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Ngaree Ah Kit
Chair
Social Policy Scrutiny Committee
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Via email: SPSC@nt.gov.au

Dear Ms Ah Kit *Ngaree*

Thank you for your letter dated 29 November 2018 in regards to the Inquiry into the Criminal Code Amendment Bill 2018 that the Social Policy Scrutiny Committee is conducting.

Please find attached the response to the questions raised by the Social Policy Scrutiny Committee in your letter.

Don't hesitate to contact my office on 89365610 if you require any further information.

Yours sincerely

Natasha

NATASHA FYLES

- 6 DEC 2018

SOCIAL POLICY SCRUTINY COMMITTEE

WRITTEN QUESTIONS

Committee to the Department of the Attorney-General and Minister for Justice:

Criminal Code Amendment Bill 2018

1. During the Public Briefing on this Bill the Department advised the Committee that the proposed amendment to enable section 161A (violent act causing death) to be considered as an alternative verdict to manslaughter implements a recommendation from the Department's February 2018 review of the operation and application of section 161A.
 - a. *In reviewing the operation and application of section 161A, what consultation was undertaken by the Department?*
2. The Department further advised the Committee that in developing the Bill, St John Ambulance, the Police Association and the United Voice union were consulted.
 - a. *Did the Department undertake any consultation with the legal fraternity in the development of the Bill? If not, why?*
3. The Law Society NT and the NT Legal Aid Commission raised concerns that since the physical and fault elements of section 161A are quite different from those applying to manslaughter, inclusion of 161A as an alternative to verdict to manslaughter is likely to "elevate the risk of appellably erroneous directions, additional confusion for jurors, jury error and miscarriages of justice."
 - a. *What consideration was given to the potential impact of the inclusion of section 161A as an alternative verdict to manslaughter on the already complex directions and instructions that judges in homicide cases are obliged to deliver and juries are obliged to consider?*
4. The Law Society has further suggested that, if it is included, the proposal to amend section 316(2) to include section 161A as an alternative verdict to manslaughter should also apply to section 316(1) as a second alternative to murder, the first alternative being manslaughter.
 - a. *Can you clarify for the Committee why the proposed amendment to section 316(2) should not also be applied to section 316(1)?*

Answers:

1a. To answer this question, it is necessary to provide some context about the nature of the review and the issues it raised.

The Department was asked to review section 161A of the Criminal Code in light of concerns that had been raised in the media that the offence was being used in an inappropriate manner, relating to situations of domestic violence. In particular, suggestions had been made that persons responsible for murder or manslaughter in some kind of ongoing relationship of domestic violence were being charged under section 161A, resulting in sentences that were too light, given the nature of the conduct.

Earlier this year, the Department examined section 161A by considering the cases in which section 161A had been charged, to see whether the section had been used in an inappropriate manner in relation to situations of domestic violence. The Department found there were no cases of the kind suggested.

From 2012-13 (when section 161A was introduced) to the time of the review, there were 81 homicide matters in the Territory. Defendants were charged with section 161A in only 12 of these matters. In nine other matters it was a 'back up charge' to a more serious charge of murder or manslaughter. This means both section 161A and murder or manslaughter was charged in relation to the same offending. 'Back up charges' are sometimes laid where the defendant's conduct could satisfy the elements of both more serious and less serious charges, often where it is anticipated there may be difficulties proving the more serious charge.

The Department considered the cases where a charge under section 161A proceeded in more detail. While in some cases, the victim and defendant were connected by a family or domestic relationship, none of these situations were ongoing domestic violence situations.

The case closest to a domestic violence scenario was *Wilson* (21635222). The victim was the ex-partner of the defendant. While they had no history of violence in their relationship, on this occasion the defendant became jealous, yelled at the victim, shoved her hard enough that she fell to the ground, and kicked her twice in the back. There was no causal link between the kicking and any significant injury. Rather, the forensic evidence suggested the victim hit her head when she was pushed to the ground, leading to a subdural haematoma, which was the cause of the death.

Similar to other classic one-punch scenarios, this is a case where it would have been difficult to show that the defendant either intended to kill the victim (murder or was reckless or negligent as to that outcome (manslaughter). The scenario is exactly the kind that section 161A was introduced to address.

Indeed, in all the cases except for one, section 161A was charged to deal with an incident that involved the victim unexpectedly dying from a single strike that would not have caused death to most persons.

The one exception identified did not relate to domestic violence. It was the potential weakness of evidence (reliant on eye witness evidence from co-offenders), together with the application of the DPP Guidelines for Prosecution, that led to a plea of guilty to 161A being accepted rather than the

DPP pursuing a prosecution for manslaughter that would potentially have led to an acquittal. The Department recommended making section 161A an alternative verdict to murder and manslaughter.

The review was a discrete review of the application of a specific provision in the Criminal Code, examining relevant cases where section 161A had been charged. Reviewing legislation and how it operates is a normal process for the Department. The Department considered the recommendation arising from the review to be a minor technical change to remove an inadvertent disadvantage to the prosecution. Therefore, no community consultation was undertaken in reviewing the operation and application of section 161A.

2a. In developing the amendment to section 189A of the Criminal Code, external consultation was undertaken with St John Ambulance, the Police Association and United Voice in relation to the proposal to extend the offence of assault on police to include 'emergency workers'. The inclusion of emergency workers in the offence of assault on police was considered as a measure that would assist in strengthening support for frontline workers in line with community expectations.

Consultation was also undertaken within government with agencies who hold an interest in the proposed amendments, including the Department of Health, and the NT Police, Fire and Emergency Services.

The impetus for the amendment to section 189A came from St John Ambulance and its 'Hands Off Our Ambos' campaign. This was a national campaign to increase awareness of rising rates of assault on paramedics. The amendment acknowledges the dangers faced by frontline emergency workers in the course of their duties and reflects community censure against such behaviour. St John Ambulance responded favourably to the proposal to amend section 189A.

The time frame for development of the Bill was also fairly short, which limited the opportunity for extensive consultation. The Department consulted with those stakeholders who, in the Department's view, were the major stakeholders. The amendment is relatively minor and wider consultation was not considered necessary in the circumstances.

The Director of Public Prosecutions was consulted on the amendments to section 316(2) of the Criminal Code.

As noted in 1a above, as the recommendation to make section 161A an alternative verdict was considered a minor technical change to remove an inadvertent disadvantage to the prosecution.

3a. Section 316(2) currently provides that two other offences may be considered as an alternative to an indictment for manslaughter, being section 174F (Driving a motor vehicle causing death or serious harm) and section 174FC (Navigating vessel causing death or serious harm). These offences are similar to section 161A in that strict liability applies to the result that the defendant's conduct causes the death of a person.

An offence under section 161A, however, has greater similarity to manslaughter than offences under sections 174F and 174FC in that the latter offences are completely strict liability offences. Both manslaughter and an offence under section 161A require that the defendant intended to engage in the conduct that caused the victim's death. The difference is that, for manslaughter, the prosecution must prove that the defendant was reckless or negligent regarding the result of the conduct (death) and for an offence under section 161A the prosecution does not have to prove a fault element, as strict liability applies.

The directions provided during a trial are a consideration for the Court. No consideration was given to the manner in which directions are provided during development of this Bill. However, it may be noted that juries deal with complex directions in relation to a wide range of cases on a regular basis. This is a general feature of our criminal justice system, and it would be anomalous to consider this issue only in relation to making section 161A an alternative verdict to manslaughter, when a similar level of complexity arises in other existing alternative verdict cases, and in a wide range of sexual offence cases.

4a. As noted in the response to Question 1a, the Department's recommendation in the review of section 161A, was that it be an alternative verdict to manslaughter and murder.

The recommendation arose from consideration of a case, 'JA', where the DPP had accepted a plea of guilty to a charge under section 161A.

JA involved a situation where a man was 'bashed' by a number of persons in a quite sustained manner, and subsequently died of his injuries. It was identified as a potential anomaly in the review of section 161A. While it was not a matter that involved any kind of domestic relationship between the persons concerned, it did appear to be a matter where the evidence potentially supported a more serious charge, but a plea of guilty had been accepted to a charge under section 161A.

The Legal Policy unit discussed this case with the Deputy Director of the Public Prosecutions, Mr Matthew Nathan SC, who advised that the weakness of available evidence was a significant factor in the decision to accept a plea to section 161A, rather than to pursue a prosecution for murder or manslaughter. The case was dependent on the eye-witness evidence of the defendant's co-offenders, a source of evidence that may be of variable reliability. The DPP had to make an 'all or nothing' choice between pursuing a charge of manslaughter at trial and facing the substantial risk that if the co-offenders suddenly failed to recall key details the defendant would be acquitted, or

accepting a plea of guilty to section 161A. A decision to accept the plea was made in accordance with the DPP's Guidelines, which require evaluation of numerous factors including weaknesses in the prosecution evidence and the best use of public resources.

That section 161A is not an alternative verdict to, in particular, manslaughter means that, in a tactical sense, the DPP can be 'wedged' in such a borderline case. That is to say, the DPP is forced to make a guess as to how unpredictable evidence will emerge at trial. This in turn creates higher risks that in any cases, including domestic violence cases (should they arise), the DPP will face strong pressure to take a plea to section 161A rather than pursue the more serious charge and risk an acquittal.

Following the initial review, subsequent discussions with the office of the DPP indicated a preference to apply the alternative verdict to manslaughter only. However, there is no practical reason why the alternative cannot apply to both murder and manslaughter.

It is noted that in New South Wales and Western Australia the equivalent offence is an alternative verdict to murder. In Victoria, the equivalent offence is a type of manslaughter, so it is an alternative verdict to murder. This mirrors the position in England and Wales.

If the Committee is minded to recommend that an offence under section 161A should be an alternative verdict to murder under section 316(1) as well as manslaughter under section 316(2), the Department would be supportive of such an amendment.