discretion to grant, in appropriate circumstances, bail to persons charged with domestic violence offences so that they can participate in rehabilitation programs.

The Commission sounds, however, a note of caution. In its current form, s7A(2A) provides that the presumption against bail in s7A(2) does not apply to a person who is assessed to be suitable to participate in a program of rehabilitation that is prescribed by the Regulations. This provision was introduced by the *Bail Amendment (Repeat Offenders) Act 2005*, which commenced on 29 September 2005. However, in the 14 years 4 months that have since elapsed, despite repeated requests that recognised rehabilitation programs be prescribed, not a single such program has ever been approved by Regulation, and as a consequence s7A(2A) has never been engaged.

The Commission submits that the Committee note the importance, once the Bill has been enacted, of ensuring that the amended s7A(2A) of the *Bail Act* is not permitted to become, as its predecessor has been, a "dead letter", but is enlivened by the declaration and gazettal of appropriate rehabilitation programs in accordance with the new s85A of the *Domestic and Family Violence Act 2007*.

3. Amendment of Criminal Code

The Commission agrees that strangulation[2] is a prevalent and particularly dangerous form of domestic violence that warrants legislative attention.[3]

The proposed strangulation offence is similar to an existing provision in the Queensland Criminal Code, which provides:

[2] The term "strangulation" is used in this submission for convenience to refer to the conduct identified in the Bill by the compound expression "chokes, strangles or suffocates".

[3] See, for example: Special Taskforce on Domestic Violence in Queensland, *Not Now, Not Ever Report* (2015), accessed at https://www.csyw.qld.gov.au/campaign/end-domestic-family-violence/about/not-now-not-ever-report; and Heather Douglas, *A Red Flag for Homicide: Should non-fatal strangulation be made a stand-alone criminal offence?* (2018), accessed at https://www.policyforum.net/red-flag-homicide/.

315A Choking, suffocation or strangulation in a domestic setting

(1) A person commits a crime if—

(a) the person unlawfully chokes, suffocates or strangles another person, without the other person's consent; and

(b) either—

(i) the person is in a domestic relationship with the other person; or

(ii) the choking, suffocation or strangulation is associated domestic violence under the *Domestic and Family Violence Protection Act 2012*.

Maximum penalty—7 years imprisonment.

(2) An assault is not an element of an offence against subsection (1).

The proposed NT provision is more complicated, but substantially similar.

Unlike the Queensland Code, which does not define "chokes, strangles or suffocates", the NT amendment defines these three terms as a single phrase, without distinguishing between them individually. The Commission is concerned that it is unnecessarily unwieldy and potentially problematic to use three different (though similar) words to describe the conduct impugned by this provision, but the Commission also accepts that there is utility in adopting the compound expression, as it already appears in s175 of the Criminal Code, which provides:

Disabling in order to commit indictable offence

Any person who, by any means calculated to *choke, suffocate or strangle* and with intent to commit or to facilitate the commission of an indictable offence, or to facilitate the flight of an offender after the commission or attempted commission of an indictable offence, renders or attempts to render any person incapable of resistance is guilty of an offence and is liable to imprisonment for life. (Emphasis added)

Prior to the publication of the Bill, the Commission participated in consultations conducted by the Department of the Attorney-General and Justice, in the course of which there was discussion as to whether it would be preferable to enact a separate, stand-alone strangulation offence, or to amend s188 of the Criminal Code to make strangulation an aggravating circumstance for the offence of assault.

The Commission supports the decision to take the former course, for three reasons. Firstly, the new offence (unlike s188 of the Code) utilises the model Criminal Code principles of criminal responsibility. That is consistent with the government's ongoing commitment to progressively recast all criminal offences in the Northern Territory (including assault offences) in accordance with those principles. The Commission

supports the program to adopt the model Criminal Code provisions for criminal responsibility.

Secondly, the new offence includes a specific element in relation to the state of mind of the strangler, namely that the strangler is reckless as to whether the person being strangled is consenting. This corresponds to s192(3) of the Criminal Code ("Sexual intercourse and gross indecency without consent"). Noting that some adults engage in consensual conduct involving strangulation for sexual gratification, the Commission considers that it is appropriate to structure this element of the new offence in a similar manner to the equivalent element of s192, rather than to incorporate the elements of s188, which are differently conceptualised.

Thirdly, the establishment of this offence as a separate offence sends a message to the community that this particular form of domestic violence is particularly dangerous, and is deplored by the community and the legislature.

The Commission notes that the maximum penalty for the new offence is the same as the maximum offence for aggravated assault, namely five years imprisonment. This is two years lower than the maximum penalty for the Queensland counterpart of the offence. The Commission submits that five years is an appropriate maximum penalty for the strangulation offence, for four reasons.

Firstly, the strangulation offence, like aggravated assault (which also carries a maximum penalty of five years), encompasses a broad range of conduct which, at its lower end, may not even involve the infliction of actual harm on the victim: the definition of "chokes, strangles or suffocates" expressly provides that it includes pressure, obstruction, interference or impedance with respiration *to any extent*. It has been held by the Queensland District Court that the Queensland offence referred to above (which, as mentioned, does *not* define "chokes, strangles or suffocates") does not include such a broad range of conduct.[4]

Secondly, the proposed maximum penalty of five years corresponds to the maximum penalty prescribed by the ACT offence of "Acts endangering health etc" (s28 *Crimes Act 1900* (ACT)), which provides that a person who intentionally and unlawfully chokes, suffocates or strangles another person is liable for imprisonment for up to five years. Significantly, the ACT Act defines "choke", "strangle" and "suffocate" broadly, using the term "to any extent", in much the same way as the Bill.

Thirdly, for more serious conduct, more serious offences carrying higher penalties are available. A perpetrator who by strangulation endangers or is likely to endanger the victim's life is liable to be convicted of the offence of "causing serious harm" (s181 of the Criminal Code), which carries a maximum sentence of fourteen years. A perpetrator who intends to cause serious harm by strangulation and causes harm, is liable to be convicted of the offence of "acts intended to cause serious harm" (s177 of the Criminal Code), which carries a maximum penalty of life imprisonment.

[4] In *R v AJB* [2019] QDC 169, Coker DCJ held that "the relevant element contained… in section 315A of the Criminal Code, was constituted by… a stopping of breath, not a restriction in the ability to breathe" (at [22]). See also *R v Green* (No. 3) [2019] ACTSC 96.

Fourthly, it is notorious that the imprisonment rate in the Northern Territory is unsustainably and harmfully high, at a rate some five times the national average. Accordingly, as a matter of public policy, restraint should be exercised in establishing new offences and in fixing their maximum penalties.

The Commission supports the introduction of the strangulation offence as set out in the Bill.

4. Amendment of *Domestic and Family Violence Act 2007* (DFVA)

4.1. Tenancy agreements

The Commission refers to the Section headed "Reforms to the Act in relation to Domestic Violence" (paragraphs 3.75 to 3.79) in the Report of the Committee's *Inquiry into the Residential Tenancies Legislation Amendment Bill 2019* (December 2019). The Commission endorses the comments of the Committee therein, and the Committee's associated recommendation (Recommendation 8).

As the Commission stated in its submission to that inquiry, the Commission confirms its support for the Darwin Community Legal Service (DCLS) response to the NT Government's *Review of the Residential Tenancies Act 1999* discussion paper. The DCLS response contains detailed submissions headed "Treatment of Family and Domestic Violence within the Act". The Commission reiterates its endorsement of the DCLS recommendations, and the view expressed by stakeholders to the Committee's December 2019 inquiry that the measures in the current Bill, while supported, will not be an effective substitute for the reforms to the *Residential Tenancies Act 1999* that are long overdue.

The modest but significant reforms to section 23 of the DFVA made by Clause 10 of the Bill are welcomed. These reforms will resolve the current uncertainty as to the Court's powers to terminate a tenancy and will help to increase victims' access to protection under the Act by not requiring evidence of permanent relationship breakdown to support the making of orders under section 23.

Giving a clear power to the Court to terminate a tenancy will provide much needed certainty and relief to the small number of sole tenants whose experience of domestic violence means that they are unable to remain in their tenancy in safety. DVLS has assisted women in sole tenancies who require termination of the tenancy where they are unable to continue to reside in the premises because of ongoing domestic violence against them at the home, including unlawful entry, property damage and stalking.

DVLS have also assisted women with sole tenancies whose relationships have ended due to domestic violence and they are unable to maintain the tenancy alone.

Providing the court the power to terminate a tenancy without imposing a replacement tenancy agreement provides certainty to victims of domestic violence in relation to jurisdiction. This will reduce both stress on the victim and the burden on legal and

support services in assisting a victim to seek relief both in the Local Court for a domestic violence order and in the Northern Territory Civil and Administrative Tribunal (NTCAT) on an application for a hardship termination of a tenancy.

In circumstances where a victim of domestic violence has evidence sufficient to satisfy the Local Court in relation to termination of a tenancy, it is equally likely that NTCAT would be satisfied that those same circumstances would meet the test for a hardship termination. As such, the amendment does not, in our view, put landlords at a disadvantage, rather it serves only to reduce stress and the burden on victims.

The removal of the requirement for a victim to provide evidence that the relationship has permanently broken down appropriately takes account of the reality that this can be a difficult matter for a victim to attest to with complete certainty. Victims may struggle to put to the Court on oath that a relationship of many years has permanently broken down and especially so where there are children of the relationship. Further, giving such evidence may act as a trigger to the defendant to perpetrate further domestic violence, or may dissuade the defendant from engaging in behaviour change with a view to rebuilding the relationship. As such this is a welcome amendment.

4.2. Rehabilitation programs

The Commission supports Clause 14 of the Bill, which inserts Part 2.11A ("Rehabilitation programs") into the DFVA.

This significant reform has been led by officers of the Department of Attorney-General and Justice working closely with the Alice Springs Local Court Specialist Approach to Domestic Violence ("the Pilot Program") Reference Group, in which the Commission has participated for over two years. The Commission is gratified that this lengthy and complex planning phase is now drawing to a close, and that the Pilot Program will shortly commence.

The Commission notes that the development of the Pilot Program has entailed not only the development of statutory reforms, practice models and new court procedures, but also the design and construction of a new purpose-built domestic violence matters courtroom and associated facilities that includes areas for victims of domestic and family violence and their children to attend and remain in court in safety and privacy, with access to specialist services.

Clause 14 has been drafted after extensive consultation with a broad range of stakeholders, including specialist services that support victims of domestic and family violence. In the view of the Commission, Clause 14 strikes a good balance between:

- protecting victims (s24(1A), s85G(b));
- supporting perpetrators to rehabilitate (s85B, s85C);
- ensuring that programs are robustly designed and rigorously run (s85A, s85D, s85E); and
- retaining the exercise of judicial discretion (s85B(2)) and power (s85F, s85G) as touchstones of the administration of the justice system.

For example, s85B(2) of the DFVA provides that it is the Local Court judge who ultimately has to make the call as to whether a defendant has satisfactorily completed a rehabilitation program. Since in many cases that decision will affect whether or not the defendant is imprisoned, it is, in the Commission's submission, entirely appropriate that the Court makes the call, rather than a program facilitator or indeed, an overly rigid statutory formula.

Section 85C is also supported by the Commission. It provides that a failure to complete a rehabilitation program does not constitute a contravention of s120 of the DFVA. This does not mean that the contravening defendant will suffer no consequences: they will, having failed to complete the program, have breached a condition of their bail, for which they can be charged with an offence under s37A of the *Bail Act*. It does mean, however, that they will not be placed in double jeopardy by being charged with committing offences under both the *Bail Act* and the DFVA, which would be unfairly harsh.

There is a key feature of the Pilot Program that is not expressed (and does not need to be expressed) in the Bill, but which in the Commission's view is important to understand how the reforms enacted by the Bill will work in practice.

Defendants who participate in the Pilot Program will be required to do so before they are sentenced, while on bail. The judge will explain to participants that satisfactory completion of the rehabilitation program will be a likely pre-condition to avoiding a sentence of actual imprisonment. The Program will thereby offer participants both carrots and sticks. This "therapeutic justice" approach to dealing with offenders is well established in all other Australian jurisdictions, and indeed has previously been used in the Northern Territory courts, through the CREDIT program and the SMART program. To be effective, it requires sensitive, competent and well-resourced judges and service providers.

4.3. Resource implications

The Commission welcomes the Alice Springs Pilot Program, but cautions that, on the basis of past experience, the Pilot Program will only succeed if it is well supported. This Bill provides an essential statutory foundation for the Pilot Program to succeed. In addition, however, the Program's success will be dependent on adequate resourcing both for the Court, participants in the court process, and rehabilitation program providers.

The Commission is keen to participate in the Pilot Program, but, as has been the case with previous court-based therapeutic programs, this will entail the dedication of additional resources by the Commission to represent clients who participate in the Pilot Program. The Commission anticipates that those clients will be on bail for some six to twelve months, during which they will in all likelihood be required to appear at least monthly in court so that the judge in charge of their case can supervise their progress. The Commission submits that the Committee recommend that provision be made by government for the allocation of additional funding to legal

service providers to enable them to provide the additional level of service required to ensure that legally aided participants in the Pilot Program are properly represented.

5. Amendment of *Sentencing Act*

The Commission is and has long been opposed to mandatory sentencing, which is, as has frequently been observed, "the very antithesis of just sentences".[5] Accordingly, the Commission opposes Clause 16 of the Bill, which ropes the new strangulation offence into the existing scheme of mandatory sentencing for violent offences.

By the same token, the Commission supports Clause 17, which extends the existing scope of exceptions to that scheme, so as to enable judges to avoid having to send successful participants in rehabilitation programs to prison, despite the fact that they consider that a sentence of actual imprisonment would, in all the circumstances, be unjust. This amendment is an essential pre-requisite to the establishment of the Pilot Program, and the Commission welcomes it.

[5] *Trenerry v Bradley* (1997) 6 NTLR 175 at 187, per Mildren J.