RESPONSE OF THE DEPARTMENT OF THE ATTORNEY-GENERAL AND JUSTICE

TO THE LEGISLATION SCRUTINY COMMITTEE
Written Questions for Witnesses – Public Hearing: 2 March 2020

Re: Justice Legislation Amendment (Domestic and Family Violence) Bill 2019

Amendment of Criminal Code Act 1983

Proposed Section 186AA – Choking, strangling or suffocating in a domestic relationship

1. **Given that this offence is subject to mandatory imprisonment provisions under the *Sentencing Act 1995*, Professor Aughterson noted that a conviction can carry a mandatory term of imprisonment where the person affected suffers 'physical harm' as defined under section 78C of the Sentencing Act, and might arise where the interference with the person's health is relatively minor.**

    a. ***Can you respond to the issue raised by Professor Aughterson and clarify the intended operation of the proposed offence provision in the context of mandatory sentencing?***

Response

It is intended that Part 3 Division 6A of the *Sentencing Act 1995 (*Mandatory Sentencing for Violent Offences) apply to section 186AA. To ensure consistency across the Criminal Code the proposed offence will be subjected to mandatory sentencing along with other comparable violent offences.

Clause 16 of the Bill amends section 78CA(1)(b) of the *Sentencing Act 1995* to provide for the level of the offence for the purposes of mandatory sentencing. The proposed choking offence is subject to mandatory sentencing at the same level as section 188(2) assault with aggravating features. It is a level 5 offence if it involves an offensive weapon or the victim suffers physical harm. Level 5 offences have a mandatory minimum sentence of three months actual imprisonment for the first offence and 12 months for second of subsequent offences.

Otherwise, the new offence is a level 3 offence, and 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.

The Department of the Attorney-General and Justice's view is this is an appropriate level for this offence, given the nature of the harm and potential consequences that can flow from this type of offending.

The interference that may be caused to a person's health may be appear to be relatively minor in the sense that there may not be visible signs of injury (indeed this is one of the reasons for proposing the introduction of a separate choking offence). However, choking is often used to control and intimidate women and make them fear for their lives often without visible signs of injury. It is a known risk factor for escalating harm in domestic violence cases and subsequent lethal outcomes. The proposed new offence will play an important role in sanctioning and drawing attention to conduct, that has often not received a proportionate response from police, prosecutors and courts.

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2. **Section 186AA(1) provides that a person commits an offence if they intentionally choke, strangle or suffocate another person that they are in a domestic relationship with. Consistent with similar offences in the ACT, NSW, and WA, the Northern Territory Women's Legal Service (NTWLS) suggested that the requirement that the offence occur within the confines of a 'domestic relationship' should be removed.**

   a. ***Can you explain why the proposed offence is only applicable where it occurs within a domestic relationship?***

   b. ***How would it impact on the operation of the proposed legislation if the Bill was amended to provide that it is an offence irrespective of whether or not it occurs within the confines of a domestic relationship?***

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Response

The Government's intention in relation to the proposed offence is to recognise the seriousness of this conduct in the context of a domestic relationship. There is a significant body of research showing a link between choking as a form of domestic violence and subsequent serious harm and lethal outcomes. There is also evidence that non-lethal strangulation can have a cumulative impact in terms negative health outcomes such as neck and throat injuries, neurological disorders and psychological disorders such as depression and post-traumatic stress disorder. Because domestic violence is usually a pattern of abuse and control over time rather than a one-off incident it is particularly important to address it in this context. If left unaddressed, lethal outcomes may follow.

Under the *Domestic and Family Violence Act 2007*, domestic relationship is defined broadly and includes:

- Intimate partners and ex-partners (including spouses, defacto, people who are engaged or in an intimate personal relationship - regardless of whether the two people are of the same or the opposite sex).
- Family members and relatives.
- A relative according to Aboriginal traditional or contemporary social practice.
- Carer relationships (paid and unpaid).
- Custody and guardianship relationships.
- People who reside together.

It is acknowledged that strangulation may affect women outside a domestic relationship, including from strangers, acquaintances, or work colleagues. This is egregious conduct but it is not the conduct that this offence was intended to target. The purpose of this offence is to ensure greater recognition of this particular form of domestic violence because of its increased risk of serious harm and lethal outcomes, as outlined above. Choking that occurs outside a domestic relationship may occur in the context of sexual offending and is adequately dealt with by existing offences (for example, section 192 of the Criminal Code Sexual Intercourse without Consent). It may also occur in the context of an aggravated assault and may be dealt with under section 188(2) of the Criminal Code.

The Department notes that the ACT, NSW and WA have choking offences of generic application rather than requiring a domestic relationship. However, the Department is of the view that to broaden the offence may detract and distract from the primary purpose for its introduction, that is, to draw attention to a serious form of domestic violence that is a high risk factor and has historically not received a proportionate response.

If the Committee is so minded to recommend a broadening of this offence beyond a domestic relationship it is recommended that a separate offence be created that mirrors the proposed section 186AA except for the requirement that there be a domestic relationship. In this way the domestic violence related objectives for introducing the offence will not be diluted.

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3. **With the exception of NSW, where the maximum penalty of 5 years imprisonment is the same as that proposed in the Bill, equivalent offence provisions in other jurisdictions carry higher penalties ranging from 7 – 10 years.**

   a. ***In developing the Bill, what consideration was given to the penalties for equivalent offences elsewhere?***

Response

Consideration was given to penalties for choking offences in other jurisdictions. A seven year penalty along the lines of the Queensland offence (section 315A of the Queensland Criminal Code) was considered.

However, the Department notes that the maximum penalty in NSW, the ACT and proposed in the Family Violence Legislation Reform Bill 2019 (WA) is five years imprisonment.

In addition, as noted by the Northern Territory Legal Aid Commission (NTLAC) in its submission to the Committee, the Queensland offence is a narrower offence than the one proposed in the Bill, targeting the more serious end of the proscribed conduct. In *R v AJB* [2019] QDC 169, the court 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]). In contrast, the offence proposed in the Bill includes applying pressure or obstructing or impeding respiration 'to any extent'. Like aggravated assault (section 188(2) Criminal Code), the proposed offence covers a wide range of conduct which, in the Department's view, is adequately criminalised by a maximum penalty of five years imprisonment.

NTLAC's was the only submission to the Committee that discussed the proposed maximum penalty and it supported the five year maximum. By implication, the other stakeholders who made submissions did not consider the proposed maximum penalty inadequate.

The Department also sought the opinion of the Director of Public Prosecutions who advised that a maximum penalty of five years imprisonment allows sufficient scope for sentencing, noting that the Criminal Code provides a range of more serious offences a defendant could be charged with should the offending be more serious, including disabling to commit an indictable offence (section 175), serious harm (section 181) or attempted murder (section 165).

In addition, the choking offence is unlikely to occur in isolation but rather during the course of other offending, such as aggravated assault. If the circumstances merited it, a court could impose a partly cumulative sentence to reflect the overall criminality of the conduct.

Amendment of Domestic and Family Violence Act 2007

Proposed Section 23 – Order for replacement tenancy agreement

4. **While acknowledging that the proposed amendments to section 23 seek to address the ambiguity in the existing section 23 which has been interpreted to mean that where a tenancy agreement is terminated the court must order the creation of a 'replacement agreement', Professor Aughterson noted that corresponding amendments have not been made to sections 23(5) and 23(6) which still refer to 'the' replacement agreement.**

    a. ***Consistent with proposed section 23(2), how would it impact on the operation of the proposed legislation if references to 'the' replacement agreement in sections 23(5) and 23(6) were amended to refer to 'any' replacement agreement?***

Response

The Department and the Office of the Parliamentary Counsel are both of the view that it is not necessary to replace 'the' replacement agreement with 'any' replacement agreement in sections 23(5) and 23(6). The proposed wording of section 23(2) outlined in Clause 10(2) of the Bill is sufficient to make it clear that an agreement can be terminated without a replacement agreement being made and that sections 23(5) and 23(6) will only apply if a replacement agreement is in fact made.

There would be no adverse effect on the operation of the legislation if the amendments to section 23(5) and 23(6) suggested by Professor Aughterson were made.

5. **The Darwin Community Legal Service (DCLS) raised concern that section 23 only applies where the defendant and protected person live together or previously lived together in premises and fails to contemplate the protection of a tenant that has never resided with the perpetrator.**

    a. ***In these instances, what avenues are available to the protected person to terminate their tenancy agreement where the defendant knows where they live and they are at risk of being stalked or harmed by the defendant?***

    b. ***How would it impact on the operation of the proposed legislation if the Bill was amended to enable the Court to terminate the protected person's tenancy agreement irrespective of whether or not the defendant and protected person live together or previously lived together in premises?***

Response

Section 23(1)(a) requires that the defendant and protected person live together, or have previously lived together in the premises. The intention of section 23 is to enable people who have lived together in a property to terminate or replace their lease in domestic violence situations.

In the Department's view it is beyond the scope of the current Bill to cover the circumstances in which domestic violence is perpetrated by a defendant who has never lived with the protected person but may be a risk to her safety.

In these circumstances, the protected person can apply to terminate the lease under section 99 of the *Residential Tenancies Act 1999* and the application would be heard by the Northern Territory Civil and Administrative Tribunal (NTCAT). It is noted that the NTACT has terminated tenancies under section 99 where there have been instances of domestic violence and the perpetrator did not reside at the premises. The hardship provision may extend to non-victim tenants as well.[4]

If the suggested amendment to section 23(1)(a) was recommended by the Committee, it would potentially assist a wider class of victims who had not resided with the defendant, enabling them to terminate a tenancy agreement as part of domestic violence order (DVO) rather than applying to NTCAT.

If the removal or amendment of section 23(1)(a) is recommended the Department notes that an amendment would also be required to section 23(3). For example, it would not make sense to require there to be no reasonable likelihood of the protected person and the defendant living in the premises free of domestic violence, if they had never lived there together nor had any intention of doing so (section 23(3)(ii)).

However, it is preferable to consider the scope and wording of section 23 as part of the review of the *Domestic and Family Violence Act 2007,* including the intersection with the second tranche of amendments to the *Residential Tenancies Act 1999* which will consider domestic violence related tenancy issues.

6. **Subsection 23(3)(b) provides that a court order terminating or replacing a tenancy agreement must not be made unless 'the landlord consents to the order or, if the landlord refuses consent, the Court is satisfied the refusal is unreasonable'. DCLS expressed the view that the safety of tenants subject to victimisation and violence should, on balance, be preferred to the financial interests of the landlord and raised concerns that this requirement may result in proceedings being adjourned, increasing the financial burden on the protected person and, if they do not have alternate accommodation options, putting their safety at risk.**

   a. ***Under what circumstances would the Court be likely to determine that a landlord's refusal to consent to the order was reasonable?***

   b. ***Where this is the case, what mechanisms are in place to ensure the safety of the protected person?***

   c. ***How would it impact on the operation of the proposed legislation if the Bill was amended to remove section 23(3)(b)?***

[4] (*AB & CD v XYZ Pty Ltd* [2016] NTCAT 111 (4 March 2016).

Response

Under proposed section 23(3)(b) the Court would determine whether the Landlord's refusal to consent to the orders was reasonable or not on the totality of the evidence before it. Refusal to consent may be considered reasonable, for example, if it is proposed to replace the tenancy agreement but there is evidence that the proposed tenant has no means to pay the rent or there is evidence that the proposed tenant is likely to damage the property. However, that is a matter for the Court to determine.

If the landlord refuses consent and the Court finds this was reasonable, there are limited options. For example:

- The defendant and the protected person may continue to reside together in the property with any children because they cannot afford to live separately. This, however, may be unsafe as domestic violence may continue. The only protection may be an Interim DVO with conditions requiring the defendant not to use violence against the protected person and not to use alcohol for example.
- The protected person may make an application under section 99 of the *Residential Tenancies Act 1999* for NTCAT to terminate the lease. That application may or may not have a different outcome. It is possible that the protected person may become homeless. In addition to safety considerations, the costs to the protected person is likely to be an issue (for example, meeting the costs of alternative accommodation, delays in the matter being resolved, fees for a private lawyer).

If the Committee was minded to recommend the removal of section 23(3)(b) the landlord would still have an opportunity to be heard under section 23(4). Section 23(4) provides that 'the landlord and anyone else having an interest in the premises are entitled to appear and be heard in relation to the matters. If there was a recommendation that section 23(3)(b) be removed it is important that section 23(4) be retained.

The landlord has a significant interest in the proceedings and it is important for landlords to be heard before the Court reaches a decision about tenancy order (as outlined above in case the tenant can't pay the rent or the property is likely to be damaged etc). It is not helpful to any of the parties if the Court orders a replacement agreement that cannot be complied with.

As suggested in the response to Question 5, it is the Department's view that it is preferable to consider the scope and wording of section 23 as part of the review of the *Domestic and Family Violence Act 2007,* including the intersection with the second tranche of amendments to the *Residential Tenancies Act 1999* which will specifically consider domestic violence related tenancy issues.

7. The North Australian Aboriginal Family Legal Service (NAAFLS) raised concern regarding the requirement for a Domestic Violence Order (DVO) as a prerequisite to a victim changing their tenancy arrangements. NAAFLS noted that in the NT, especially in Katherine and remote locations, this requirement would preclude many victims from accessing this provision where the service of Domestic Violence Orders and Domestic Violence applications is already difficult.

Re: Justice Legislation Amendment (Domestic and Family Violence) Bill 2019

a. ***In developing the Bill, what, if any, consideration, was given to the approach taken in section 71AB(2) of the Residential Tenancies Act 1987 (WA) which provides for alternate documentary evidence of domestic violence such as a Family Court injunction; copy of a prosecution notice or indictment containing a charge relating to violence against the tenant, or a report of family violence?***

b. ***How would it impact on the operation of the proposed legislation if the Bill was amended to provide for alternate documentary evidence of domestic violence other than the existence of a DVO as the basis for a Court order terminating the tenancy agreement or creating a replacement agreement?***

Response

The *Domestic and Family Violence Act 2007* achieves its objectives by providing for the making of DVO to protect people from domestic violence and to encourage people committing it to change their behaviour (section 3(2)(a)). The Department's view is that provisions to terminate or replace a lease under this Act should require a DVO to be in place.

It is difficult to see how the Western Australian provisions could be effectively incorporated into the *Domestic and Family Violence Act 2007* which is based around DVOs.

To terminate a lease without a DVO the provisions are better situated in the *Residential Tenancies Act 1999* as they are in Western Australia. Amendments to the NT *Residential Tenancies Act 1999,* namely the *Residential Tenancies Legislation Amendment Bill 2019* was passed in the Legislative Assembly on 18 February 2020. A second tranche of residential tenancy reforms will now be considered, including to address domestic violence. Section 71AB(2) of the *Western Australian Residential Tenancies Act 1987* was not considered during the drafting of the Bill for this reason.

It is noted that the Western Australia provision operates to enable the tenant to give notice of the termination of the tenancy agreement unilaterally on the grounds of family violence. This does not give the landlord the opportunity to heard without a Court or Tribunal considering the matter. In addition, the evidence that family violence has occurred only need be a signed letter from specified professionals, although prosecution notice, a family court injunction and other documents are also permissible.

As suggested in the response to Questions 5 and 6, the scope and wording of section 23 should be considered as part of the review of the *Domestic and Family Violence Act 2007,* including the intersection with the second tranche of amendments to the *Residential Tenancies Act 1999* which will specifically consider domestic violence related tenancy issues.

Proposed Section 24 – Order for rehabilitation program

8. **Proposed section 24(1A) provides that in deciding whether to include an order requiring the defendant to take part in a rehabilitation program when making or varying a DVO, the safety and protection of the protected person must be the paramount consideration. NAAFLS suggested that this subsection should be amended to ensure that the best interests of children of the relationship or other children present in the household is also a factor to be considered by the Court.**

   a. ***Can you explain why this provision does not provide that the safety and protection of any children of the relationship, or other children in the care of the protected person, must also be taken into consideration by the Court when deciding whether to include in a DVO an order requiring the defendant to take part in a rehabilitation program?***

Response

The Department's view is that this suggestion is unnecessary because the safety of children is already provided for. If children are at risk they should be named as a protected person on the DVO alongside any adult protected person. Section 24(1A) will apply to all protected persons both adults and children, so it is not necessary to specifically identify children in the provision.

The Department notes that section 18(1) specifically provides that the issuing authority may make a DVO if satisfied there are reasonable grounds to fear that a child will be exposed to domestic violence. This ensures that any children who experience or witness domestic violence can be included as a protected person.

The proposed section 24(1A) itself is strictly speaking unnecessary as it is already an overarching requirement under section 19(1) of the Act that in deciding whether to make a DVO 'the issuing authority must consider the safety and protection of the protected person to be of paramount importance'. A rehabilitation order made under section 24 is one of the specific orders that can be included as part of a DVO. The proposed section 24(1A) was included in the Bill to avoid any doubt that in making a rehabilitation order under section 24 that the safety and protection of the protected person must be the paramount consideration. It gives added emphasis to what is already required under section 19(1).

Although it is not necessary in the Department's view, if the committee is minded to make a recommendation to name children in this provision, a very simple amendment would suffice, for example, the addition of the words ', including children,' after protected person. An amendment of this kind would ensure that the safety and protection of children are taken into account where they are protected persons.

The Department agrees with NAAFLS that it is important for the safety of children to be taken into account. However, the Department notes:

- There can only be one paramount consideration which should remain the safety and protection of protected persons (meaning both children and adults who are protected persons)
- It is difficult for a Court to identify or assess any potential impact of a rehabilitation order on the safety and protection of unnamed persons who are not 'protected persons.'

Proposed Section 85A – Declaration of rehabilitation program

9. **The Law Society NT suggested that proposed section 85A be amended to include an express provision to the effect that persons can only be ordered to participate in a rehabilitation program as a condition of a DVO.**

    a. ***Can you clarify if it is intended that the Court may order the defendant to take part in a rehabilitation program irrespective of whether or not a DVO is in place?***

Response

By definition a rehabilitation order made under section 24 of the *Domestic and Family Violence Act 2007* can only be made as part of a DVO. The proposed section 24(1) states that 'The Court may include in a DVO an order requiring the defendant to take part in a rehabilitation program when making or varying a DVO.' A DVO must therefore be in place and the Court will determine the specific orders to be included in the DVO. The Department's view is that the amendment recommended by the Law Society Northern Territory that a section 24 rehabilitation order can only be made as a condition of a DVO is unnecessary.

If the Law Society Northern Territory's recommendation relates to safety concerns, it is noted that the proposed section 24(1A) provides that in deciding whether to include a rehabilitation order in a DVO 'the safety and protection of the protected person must be the paramount consideration.'

10. **NAAFLS raised concern that example 3 for section 85A(2) provides that the defendant agree to independent checks on the safety of the protected person while the defendant is participating in the program, and fails to take into account the safety of any children in the care of the protected person**

    a. ***Can you explain why the defendant's consent is required in order for independent safety checks of the protected person to be undertaken?***

b. Why doesn't the reference to independent checks on the safety of the protected person include any children that might be in the care of the protected person?

Response

It is recognised best practice in Domestic Violence Men's Behaviour Change Programs[5] (which includes voluntary and court-ordered participants) that the participants in the program consent to provide contact details of their partners or ex-partners. This demonstrates that they are taking responsibility for their conduct (rather than blaming the victim) and enables them to accept that information and support needs to be provided to the victim. Best practice dictates that the Men's Behaviour Change Program has arrangements in place with a service for victims (often a women's specific service) who independently contacts the victim to provide information about the program, to offer support, referral and assistance and to conduct independent checks on her safety. This is called the 'Partner Contact Service'. During this process the safety of any children in the family is also be considered, but the primary client is the partner or ex-partner (with her consent).

The program currently operating in Alice Springs by Tangentyere Council, has arrangements in place with Women's Safety Services of Central Australia (WOSSCA, formerly the Alice Springs Women's Shelter) to provide partner contact services.

As this is a vital component of these kinds of programs, it was considered useful to include it as an example for the purposes of section 85A(2).

11. NAAFLS noted that the Bill is silent on the application of this provision in relation to repeat offenders or those who have attended multiple rehabilitation programs seemingly unsuccessfully.

a. Why doesn't the Bill include any criteria or guidance regarding a defendant's eligibility or suitability to participate in a declared rehabilitation program?

Response

There are a range of factors for the Court in considering whether a rehabilitation order under section 24 is appropriate.

The bill makes it clear in proposed section 24(1A) that the safety and protection of the protected person must be the paramount consideration.

There may be many signs that a rehabilitation order may not be safe, including repeat offending or past attempts at rehabilitation that have been unsuccessful. Recidivism is sadly a common feature in domestic violence matters.

[5] For example, Victorian State Government Family Safety Victoria (2017), Men's Behaviour Change Minimum Standards. It is noted that these are gender specific service standards and do not apply to programs for women.

The Department's view is that trying to prescribe strict criteria in legislation may impede the Court in effectively considering whether an order is in the interests of safety. The Department's view is that it is preferable to have an overarching legislative requirement that safety and protection the paramount consideration and allow the Court will weigh up the range of circumstances in each individual case.

Proposed Section 85B – Satisfactory completion of rehabilitation program

12. Professor Aughterson noted that the term 'violent offence' in proposed section 85B(1)(c) is not defined in the Bill.

a. Can you clarify whether the term 'violent offences' in the Bill refers to 'violent offences' as defined in section 78C of the Sentencing Act 1995?

b. If this is the case, why doesn't the Bill make this clear in section 4 (Definitions) of the Domestic and Family Violence Act 2007?

c. If this is not the case, can you explain what the term 'violent offence' refers to?

Response

The definition in section 78C and Schedule 2 of the *Sentencing Act 1995* provides an appropriate definition for 'violent offences' in this context as it is intended to aid the Court in sentencing decisions.

As this definition is provided for in section 78C of the *Sentencing Act 1995* the Department and the Office of the Parliamentary Counsel are of the view that the definition does not need to be repeated in the *Domestic and Family Violence Act 2007*.

However, following consultation with the Office of the Parliamentary Counsel, and to avoid any doubt, a definition of violent offences could be inserted in section 85B of the *Domestic and Family Violence Act 2007* as well.

13. NTWLS raised concern regarding the discretion available to the Court under proposed section 85B(2) and the absence of any requirement for the Court to seek the views of the protected person on making a finding that the defendant satisfactorily completed a rehabilitation program despite having received any non-compliance reports from a program facilitator.

a. In developing the Bill was any consideration given to the inclusion of a requirement for the Court to seek the views of the protected person in these circumstances? If not, why not?

Response

The Department respectfully disagrees with the view of NTWLS that it would be in the interests of the protected person to express a public view in Court about whether the Defendant had satisfactorily completed the program.

At the Alice Springs Local Court where the Specialist Approach to Domestic Violence is being trialled (and where these provisions will first be utilised) the following arrangements will be put in place to ensure that the safety of the protected person is properly considered and prioritised by the program facilitators and the Court.

- Both the defendant and the protected person will be assessed by separate risk assessors prior to the rehabilitation order being considered by the Court. This is a detailed process being undertaken by experts.
- Under draft practice directions currently in development the protected person or the protected person's independent risk assessor will be able to provide information to the Court about whether a rehabilitation order is appropriate in the circumstances. (The protected person may feel unsafe to personally express a view for the reasons outlined above. However, the risk assessor can still provide an independent opinion to the Court about the safety risk for the protected person.)
- If the defendant is ordered to attend the Men's Behaviour Change Program operating in Alice Springs the program has an arrangement with Women's Safety Services of Central Australia (WOSSCA, formerly the Alice Springs Women's Shelter) to make contact with partners and ex-partners, provide them with information about the program, provide them with support, and check on their safety. Any safety concerns from the protected person's point of view will be conveyed to program facilitators.
- Program facilitators are required to under the proposed legislation to report any domestic violence or contravention of a DVO to the Court and the Police in writing (proposed section 85D(1)) and to provide a non-compliance notice if the defendant fails to comply with a requirement of the program (proposed section 85D(3)(b)).

This ensures that the protected person's interests and safety are properly considered, without her being placed at increased risk or pressure from the defendant and the defendant's family.

The Department's strong view is that the inclusion of a requirement that the Court seek the views of the protected person to determine if the program has been satisfactorily completed is unsafe for the protected person and potentially puts too much responsibility on the protected person to be arbiter of the defendant's behaviour.

Additional Issues

14. NTWLS suggested that consideration be given to amending the Victims of Crime Assistance legislation such that the proposed offence of choking, strangling or suffocating in a domestic relationship is recognised a s compensable violent act under Schedule 3 of the *Victims of Crime Assistance Regulations 2007*.

a. Has any consideration been given to amending the Victims of Crime Assistance legislation as suggested by NTWLS? If not, why not?

Response

'Compensable violent acts' are set out in Schedule 1 of the *Victims of Crime Assistance Regulations 2007*. Schedule 3 contains a list of injuries (physical and psychological) that are

considered to be 'compensable' under the victims of crime assistance scheme. The difference between the two is:

- For a 'compensable violent act', the sum of assistance is based on the commission of the violent act itself, rather than the nature of the injuries suffered by the victim.
- For a 'compensable injury', the sum of assistance is based on the nature of the victim's injuries, rather than the nature of the offence that caused those injuries.

The Department assumes that the NTWLS intended to suggest that the proposed offence of choking, strangling or suffocating in a domestic relationship be included as a 'compensable violent act' within Schedule 1 of the Regulations.

Currently, all 'compensable violent acts' in Schedule 1 are offences of a sexual nature. They range in objective seriousness from, for example, an indecent assault on a child under 16 where the child suffers harm, to, for example, sexual intercourse with or gross indecency on a child under 16 if a factor of aggravation applies to the offence. Given that the proposed offence of choking, strangling or suffocating in a domestic relationship is not a sexual offence, the Department's view is that it would be inappropriate to include it as a 'compensable violent act' in Schedule 1.

The victims of crime financial assistance scheme is currently under review. In 2019, the Department conducted a public consultation process as part of that review and the results of that process are still under consideration. Depending on the outcome of that review, there may be scope to include the proposed offence more explicitly within the victims financial assistance scheme. However, such an amendment would need to be considered as part of the victims of crime review, rather than as incidental to the current amendments.

Under the current victims of crime assistance legislation, a victim of the proposed offence could be eligible for assistance on the basis of the particular injuries they suffer as a result of the offence (up to a maximum of $40 000). Alternatively, if the offence formed part of a 'pattern of abuse', the victim could receive assistance for 'domestic violence injuries' (which is a payment of between $7500 to $10 000). The victim would receive the most beneficial payment for which they are eligible.

15. Section 22 of the *Domestic and Family Violence Act 2007* provides that a DVO may include a 'premises access order'. Section 22(2) further provides that before making a premises access order, the issuing authority must consider the effect of making the order on the accommodation of the persons affected by it. NAAFLS raised concern regarding the operation of this section in remote communities where alternate accommodation options may be limited, and expressed the view that the legislation should clarify that the protected person's right to live free from violence out trumps the defendant's right to remain residing with the protected person.

RESPONSE OF THE DEPARTMENT OF THE ATTORNEY-GENERAL AND JUSTICE

TO THE LEGISLATION SCRUTINY COMMITTEE
Written Questions for Witnesses – Public Hearing: 2 March 2020

Re: Justice Legislation Amendment (Domestic and Family Violence) Bill 2019

a. How would it impact on the operation of the proposed legislation if section 22(2) was amended to clarify that before making a premises access order, the issuing authority must also consider the safety of the protected person and any children in their care?

Response

In making any DVO, including a premises access order, the Court is required to consider the safety and protection of the protected person to be of paramount importance (section 19(1)). This is an overarching provision for DVOs, and applies to all orders that can be included as part of a DVO, including premises access orders, tenancy access orders and rehabilitation orders etc.

An amendment to section 22(2) as suggested would affirm that the safety and protection of the protected person is the paramount consideration in making premises access orders and is unlikely to have an adverse effect on the operation of the Act. It may enable more protected persons and their children to remain in their own homes. However, this can be difficult in remote communities where victims may not feel safe enough to remain in their homes, notwithstanding a premises access order being put in place.

There may be a case to be made for an amendment to section 22 as suggested, but this is beyond the scope of the current amendments and should be fully considered in the review of the *Domestic and Family Violence Act 2007*.