LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

13th Assembly

LEGISLATION SCRUTINY COMMITTEE

Public Briefing Transcript

10.00 am, Monday 9 December 2019

Litchfield Room, Level 3 Parliament House

Members: Ms Ngaree Ah Kit MLA, Member for Karama (Chair)
Mr Tony Sievers MLA, Member for Brennan
Mrs Lia Finocchiaro MLA, Member for Spillett
Ms Sandra Nelson MLA, Member for Katherine (Deputy Chair)
Mrs Robyn Lambley MLA, Member for Araluen

Witnesses: **Department of the Attorney-General and Justice**
Jenni Daniel-Yee: Director, Legal Policy
Penny Drysdale: Senior Policy Officer and Lawyer, Policy Coordination / Legal Policy

JUSTICE LEGISLATION AMENDMENT (DOMESTIC AND FAMILY VIOLENCE) BILL 2019

Department of the Attorney-General and Justice

Madam CHAIR: Good morning, everyone and thank you for joining us. I am Ngaree Ah Kit, the Member for Karama and Chair of the Legislation Scrutiny Committee. On behalf of the committee, I welcome everyone to this public briefing on the Justice Legislation Amendment (Domestic and Family Violence) Bill 2019.

I acknowledge that this public briefing is being held on the land of the Larrakia people and I pay my deepest respects to Larrakia elders past, present and emerging.

I also acknowledge my fellow committee members in attendance today: Member for Brennan, Tony Sievers; Member for Katherine, Sandra Nelson, on the phone; and the Member for Araluen, Mrs Robyn Lambley, also on the phone.

I welcome to the table to give evidence to the committee, from the Department of the Attorney-General and Justice, Jenni Daniel-Yee, Director, Legal Policy and Penny Drysdale, Senior Policy Officer and Lawyer, Policy Coordination/Legal Policy. Thank you for coming before the committee. We appreciate you taking the time to speak to the committee and look forward to hearing from you today.

This is a formal proceeding of the committee and the protection of parliamentary privilege and the obligation not to mislead the committee apply. This is a public briefing which is being webcast through the Assembly's website. A transcript will be made for use of the committee and may be put on the committee's website.

If, at any time during the briefing, you are concerned that what you will say should not be made public, you may ask that the committee go into a closed session and take your evidence in private.

I will ask each witness to state your name and the capacity in which you appear this morning before inviting you to make a brief opening statement, and then proceed to the committee's questions. Could you each please state your name and the capacity in which you appear this morning.

Ms DANIEL-YEE: Jenni Daniel-Yee, Director, Legal Policy.

Ms DRYSDALE: Penny Drysdale, Senior Policy Officer and Lawyer in the Department of the Attorney-General and Justice.

Madam CHAIR: Thank you. Ms Daniel-Yee, would you like to start by making a brief opening statement.

Ms DANIEL-YEE: I will pass to Penny for that.

Ms DRYSDALE: The Justice Legislation Amendment (Domestic and Family Violence) Bill 2019 addresses three distinct issues in relation to domestic and family violence. It aims to provide greater incentive for defendants in domestic violence proceedings to attend rehabilitation programs, it creates a new offence of choking, suffocation and strangulation in a domestic relationship to recognise the seriousness of this conduct and it clarifies that as part of the Domestic Violence Order, tenancy agreements can be terminated without being replaced and that the permanent breakdown of a relationship is not required to make a tenancy order.

I will provide a brief summary of each of those areas in turn to provide some background and then questions.

The first part of the bill has really arisen in relation to the development of a specialist approach to domestic violence at the Alice Springs Local Court. That is part of the government's 10-year domestic and family and sexual violence reduction framework to make Territorians safer, and the purpose of that approach is really to improve the safety and wellbeing of victims of domestic violence and to increase the accountability of perpetrators of domestic violence and the impetus for them to change their behaviour.

There is a number of non-government organisations who have been working together with the Alice Springs Local Court since around 2016 to establish this specialist approach and are collaborating together to make sure that they look at all of the issues and really trying to address that repeat offending which we see very often in domestic violence matters. It is a collaborative approach and it is expected to commence in the early part of 2020.

As part of the specialist approach, it has always been intended that the Alice Springs Local Court will order offenders to attend rehabilitation programs to help them change their behaviour. However, in that developmental process judges and some of the stakeholders raised concerns that mandatory sentencing may provide a significant disincentive to offenders consenting to the orders to attend the programs and actually undertaking that rehabilitation.

The bill amends section 78DI of the *Sentencing Act 1995* to make clear that if a defendant satisfactorily completes a rehabilitation program ordered by the court as part of a domestic violence order that the court may find that that constitutes exceptional circumstances for the purpose of mandatory sentencing, and for those exceptional circumstances to be found the court will need to be satisfied that the offender has taken responsibility for his or her conduct and made a genuine effort to change. That is the motivation for the amendment in this first part of the bill.

I will briefly explain how that is expected to work to give some background. Often in domestic violence situations there are both criminal proceedings and also a civil application for a domestic violence order under the *Domestic and Family Violence Act* and they arise from the same incident or set of facts in that sense.

Under the specialist approach to domestic violence at the Alice Springs Local Court they will be considered together, both the criminal and civil matters in a specialist list so that the court can take a specialised approach to that offending and try to promote that safety and behaviour change.

If the defendant pleads guilty to the criminal matters and consents to an assessment then the court will consider making a domestic violence order that includes an order to attend a rehabilitation program, but that order can only be made if the defendant is assessed and found to be a suitable person to take part in the program and there is a place available. Also under the specialist approach the safety of the protected person will be assessed and their views about the defendant attending the rehabilitation program will be considered by the court.

If a court makes an order for the defendant to attend a rehabilitation program the court will grant the defendant bail to enable the defendant to undertake the program in the community and defer sentencing for a period of time, possibly five months for example, to enable the defendant to attend that program.

Then the court will require the defendant to appear before it from time to time for a review. The judge will be talking to the defendant, encouraging the defendant, making sure that the defendant is making that genuine commitment to the program and to change.

If the program is satisfactorily completed and the court is satisfied that the offender has taken responsibility for their conduct and made a genuine effort to change the court will take this in to account in sentencing, and the amendment means that it is open to the court to find that attendance of the program constitutes exceptional circumstances for the purposes of mandatory sentencing.

As the law currently stands, the completion of a program may not be sufficient grounds to constitute exceptional circumstances, that is why that amendment is needed to clarify that.

If the court finds that there are exceptional circumstances the court is not required to impose the mandatory minimum sentence for violent offences that would otherwise be required under Part 3(6A) of the *Sentencing Act*. A term of actual imprisonment will still be required but the court will determine the appropriate sentencing in the circumstances of the case. In some cases offenders may already have served some time. Those things will be taken into account.

The *Domestic and Family Violence Act* already contains a power in section 24 for a court to order a defendant to attend a rehabilitation program as part of a domestic violence order. This bill puts additional safeguards in place in relation to rehabilitation programs to prioritise that safety for the victim and to ensure fairness for defendant. The bill amends section 24 of the *Domestic and Family Violence Act* so that the safety and protection of the protected person is the paramount consideration for the court in determining whether to make a rehabilitation order.

The bill also importantly creates a new part 2.11A of the *Domestic and Family Violence Act* to provide for rehabilitation program orders. The new part provides that the minister may by gazette notice declare programs to be rehabilitation programs and the notice specifies the requirements of the program. All of that is transparent and clear for people to see which programs are available for this purpose.

The new part also defines what is meant by the satisfactory completion of the program. So the program is satisfactorily completed if the court receives a notice from the program facilitator to say that the defendant has met all the requirements, but also the defendant must not have breached a domestic violence order or committed any further domestic violence offending or any further violent offending at all. The bill provides the court has a discretion to find that the program has been satisfactorily completed if that is necessary to avoid an unjust outcome in all of the circumstances. If the court does so it must state its reasons in writing for that.

The new part also provides for the duties of program facilitators which were not provided for previously. The program facilitator must notify the court when the defendant has completed all the requirements of the program, which we are calling a completion notice. They must also notify the court if the defendant has failed to comply with the program requirement, which we are calling a non-compliance notice. If requested by the court, for example prior to a review that I mentioned earlier, the court can request the program facilitator to provide a summary of the defendant's participation to date, so that the court can take that into account in those reviews, and the court can be well informed about all those matters.

The program facilitators must also notify the court and the police if the program facilitator becomes aware of the defendant committing domestic violence or contravening a domestic violence order while they are subject to that rehabilitation order and that notice must be in writing.

The new part provides that the court may require the defendant to appear before it from time-to-time to review the defendant's progress, as I mentioned earlier. The timing of those reviews will be at the court's discretion and will vary from case to case. That is an important part of the compliance.

If the court receives a non-compliance notice from a program facilitator it must conduct a review of the defendant's participation in the program—so if there is non-compliance, then the person will be brought back before the court and the judge would talk to that person about how serious their commitment is and what might need to be put in place from there.

Under the new part, if the defendant fails to attend a review, or fails to comply with a program requirement, or the court believes the defendant might present a risk to the safety of the protected person, or any person, the court may issue a summons for the defendant to appear before the court, or if satisfied that the defendant may not appear issue a warrant for the defendant's arrest. So the summons or warrants may be issued on the court's own initiative, if it is concerned for example, or on application of the parties.

Under the new part the court has the power to revoke that 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 person.

The bill makes an amendment to the *Bail Act* to provide that rehabilitation programs, declared by the minister under the *Domestic and Family Violence Act,* are included in section 7A(2A)(b) along with any rehabilitation programs prescribed by the regulations. That creates consistency in relation to the way that is dealt with.

The new part also includes some safeguards to ensure that minor non-compliance by the defendant does not unfairly prevent that defendant from continuing with the program or satisfactorily completing it. The Part provides that, if a defendant fails to comply with a requirement of the program, it does not constitute a breach of the domestic violence order but rather the court may still find that the defendant satisfactorily completed a program, even if a non-compliance notice has been issued by the program facilitator. That ensures that the court can make that fair judgment in the circumstances of the case.

These amendments in this bill are important for the implementation of the specialist approach to domestic violence at the Alice Springs Local Court. They remove the disincentive for offenders to participate in rehabilitation programs and they better regulate the rehabilitation programs ordered under the *Domestic and Family Violence Act*.

If this approach is successful in Alice Springs, rehabilitation programs in other locations might be declared by the minister and there is an intention to really learn from and document how things occur in Alice Springs, so that then potentially that can be considered for other parts of the Northern Territory.

I know that provided a bit of detail, but it gives you a sense of how the scheme will work in practise, hopefully.

May I proceed, just briefly, make some comments about the other two parts of the bill?

Madam CHAIR: Sure, thank you.

Ms DRYSDALE: The new choking offence. Domestic violence in which a perpetrator chokes, strangles or suffocates their partner has been identified as a high-risk factor for serious harm and subsequent lethal outcomes in domestic violence situations. However, this conduct has often not been taken seriously enough in the investigation and prosecution of domestic violence incidents.

The bill amends the Criminal Code to provide that it is an offence with a maximum penalty of five years' imprisonment for a person who intentionally chokes, strangles or suffocates a person with whom they are in a domestic relationship. The offence requires the prosecution to prove that the person subjected to the choking did not consent and that the defendant was reckless to that circumstance.

This type of conduct would otherwise be captured as assault under section 188(2) of the Criminal Code but the creation of a new separate offence will ensure greater recognition of this type of domestic violence and its increased risk of serious harm and lethal outcomes.

Mr SIEVERS: I was wondering why—that is a serious assault, choking someone around the neck.

Ms DRYSDALE: Yes.

Mr SIEVERS: It is already captured in the Criminal Code?

Ms DRYSDALE: Yes.

Mr SIEVERS: This section is highlighting that for domestic violence?

Ms DRYSDALE: That is right. I think they have found that, because sometimes there are not such visible injuries in those choking cases, it might mean it is not taken as seriously as it could be. Some of the research internationally shows, that if the person has that kind of threatening conduct which causes the victim to fear for their life, it is often a high-risk indicator for subsequent lethal outcomes and other forms of serious harm. That is why there is a growing view across the country now, to make that a separate offence, as it actually draws attention to that conduct and puts everyone on notice that this is quite serious conduct that needs to be looked at in terms of the future safety of that family.

Mr SIEVERS: Thanks.

Ms DRYSDALE: The bill introduces the definition of 'chokes, strangles and suffocates' in similar terms to the definitions recently introduced in the Australian Capital Territory. This is proposed to remedy the narrow interpretation taken in the case of R v Green, in which the ACT Supreme Court held that the offence required proof that the victim's breathing had stopped and was not merely restricted or impeded.

The bill also amends the *Sentencing Act* to make the new offence subject to mandatory sentencing for violent offences at the same level as assault with aggravating features in section 188(2) of the *Criminal Code Act*. The proposed new choking offence is a Level 5 offence for the purpose 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 for second or 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.

Finally, the amendment is also being made to add the new choking offence to the list of offences in Schedule 1 of the *Criminal Code Act* which identifies those provisions to which Part IIAA of the *Criminal Code Act* applies. That is in relation to the proof of criminal responsibility.

The third part of the bill relates to tenancy agreements. The bill amends section 23 of the *Domestic and Family Violence Act 2007* which provides for orders in relation to tenancy agreements. Under the *Domestic and Family Violence Act*, the court has the power to order the termination of a tenancy agreement and the creation of a replacement agreement in similar terms. This enables, for example, a tenancy agreement that is in both parties' names to be terminated and replaced with a replacement agreement created in either the protected person's name, if it is safe for her to stay there, or in the defendant's name if the protected person needs to leave that property for safety reasons.

Madam CHAIR: Acknowledging that it is not only females who are victims of domestic and family violence?

Ms DRYSDALE: Yes, correct. My apologies.

The bill amends the *Domestic and Family Violence Act* so as to avoid any doubt that a tenancy agreement can be terminated without a replacement agreement being made. This is necessary because courts have sometimes read the power to terminate the agreement as merely facilitative of the power to create a replacement agreement and held that there is no power to terminate in the absence of a replacement agreement. This amendment is necessary to avoid any doubt that the agreement can be terminated, even without a replacement agreement, because in some circumstances the safest outcome for the family will be for the tenancy agreement to be terminated, essentially, without another agreement being made—for example, where there is continuing harassment of the victim. If she or he is staying at the property and there is harassment of that victim, then the court may not be able to make an agreement in either party's name that is safe. This amendment remedies that situation.

The bill also amends the *Domestic and Family Violence Act* to remove the requirement that for a court to order a tenancy agreement to be either terminated or replaced, the relationship must have permanently broken down. In the early days when the family is in crisis, it can be hard to know whether the relationship is permanently broken down. Sometimes the protected person may retain hope that the relationship might be repairable and may not want to make submissions to the court that that relationship has permanently broken down. However, for safety reasons, it is still critical that the family live apart, so the amendment will help ensure that occurs and that there are safe living arrangements and the parties can proceed with their lives.

This bill, with these three elements, is part of the government's efforts to improve the safety of victims of domestic violence and increase that impetus for offenders to take responsibility for their conduct. Thank you. That is the overview.

Madam CHAIR: Thank you very much. I will open up to the committee for any questions.

Ms NELSON: This is Sandra Nelson, Member for Katherine. My first question is to do with part 2.11A. It says, 'Includes some safeguards to ensure that minor non-compliance by the defendant is not unfairly prevent from continuing with the program and satisfactorily completing it'. What exactly constitutes a minor non-compliance?

Ms DRYSDALE: In some cases, for example, where there might be a reason why the defendant has not turned up to a program or has not met all the requirements to a program, failure to come to a meeting or something like that that might be minor non-compliance, and the view is that because people are engaged in that process of making change that there is going to be …

Ms NELSON: Sorry, I am going to interrupt someone because of the mute button. I cannot hear anything.

Mr SIEVERS: We are just moving the phone, Sandra.

Ms DRYSDALE: It might be something like a failure to attend a meeting or do particular things like that. And the view was – the stakeholders came to a view and advised us in relation to that – if that was fatal to the defendant's efforts to proceed in this program then the whole thing would not be that useful if someone is going to be essentially kicked off the scheme for things that might not reflect behaviour that would cause risk or further violence or anything like that. It might be just failure to comply with certain things that were required.

Madam CHAIR: For example, perhaps an offender over slept or somebody could not pick them up or they could not find a way to their meeting on time might be deemed just a minor …

Ms DRYSDALE: That kind of thing, exactly.

Madam CHAIR: It is not like they went around to the house to try to cause grief or violence to the victim.

Ms DRYSDALE: No, that is right. It is clear that the defendant cannot satisfactorily complete the program if they have engaged in further violence or breached a DVO—that kind of thing. Although again for those reasons we have enabled the court to have discretion in relation to that, so where it might be a breach of a domestic violence order, for example, that has not involved further violent conduct or further harassment or anything like that, the court could look at the whole of the circumstances of the case and how committed the offender is to changing and make a judgement and then put those views in writing so that is transparent.

Ms NELSON: Thank you. I also read the first offence is an immediate three months gaol term. Are they participating in this program when they have been sentenced to gaol to serve time?

Ms DRYSDALE: No. This scheme works where defendants have pleaded guilty to a criminal offence and then an order is made under the *Domestic Violence Act*. What happens is that sentencing is deferred until the end of the program and then how committed they are and what they have done in the program is then taken in to account on sentencing.

This scheme is about the pre-sentence period, if you like, but once they have actually taken responsibility for their conduct and pleaded guilty in that way. There might be other offenders who have more serious conduct that immediately warrants a prison term in which case those offenders would not go on this scheme they will be sentenced to a term of imprisonment. They might still be ordered to attend a program as part of a suspended sentence of imprisonment or something like that but that will different. That is not what these amendments are referring to.

Mr SIEVERS: What other consultation is being done on the bill, about these changes?

Ms DRYSDALE: Yes, these changes were really proposed by stakeholders and people involved in the specialist approach to domestic violence at the Alice Springs Local Court. In particular, that includes stakeholders from legal aid, the women's legal service, what used to be called the women's shelter in Alice Springs, and a range of other stakeholders who are involved in that approach.

Madam CHAIR: Could I just confirm Penny, those are stakeholders only in the Central Australian region?

Ms DRYSDALE: No there has been some consultation with others during the drafting of the bill, but that was the main—where discussions around the scheme and how it will work, and where some advice came. But for example the domestic violence legal service in Darwin also had some input into the scheme and the amendments and how they worked and other legal service providers here.

Mr SIEVERS: Some of these like the choking and the changes to tenancy stuff are big changes. How will it roll educational-wise, how will you make sure that those messages get out to the community around, you know the choking stuff and that where they may not know.

Ms DRYSDALE: Yes, that is right. I suppose there will be a range of ways of doing that through the network of legal service providers. But also in relation to domestic violence there is a network of key services, both in Central Australia and around Alice Springs called CAFVSAN.

Then there is also a domestic violence network in Darwin where all of the key agencies who have an interest in safety and helping families through those difficult times come together. We see those avenues as really important for communication and to get those messages out to the agencies in relation to that. But obviously with something like the choking offence, the education and communication to police and prosecutors is also going to be a critical part of it. The office of the DPP has input into the amendment.

Madam CHAIR: Penny, can you tell me since the Alice Springs local court has been working in regards to domestic and family violence in the specialist manner, is it making a difference?

Ms DRYSDALE: Well it has not actually commenced in fulsome yet, so what has happened is that the agencies have been working together to develop an approach, and they are hoping that will commence next year.

But what has happened is a whole range of things, in relation to domestic violence that they are looking at more broadly, and have been identified I guess through that approach. We are hoping that will commence in 2020 and then we will monitor that very carefully, you know trial it for say three years. If things start to work and be a really strong good approach then there is no reason why we then cannot consider looking at how that works in other parts of the Territory.

Madam CHAIR: Can we confirm that children in all scenarios are at the forefront of this work as well? They are watching the violence, they are being subjected to what they are observing, what is going on. I guess through my personal experience growing up, a lot of those people who were exposed to domestic violence in their homes end up becoming the perpetrators or the victims later down the track.

Ms DRYSDALE: Yes, I think that is very important and we hope these amendments will be particularly helpful for children, particularly, in relation to the tenancy agreement. Hopefully, that will mean fewer children are having to live in an environment where they are repeatedly exposed to that domestic violence all the time.

In relation to exceptional circumstances to mandatory sentencing, I think these amendments are going to be particularly useful because in some circumstances families may want to stay together. The whole idea is where that defendant wants to take responsibility for his or her conduct and change that we are actually giving them help and impetus and encouragement to do that rather than just being a revolving door if you like of people in and out of gaol. Where they might continue to offend in front of the same children or actually re-partner and continue offend in front of new children.

We are hoping that this will actually help break that nexus of violence that we know can be so entrenched in some cases.

Ms NELSON: Which stakeholders did you consult with in Katherine and the Barkly region?

Ms DRYSDALE: I will just get my list. It will mainly be through the women's shelters, the membership of those networks and also the Cross Agency Working Group on domestic and family violence has members from Katherine and Tennant Creek involved in that.

Ms NELSON: The Katherine Women's Crisis Centre and the Katherine Women's Information and Legal Services? I understand that it is going to help significantly in the Alice Springs specialist court but I am wondering how we are going to be supporting people in Katherine with this sort of program?

Ms DRYSDALE: Yes. The program about exceptional services will not be available in other locations until programs are declared. There is some journey of discussion with the stakeholders in other locations for that to be available in other places. We would certainly commit to doing that before it was then rolled out in other locations. I can go back and look at any feedback we had from those particular areas as well.

Ms NELSON: Thank you, I would appreciate that. I think it is a good step forward, a good move, it reads well but there is a little bit of me that is concerned that we are implementing this legislation. Obviously, legislation is not jurisdictionally specific, is it? It applies to all the Territory?

Ms DRYSDALE: No, that is right. If it is effective we would hope programs could be declared in other locations. I can take that on notice.

Ms NELSON: Thank you.

Madam CHAIR: If there are no further questions, we will close off this public briefing and will move on to the next public briefing which is on Licensing (Director-General) Repeal Bill 2019.

Mr SIEVERS: Thank you Penny and Jenni.