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13th Assembly

SOCIAL POLICY SCRUTINY COMMITTEE

Public Hearing Transcript

Criminal Code Amendment Bill 2018

3.00 pm, Thursday, 6 December 2018
Litchfield Room, Level 3 Parliament House, Darwin

Members: Ms Ngaree Ah Kit MLA, Chair, Member for Karama\
Mrs Lia Finocchiaro MLA, Member for Spillett
Ms Sandra Nelson MLA, Member for Katherine

Witnesses: Judith Barker: Chief Executive Officer, St John Ambulance Australia (NT) Inc.

Russell Goldflam: Social Justice Committee, Law Society NT

Fiona Hardy: Senior Policy Law Officer, Legal Policy, Department of the Attorney-General and Justice
Caroline Heske: Senior Policy Lawyer, Legal Policy, Department of the Attorney-General and Justice

CRIMINAL CODE AMENDMENT BILL 2018

ST JOHN AMBULANCE AUSTRALIA (NT) INC.

Madam CHAIR: Good afternoon everyone and thank you for joining us. I am Ngaree Ah Kit, the Member for Karama and the Chair of the Social Policy Scrutiny Committee. On behalf of the committee I welcome everyone to this public hearing into the Criminal Code Amendment Bill 2018.

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

I also acknowledge my fellow committee members in attendance today, Lia Finocchiaro, the Member for Spillet and on the phone we have Sandra Nelson, the Member for Katherine.

I welcome to the table to give evidence to the committee from St John Ambulance Australia (NT) Incorporated, Judith Barker the Chief Executive Officer. Thank you for coming before the committee. We appreciate you taking the time to speak to the committee and we 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 applies.

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I will now invite you to make an opening statement if you would like, Ms Barker.

Ms BARKER: Thank you minister.

In response to the Criminal Code Amendment Bill 2018 (Serial 69) put forward by the Department of the Attorney-General and Justice proposing the amendments to the Criminal Code, St John Ambulance Australia (NT) support in principle the proposed amendments that will expand section 189A of the Criminal Code to be inclusive emergency workers under a newly inserted definition.

In regards to our staff who are front line emergency workers that are there for the community's benefit and are there to save lives each day they should be able to do so knowing that they are valued and that in going into dangerous situations the Government has put in place laws that will protect them and have an appropriate outcome should anything negative happen.

In regards to the definition of emergency worker which includes paramedics and ambulance officers, St John Ambulance (NT) ask that this definition be expanded to include patient transport officers. Patient transport officers are front line workers with St John Ambulance Australia. They respond to a proportion of 000 calls and they go into similar environments within the community that our paramedics do.

Our patient transport officers may be closer to incidents and therefore first respond and hold a scene until the qualified paramedics can reach them. We ask that they be given consideration given that they will face similar unfortunate dangers that the paramedics do.

So far this year we have had 63 incidents of reported violence or threats of violence against our staff and we think that the amendment to the bill as part of the framework and series of actions is an important one put forward.

Madam CHAIR: Thank you very much. I will now open it up to the committee members for any questions for Ms Barker.

Mrs FINOCCHIARO: Thank you. I wanted to ask what St John were hoping to get out of the legislative change, just noting that they would be covered under—I do not have the section in front of me—the one that relates to all workers.

Ms BARKER: Section 188.

Mrs FINOCCHIARO: Yes. Which only has a difference of a two year maximum penalty. Given that is the practical change I suppose, an additional two year maximum penalty—there is obviously something else St John's were wanting to get out this amendment.

Ms BARKER: We have seen across Australia an alarming incidence of violence against paramedics is on the increase. What we and our staff are looking for is the recognition of the role that they play within the community, a recognition of the danger and violence that they are facing and that the Government sees it as important to step up and take action against that.

While we appreciate it only seems like it is another two years and that might not seem a lot to someone who is not working in those situations, it means a lot to the people who are on the front line to know that they have some sort of support and a level of protection from their government.

Madam CHAIR: Member for Katherine down the line, do you have any questions?

Ms NELSON: Not at this time, no.

Mrs FINOCCHIARO: It is up to the courts to put in place any length of sentencing, so is it envisaged then that it will act as deterrent if people knew it was a 16 year maximum penalty then they might be less inclined?

Ms BARKER: We see this as part of a whole framework of actions. Some of those actions are upon St John Ambulance to take themselves and we have done that through our 'Hands Off!' education campaign that goes across the community. We see that there are preventative actions in terms of planning that we put into place with police when going into dangerous situations.

We have put in additional training for our staff in terms of recognising danger, de-escalation of dangerous situations and learning to manage difficult positions. There is a framework of actions and we see this amendment to the bill as one more step in that.

Mrs FINOCCHIARO: Yes, thank you.

Madam CHAIR: Ms Barker I understand that ambulance services in a number of jurisdictions around the nation have actually promoted hands off our ambos campaigns. Could you tell us about how the one in the Northern Territory operated? Do you think it made a difference or was successful?

Ms BARKER: We are still measuring. We know that our figures for this year in terms of violence have decreased which is a positive for us. This is about generating a conversation. When the other ambulance services and ourselves have looked at where the violence is occurring and who is committing some of the violent acts, the public seem to have this perception that it is a certain group of people. It is not them, their friends and would not be anyone that they know. That is incorrect. Unfortunately when anyone becomes affected by adrenalin or alcohol it can lead to violence.

This is about starting the conversation within the community and starting to ask people when your friends or family are getting out of control, you need to step in, help us and keep us safe so that we can do our job. That has seemed to have been a common theme across all ambulance services. In others that have run focus groups, that is what they have found as well.

Madam CHAIR: The final question that I had for you Ms Barker is I am wondering with the 63 incidences of reported violence or threat this year against ambulance officers and patient transport officers that might have a detrimental impact on their health and wellbeing. I am wondering if there would be any St John Ambulance workers or drivers who are a bit fearful to go out and render assistance because there have been 63 incidences so far this year?

Ms BARKER: Yes. Last Thursday I was in Melbourne for the launch of a key piece of research that Beyond Blue undertook on behalf of the federal government that looked into the mental health and wellbeing of all emergency service workers across all of Australia. The results that came back showed violence and aggression faced at work is having a negative impact on paramedics, police officers and emergency service workers.

We take that very seriously and have just launched a mental health and wellbeing strategic plan for our staff in the Territory. Part of what that will address is being able to speak up when your stress gets too high, resilience feels too low and to start to put plans in place that work for you and your mental health and wellbeing. We know that facing violence and aggression at work has negative impacts on our staff.

Madam CHAIR: Thank you. Are there any other questions from the committee?

There are no further questions from the committee. Thank you very much Ms Barker for appearing today.

Ms BARKER: Thank you for inviting me.

Madam CHAIR: We will recommence at 3.30 pm for our next witness.

The committee suspended.

LAW SOCIETY NT

Madam CHAIR: Good afternoon everyone and thank you for joining us. I am Ngaree Ah Kit, the Member for Karama and the Chair of the Social Policy Scrutiny Committee. On behalf of the committee I welcome everyone to this public hearing into the Criminal Code Amendment Bill 2018.

I also acknowledge my fellow committee members in attendance today, Lia Finocchiaro, the Member for Spillet and via teleconference Sandra Nelson, the Member for Katherine.

I welcome to the table to give evidence to the committee from the Law Society NT, Russell Goldflam, member of the Social Justice Committee. 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 applies.

This is a public briefing and 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 hearing 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.

Mr Goldflam I will invite you to make an opening statement if you so wish.

Mr GOLDFLAM: Thank you Ms Ah Kit. Firstly, I should say that not only am I speaking as a member of the Social Justice Committee of the Law Society of the Northern Territory, but since I received and accepted the invitation to give this evidence, I was also asked by the Director of the Northern Territory Legal Aid Commission, my employer, to speak on behalf of that agency which has made a substantially identical submission to this enquiry.

On behalf of NT Legal Aid and the Law Society NT, we thank the committee for this opportunity to participate in the consultation process in relation to the Criminal Code Amendment Bill 2018.

My apologies—the warning I was just given that I should not mislead the committee, there is a correction I need to make to the submission. That is in relation to the part of the submission dealing with the proposed amendment to section 316 of the Criminal Code in which the submission says that it appears that there has only been one prior conviction imposed on a person for the offence under section 161A of the Criminal Code of violent act causing death.

We cited the case of Esau Pascoe, a sentence imposed by Chief Justice Riley on 17 July 2014. I have since discovered that there have been three other cases in which offenders were convicted of that particular offence and I apologise for inadvertently misleading the committee by suggesting that there had only been one such matter that had come before the courts.

For the record, those three matters were a sentence imposed on Brett Yirrwalama by Justice Hiley on 6 July 2016. That offender pleaded guilty to the offence of a violent act causing death and was sentenced to a period of four years and six months with a non-parole period of two years and three months.

The sentence imposed on Waylon Miller also by Justice Hiley on 15 June 2018 of this year. That offender also pleaded guilty to the same offence and received a sentence of three years and nine months which was

suspended in effect after six months—I think he had served that time by the time he was sentenced and was released immediately.

The third sentence was very recently on 1 August of this year by Chief Justice Grant on an offender named Adam Tirak. After pleading guilty his sentence was four years suspended after 15 months, again for the offence of violent act causing death.

There have been four cases that I have been able to find and my submission is that those are the only four cases for which people have been found guilty of that offence since the offence was established about six years ago.

Madam CHAIR: Thank you for clarifying that Mr Goldflam.

Mr GOLDFLAM: I will make a brief opening statement about the substance of our submissions. Firstly the bill is in two quite distinct parts. The first concerns sentencing people who use violence against emergency workers and I will turn to that first.

I have taken the opportunity to read the submission that the committee has received from St John Ambulance Australia and I do not take issue with the substance of that submission that perhaps the definition of emergency workers could be expanded. Notwithstanding that, we do not support the proposed amendment for the reason set out in our rather brief submission but it is quite simple.

The most important part of our submission in my respectful view is that police are in a category of their own. That is because police in effect in our society, have a monopoly on the lawful use of violence including in extreme cases, lethal violence. They are in a very different position to other people who, in the line of duty, can be victimised by violent offenders.

Police are in a special position because they have this extraordinary burden and responsibility of having to decide whether to use weapons or not, including guns. Nobody else on the street has that power or that responsibility and therefore the penalty regime for those who would defy police by using violence against them needs to be kept separate from the penalty regime that applies to people who assault workers.

That all said, as we have pointed out in our submission, the actual difference between the law as it would be if this amendment is passed and the law as it is now is very small indeed. It will not affect the penalties that are currently applicable for people who assault either workers or police where no harm is caused. It will not affect the penalties imposed on either workers or police where harm is caused. It will only affect the penalty where serious harm is caused and even then it will only affect that penalty by a very small margin. Going up from 14 years for causing serious harm at the moment for everybody, to 16 years for police.

I am happy to answer any questions but I do not think I need to take up any more time of the committee expanding on that part of the submission.

I will now make submissions to elaborate on the second part of the bill which is part of the bill dealing with the amendment to section 316(1) of the Criminal Code. The problem that is an overarching problem for any attempt to reform the law of homicide in the Northern Territory is that alone, amongst all of the jurisdictions in Australia, the Northern Territory has a particularly draconian and inflexible scheme of mandatory sentencing that applies to murder. That distorts everything when it comes to people who are charged with offences arising out of an unlawful killing—that is, an unlawful killing that might be a murder, manslaughter or a violent act causing death.

The person who is accused of causing the death is always looking down the barrel of potentially the rest of their life in jail. There is only one sentence for murder and that is life. Although there is a non-parole period that can be fixed in some cases of 20 years and other cases of 25 years or longer, it is extremely difficult to actually get parole because there are especially strict rules about granting parole to murderers in the Northern Territory.

As a result of the 64 people who have been sentenced for murder in the Northern Territory since the Criminal Code came into force on 1 July 1984, only five have been admitted to parole over that period of nearly 40 years.

That is a shadow that looms over any attempt to reform homicide law. The fact that we have mandatory sentencing for murder which means that any other attempts that we make to reform the law are going to be distorted—if I can put it that way—by the existence of this mandatory sentencing.

Ms NELSON: Exactly.

Mr GOLDFLAM: That being said, if parliament does decide to add onto the range of options that juries are given when they are dealing with people who are accused of homicide then it makes no sense to add as an alternative, violent act causing death onto a manslaughter indictment but not onto a murder indictment.

Up until the major reforms to our criminal responsibility provisions which were enacted, I think they came into force in 2006 and introduced by Attorney-General Toyne from Clare Martin's Labor government in 2005 which abolished the old offence—members you may or may not be aware of, of dangerous act causing death that had been in the Criminal Code since 1984.

Up until then it was common that people would be tried by a jury for murder and the jury would be instructed by the trial judge that they had four choices. They could find the accused guilty of murder, manslaughter, dangerous act causing death or not guilty of anything.

It was that hierarchy of three increasingly less serious forms of homicide from murder down to dangerous act causing death. Violent act causing death is not the same offence as a dangerous act causing death but it has some similarities to it. If the legislature was going to—we are not suggesting this should happen—create an extra alternative for juries then they should do it whether the indictment is one that has manslaughter at the top or murder at the top.

There is no explanation that I am aware of as to why that course has not been taken by the Attorney-General in introducing this bill. I have read the introductory submissions that were made to this committee by staff from the Department of Justice on 19 November but unfortunately that particular issue was not addressed, I do not think, as to why if this is to be added on for manslaughter it is not also to be added on for murder.

Over and above that, we are not supportive of the amendment at all primarily because it is not going to achieve any particular good as you can see from the sentences that have been imposed for violent act causing death. They are quite similar to each other but more importantly they are not much different from the sort of sentence that would have been imposed for manslaughter on those people. I will give you an example to substantiate that in a moment.

Adding in the fact that not much good will be done, if any, there is a real risk that the additional burden on juries caused by having to explain to them a whole new type of offence with a completely different set of elements because the structure of the offence of violent act causing death is quite distinct from the structure of the offences of either manslaughter or murder.

The extra burden on juries could result in: miscarriages of justice; jury members might find it difficult to reach a verdict; the jury could be hung which means there has to be a whole new trial, so there is an expense there; or the directions given because they are so much more complex have some sort of mistake in them which might lead to an appeal and again the need for a new trial. There are real risks and costs involved in added to the complexity of the already quite complicated procedural laws that are associated with a murder trial.

I said that there will not be much difference between the penalties imposed for dangerous act causing death with the penalties imposed for manslaughter and to illustrate that I refer to the case which, as can be seen from the second reach speech of Attorney-General Elferink when he introduced the violent act causing death offence back in 2012. The case which generated the discussion which ultimately led to the introduction of that offence was the killing of a police officer in Katherine named Brett Meredith by a man named Michael Martyn.

The case was one where Martyn and Meredith were both drinking quite heavily upstairs in a licensed premises in Katherine and Martyn engaged in violence and as a result Meredith fell down some stairs and died of a fractured skull. Ultimately Mr Martyn was convicted of manslaughter by a jury. They did not have the offence of violent act causing death so the need to create the offence certainly was not generated by that case but the publicity associated with that case led to the public clamour for an additional offence to be added into the Criminal Code.

In any event, Mr Martyn was sentenced by a judge and the sentence was thought to be too low by the prosecution so they appealed and the Court of Criminal Appeal on 16 November 2011, allowed that Crown Appeal and resentenced Mr Martyn to a term of five years with a non-parole period of two years and six months. That was after a trial, he had not pleaded guilty to anything. Usually, as you may be aware, a person who pleads guilty to an offence gets a discount of about 25%, perhaps more. All those cases I mentioned

before with the sentences of around four years were imposed as the head sentence, they were all guilty pleas.

You can see from that, that the sentence imposed by the Court of Criminal Appeal—the highest court in the Northern Territory—on Mr Martyn for a manslaughter which was in the nature of a violent act cause death case, was pretty much exactly the same as the sentence that had been imposed on the other four offenders for a violent act causing death.

So there is not really much difference in reality between the seriousness of—I can call it without being disrespectful—a low end manslaughter, a manslaughter not attended by gross recklessness which would make it more serious and would normally attract a sentence of closer to 10 years imprisonment or even higher, and a violent act causing death at the lower end of the range of homicides.

Those are the matters that I wish to elaborate on but I am happy to attempt to answer any questions that members may have.

Madam CHAIR: Thank you very much Mr Goldflam. I will now open it up to the committee for any questions they may have.

Mrs FINOCCHIARO: Thank you very much Mr Goldflam. I think anyone who is not a criminal lawyer will find this challenging so we appreciate your expertise in the area and to work through this with us.

I wanted to ask in relation to section 316 indictment containing count of murder or manslaughter, there can be a charge of murder or manslaughter and then subsection 2 includes reckless driving and reckless boating. The intention of the bill would be to add in the violent act causing death or the one punch. I wanted to ask whether they were similar offences. I believe reckless driving and reckless boating and violent act causing death are all strict liability offences.

Mr GOLDFLAM: Is that Ms Finocchiaro?

Mrs FINOCCHIARO: Yes, it is the Member for Spillet. Sorry, I should have said that to start with. Apologies.

Mr GOLDFLAM: Indeed the offences under section 174F and 174FC which relate respectively to dangerous driving and dangerous boating—I suppose you could call it—causing death, are strict liability offences.

It is not really correct to refer to them as reckless or recklessness and this is where criminal lawyers love this stuff but it is totally incomprehensible to ordinary people or even Members of Parliament who are not ordinary. It just goes to show how complicated this is for juries, by the way. But recklessness is an element of manslaughter but it is not an element of a strict liability offence.

In other words, to prove manslaughter by way of recklessness one of the things that the Crown has to prove is that the offender was aware that there was a substantial possibility that death might result from their conduct and chose to proceed notwithstanding that awareness.

A strict liability offence such as dangerous driving causing death does not involve any element of awareness that death might result or even the less serious version of manslaughter, negligence—which is that they, without realising that death might result, nevertheless act as in such a careless way that it was criminal. I am paraphrasing here.

Yes you are right. The mental elements or the fault elements of the existing alternatives to manslaughter, the driving and boating offences, are similar to the fault element for violent act causing death in that they are both strict liability offences. However, there is a whole extra layer of complexity with violent act causing death because if you look at 161A itself, although it is strict liability it is not really that strict because it does not count. The defence raised that you are not criminally responsible if the violent act was either for the purpose of benefiting another person or it was part of a socially acceptable function or activity and the conduct was reasonable, which is complicated to have to take a jury through.

There has never been a trial as far as I know in the Northern Territory where a person has been charged with violent act causing death and the jury has actually had to figure out what all that means. The four cases I have referred to where people were convicted of that offence were all guilty pleas. There are similarities to 174F and 174FC but they are not one-to-one correspondences.

I might also add that it is not surprising that dangerous driving causing death is not an alternative to murder. Dangerous driving causing death is a fatal car accident where the driver drove dangerously and it is a serious criminal offence. People go to jail for it all the time.

It is nothing like murder. Murder is not an accident, a murder is where a person intends to either kill or seriously harm the victim. So it is not surprising that dangerous driving causing death would not be on the same indictment or be left as an alternative on the same indictment as murder. I hope that makes sense.

Mrs FINOCCHIARO: Yes. That is very good thank you for that. I take your point about the defence provisions in 161A, but I guess what I was leading to is if 174F and 174FC would be similar to 161A for a judge to have to guide a jury through.

It was sort of making a connection between the three types of offences in terms of that burden. In your submission you raised a concern around guiding a jury through that process although you did note that that defence component makes it different to dangerous driving and boating.

Mr GOLDFLAM: The difference really is that in a case where somebody has driven in a bad way and as a result someone gets killed and that person then gets charged with manslaughter. It is not an easy decision for the jury but the jury is going to be told that in 90% of these cases there will not be any question that the victim died as a result of being in the car accident. That part of the case is usually not very complicated.

The complicated part of the case is whether the driver was reckless, negligent or just a dangerous driver. They are the three alternatives that the jury would be asked to consider in a manslaughter driving case. That is not unusual and they are not unusual sorts of cases because we have lots of deaths on the roads. They come up a lot.

The sort of case involving violent act causing death is much less common and it is not an accident sort of case because the violent act itself is not accidental. The violent act always involves some level of intentionality. It is not that comparable in my submission with the current menu, if I can put it that way, that a jury is given in fatal car crash cases.

Mrs FINOCCHIARO: Thank you.

Madam CHAIR: Member for Katherine down the line, do you have any questions?

Ms NELSON: Not right now. No.

Madam CHAIR: I was wondering from your conversations it sounds as if we are lacking a bit of education in regards to preparing our jurors to be able to follow all the information you wisely shared with us. Do you think that could be beneficial in regards to changes like these going forward?

Mr GOLDFLAM: Better education for jurors?

Madam CHAIR: Yes.

Mr GOLDFLAM: They have tried to do that in Victoria and they passed some very complicated legislation telling judges exactly what it is that they had to say to the jurors. I cannot speak for the criminal law bar in Victoria but my impression is that it has been regarded as making things worse.

I do not want to sound like I am too sycophantic to our judges in the Northern Territory but in my experience our judges—and we are a small jurisdiction and we have only got half a dozen judges who are required to instruct jurors—have developed the art of being able to communicate effectively with jurors using ordinary language.

The instructions that they give, not only are they much clearer that what I was saying off the cuff because they have done it many times before and have their own notes and precedents prepared in front of them when they address jurors.

They are also supplemented by written directions that they give jurors in a form of a document they call an aide memoire where they set down a list or a write up and hand it out to the jurors before they go off to deliberate. It is sort of a road map with all the questions in sequence that are suggested to the jurors they ask themselves and work through them in a methodical way to get to the verdict.

That system works as well as it can. It certainly does not need to be made any more difficult but there is no foolproof, simple way of completely taking the load off jurors. They have a tough job to do and some of it can be quite complicated. I think the system works as well as it can in that respect as a general proposition.

Madam CHAIR: Excellent. Thank you for your response Mr Goldflam. The final one that I have was in regards to the suggestion in your submission for violent act causing death to be used or available as an alternative verdict to not only manslaughter, as is currently proposed, but to murder as well. I am just getting my head around how that would work with the jury and the instructions from the judge.

Would that work in a sense where the judge would say to the jury, you have the option to find the defendant guilty if these elements are present of murder and if not murder, manslaughter or violent act causing death?

Mr GOLDFLAM: Yes. If this bill is passed and it is passed to amend section 316(1) and (2), there will be cases where a judge would say to a jury to first ask yourself whether or not the accused intended to either cause the death or serious harm of the victim. If your answer to that is yes, then you are going to find the accused guilty of murder.

If your answer is no or you are not satisfied beyond reasonable doubt that it is yes, then you next look at manslaughter. If you are satisfied beyond reasonable doubt that the accused was either reckless or negligent then you will find the accused guilty of manslaughter. On the other hand, if you are not sure about that then you have to look at whether or not the accused is guilty of violent act to another person causing death. Then the judge will go through detailed directions about the elements of that third offence which is quite different from the others.

It will be a cascading set of directions. First you look at murder, if not murder then manslaughter and if not manslaughter then violent act causing death.

Madam CHAIR: Thank you very much. Does the committee have any other questions for Mr Goldflam?

Ms NELSON: Yes Madam Chair, I have a question.

Mr Goldflam, I read with interest the letter in your submission where you said that this society opposes mandatory sentencing and while acknowledging the bill does not create a new mandatory sentencing provision, it does nothing to repeal the mandatory sentencing. If we do not repeal the mandatory sentencing and the bill goes through, is it all a moot point?

Mr GOLDFLAM: It is pretty moot in our respectful submission. Indeed, in the material …

Ms NELSON: For the record, I do not support mandatory sentencing either.

Mr GOLDFLAM: Well the government says that, and you are a member of the government party. The government says that it is going to repeal mandatory sentencing and we look forward to that.

In the Statement of Compatibility with Human Rights that was provided to the committee there is with respect, a very detailed and helpful analysis of the reasons why these provisions are incompatible with article 14(5) if the International Covenant on Civil and Political Rights. All the offences that are dealt with by the bill are mandatory sentencing offences. That is the background.

Whether this bill is passed or not in itself will not change any of that but all of our violent offence laws in the Northern Territory infringe the international covenant that Australia has entered into which effectively say that mandatory sentencing is not fair.

Ms NELSON: Yes.

Mr GOLDFLAM: We look forward to the government making good on its promises made in the election campaign to do something about this. I am holding my breath.

Ms NELSON: I cannot say anything.

Mr GOLDFLAM: No.

Ms NELSON: But I am definitely working on it. I want to tell you that I am working it. There are quite a number of us. I just have a quick question and sorry to be colloquial but is it what comes first, the chicken or the egg? Is that where we are at with this?

Mr GOLDFLAM: No. I do not think it is an argument that we have got mandatory sentencing anyway so we may as well enlarge the scope of police to include police and emergency workers. I think they are quite distinct issues.

Ms NELSON: Yes.

Madam CHAIR: Member for Spillett?

Mrs FINOCCHIARO: Mr Goldflam do you mind explaining the practical or the functional difference between an additional charge, so if you were charged with manslaughter and violent act or manslaughter and violent act as an alternative. What is the difference there?

Mr GOLDFLAM: Thank you. That is a very good question. The Criminal Code, I do not have it in front of me so I cannot tell which section number, it is section 300 and something.

The Criminal Code says that an indictment—an indictment by the way is the piece of paper which sets out what it is that a person is being charged with, a document of fundamental importance in any criminal trial because it is document which in effect joins issue between the two parties. It says, this is what this person did and the accused will say either guilty or not guilty on that document. So the accused knows what he or she is charged with.

The Criminal Code says that an indictment can only have one charge on it for one thing that a person has done, with some exceptions. There are a list of exceptions in the Criminal Code. For example, a person who is charged with stealing will just have a charge of stealing on the indictment but the jury will be told that as an alternative to stealing they could find that accused was guilty of receiving.

Sometimes the police have nabbed somebody who has 100 television sets in their garage and they only watch one TV, so there is pretty strong evidence that somebody has stolen 100 TVs. But they may not be able to prove that the person was responsible for stealing the TVs even though they have ended up with them. It will be pretty obvious that they have either stolen them or received them.

Receiving is a statutory alternative to stealing. There are a few other charges like that in the Criminal Code where there are specific provisions which say you can charge offence ‘a’ and the jury can be instructed that they can find a person guilty of offence ‘b’ instead. One of those is murder. At the moment, for anybody who is charged with murder there is a statutory alternative that they can be found guilty of manslaughter, as an alternative to murder.

Mrs FINOCCHIARO: On the indictment, is that right?

Mr GOLDFLAM: The manslaughter will not appear on the indictment. The jury will be instructed by the judge at the end of the case that even though the indictment only has the one charge on it, they have a menu of two charges to choose from. There is a small number of offence categories which have those special rules. I hope that answers the question.

Mrs FINOCCHIARO: Yes, it does. Thank you. If a violent act was to move into section 316(2), would that give the DPP opportunity to be more flexible in the way it charged people? Or apply the most successful outcome to their prosecution?

Mr GOLDFLAM: With respect that is a really good question. When we were working on this submission—I drafted the submission but talked to a lot of colleagues about it—there was a lot of scratching of heads amongst myself and my colleagues.

If these amendments were introduced, would it mean that there would be a benefit for prosecutors or for that matter, would there be a benefit for defence and their lawyers? Because if you have more alternatives there is more possibility that a jury who is not quite sure that they want to convict somebody of manslaughter or murder but might come up with a compromise verdict where they end up convicting the person of a rather less serious offence than the one that was on the indictment.

Whether that works to the advantage of a prosecution or defence, it is very difficult to say. It may be that in some cases it would work to the advantage of prosecution and in other cases it might work to the advantage of defence. It depends on the case in question. At the moment having that additional offence of 161A on the statute books means that there is more room for prosecution and defence to negotiate and talk to each other before they even get to court. That is how it is that we see those four cases where people have pleaded guilty to violent act causing death.

All of those people, I have no doubt even though I do not actually know anything about those cases other than having read the sentencing remarks, would have started off with them being charged with either manslaughter or murder. When they got to the pointy end after months of preliminary activity in the courts—the Local Court first of all then being transferred up to the Supreme Court when the lawyers got their hooks into the cases and carefully read all the witnesses statements and examined all of the evidence—they decided between them that the most appropriate thing to do was to plead guilty to that rather less serious charge under 161A.

As I say, I do not think it would have made any significant difference to the actual penalties that were imposed anyway but they were negotiated pleas. Whether that gives the prosecution or the defence an advantage, I do not know. It depends on the case. Maybe it gives everybody an advantage.

Madam CHAIR: Thank you very much Mr Goldflam. I note that we are out of time and on behalf of the committee I thank you for appearing before us and taking the time out of your busy schedule to go through the combined submission from the NT Legal Aid Commission and the Law Society NT.

Ladies and gentlemen, we will have a one minute break and then we will hear from the Department of Attorney-General and Justice.

Mr GOLDFLAM: Thank you very much.

Madam CHAIR: Thank you again.

The committee suspended.

DEPARTMENT OF ATTORNEY-GENERAL AND JUSTICE

Madam CHAIR: Good afternoon everyone and thank you for joining us. I am Ngaree Ah Kit, the Member for Karama and the Chair of the Social Policy Scrutiny Committee. On behalf of the committee I welcome everyone to this public hearing into the Criminal Code Amendment Bill 2018.

I also acknowledge my fellow committee members in attendance today, Lia Finocchiaro, the Member for Spillet and via teleconference Sandra Nelson, the Member for Katherine.

I welcome to the table to give evidence to the committee from the Department of the Attorney-General and Justice, Fiona Hardy, Principal Policy Law Officer, Legal Policy and Caroline Heske, Senior Policy Officer, 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 applies.

This is a public briefing and 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 hearing 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 their name for the record and the capacity in which they are appearing. I will then invite you to make a brief opening statement before we proceed to the committee's questions.

Can you each please state your name and the capacity in which you are appearing?

Ms HARDY: I am Fiona Hardy and I am the Principal Policy Law Officer with Legal Policy in the Department of Attorney-General and Justice.

Ms HESKE: I am Caroline Heske and I am a Senior Policy Lawyer with the same unit, Legal Policy unit, with the Department of Attorney-General and Justice.

Madam CHAIR: Thank you very much. Would either of you like to make an opening statement this afternoon?

Ms HARDY: We did not intend to make an opening statement Madam Chair, because last week or the week before when other people from our department came and gave evidence they made an opening statement on that occasion. We are here in much more of a responsive capacity today.

Madam CHAIR: Fantastic. That is duly noted and thank you very much for clarifying. I will now open it up to the committee for any questions they may have.

Mrs FINOCCHIARO: Thank you for answering our questions. We have not had a huge opportunity to look through them but I wanted to ask, the genesis of the amendment for 161A came out of situations of domestic violence, can you expand on what was happening that was worrisome?

Ms HARDY: I will leave Caroline to answer this question.

Ms HESKE: There had been some queries raised in the media and with the Attorney-General about whether there were cases where section 161A was being inappropriately charged or accepted as a plea in cases of ongoing domestic violence which were really more serious.

We conducted a review of all the cases where section 161A had proceeded to see if any of them met this description. None of them met the description. When I was researching this area what I discovered was that there had been issues of this kind in Western Australia. It appeared to be related to a practice of charging down there which was different to the practice that has been adopted here. There was no evidence that it was an issue here but questions had been raised.

Mrs FINOCCHIARO: If that is not a concern for our jurisdiction then what has prompted the bill before us?

Ms HESKE: I am sure you are aware that the bill has two aspects and that was the second aspect.

Mrs FINOCCHIARO: Yes, sorry. Not the ambulance stuff.

Ms HESKE: As part of that review, the department made a recommendation that section 161A be made an alternative verdict to murder and manslaughter as we put in our submission which I understand you received this afternoon. That was made after we considered all the cases that had come before the court and also had discussions with the DPP.

In particular, there was one case which was not a typical one strike or one punch. It was a case that involved a more sustained bashing of a person but the issue was in terms of proving the state of mind of the offender. There was potentially weak evidence. The DPP was in a position where it had to decide what the appropriate charge was in accordance with their guidelines which includes things like the reasonable prospect of conviction, all those kinds of factors and taking into account the courts and DPP's available resources. A decision was made in that case to accept a plea to section 161A even though that was not a classic one punch type scenario.

One of the issues that raised was that in having to make that call, they were a little bit more confined than they would have been in Western Australia, New South Wales or Victoria because 161A is not an alternative verdict to manslaughter. That means if they went to trial on manslaughter and the jury was not satisfied beyond reasonable doubt that the defendant had acted recklessly or negligently, there would be a complete acquittal as opposed to having this slightly lesser charge available. Does that answer your question?

Mrs FINOCCHIARO: Yes, thank you. So it is envisaged if prosecutions that are unlikely to reach that threshold of manslaughter or murder, a portion of them could be picked up by 161A if it was an alternative?

Ms HESKE: Yes, that is possible. As the department noted in those submissions, there is really not a large volume of cases coming through of this kind. It is the kind of thing that could arise in a domestic violence situation where you do not have a lot of other witnesses and evidence. It was in terms of addressing any

potential future issues. One possible solution we saw was in line with three of the four other jurisdiction that have a one punch style offence.

Mrs FINOCCHIARO: It is the department's submission that it be an alternative verdict to murder and manslaughter. So 316(1) and (2)?

Ms HESKE: Yes, that is correct.

Mrs FINOCCHIARO: But the bill is only 316(2)?

Ms HESKE: Yes, that is correct.

Mrs FINOCCHIARO: Right, thank you.

Madam CHAIR: Member for Katherine, do you have any questions?

Ms NELSON: Thank you Madam Chair, I do have a couple questions. I might seem a little redundant but I have to ask these questions to get my head around it. If the bill proceeds then these amendments and this legislation is only applicable offences committed against front line workers?

Ms HARDY: The amendment to section 189A of the Criminal Code, that part of it.

Ms NELSON: Okay.

Ms HARDY: There are two parts to the bill Member for Katherine. There is an amendment to section 189A which is the assault police offence and that is being expanded to include emergency workers and then the second amendment which is the alternative verdict provision which we have just been talking about.

Ms NELSON: Okay. Carry on. Let me just mull this over in my head for a minute before I ask a question again.

Madam CHAIR: Just as a follow on, I guess I am getting my head around the emergency service workers. St John Ambulance has asked for patient transport officers to be captured in the definition of ambulance workers.

I am thinking about a remote nurse who is in a remote Aboriginal health clinic because there are not ambulance services everywhere across the Territory. If a nurse is in the workplace during the day she is obviously covered. If she is on her way home and there is a car accident, and she pulls over to the side of the road to render assistance, does this proposed legislative amendment now provide her with that protection when she is rendering first aid on the side of the road? A nurse, not an ambulance work or a patient transport officer.

Ms HARDY: The definition of an emergency worker does extend in certain circumstances to people who are not ambulance officers. It only covers them during the time that they are in the execution of their duties, so when they are on duty. Once a person is off duty they become a normal member of the public. If they go and provide assistance at a scene, they are doing it as a member of the public.

Madam CHAIR: In the example that I just give with that nurse from the remote health clinic, she would not be captured under this amendment?

Ms HARDY: No not under this provision. But if she was assaulted other provisions of the Criminal Code would apply.

Mrs FINOCCHIARO: What consultation was done in relation to 161A in making that an alternative option?

Ms HESKE: There was quite limited consultation done in relation to that provision. It was looked first in terms of this review into this issue of domestic violence in that limited circumstance.

We found there were no issues apart from what came out of our discussions with the DPP about that particular case, JA, and comparing with other jurisdictions. We saw this as a fairly minor technical amendment to bring this in line with those other jurisdictions. We did not go and consult further on it.

Mrs FINOCCHIARO: Thank you.

Madam CHAIR: Member for Katherine?

Ms NELSON: Yes, thank you Madam Chair. I am really supportive of the intention of these amendments but I am just a bit concerned—we have just dealt with the births, deaths and marriages amendment because of consequential amendments—about the ongoing or flow on consequences to any changes to the Criminal Code.

After having read Mr Goldflam's submission as well, it leaves me a bit unsure or maybe not understanding very well the impact that this is going have on other pieces of legislation. That is also the mandatory sentencing. This is beyond the scope of this particular inquiry and the legislation we are talking about today.

What are the consequences to this? What else is going to come up if we pass the bill? Are there any other consequences to other legislation?

Ms HARDY: No, there is no consequence to other legislation. These are discrete amendments to the Criminal Code.

Ms NELSON: Discrete amendments, okay.

Ms HARDY: The amendment to section 189A is an amendment particular to section 189A and the amendment to section 316, however it ends up being worded—whether it includes murder as well as manslaughter or is limited to manslaughter—merely provides that section 161A is an alternative verdict to manslaughter and / or murder. It does not go any further than that.

Mr Goldflam has spoken about mandatory sentencing but this bill has nothing to do with mandatory sentencing. Mandatory sentencing has no effect on the operation of this bill.

Ms NELSON: Okay.

Madam CHAIR: I am seeking clarification, we have two separate aims or objectives of this bill and both under the Criminal Code. Is there a reason why they were not treated separately? Is it common practice to make a whole suite of changes wherever you can?

We have the two discrete aspects of the bill and keep going from the protection of emergency workers expansion and back to—there is nothing wrong with it. It is just that we look through a process to make parliament more open to the people. For those people who might be listening online who are not lawyers, just to give them the clarification as to why these two separate issues are being dealt with in the same bill?

Ms HARDY: The short answer to that is they both are quite minor issues. They were perceived by the department as being quite minor issues so rather than develop two separate bills which involves a lot of paperwork and time devoted to producing a bill. Whether it is putting in a comma or changing a multitude of provisions, there's the same process of going through the cabinet process et cetera to having bills introduced. It is the same process.

It was seen as a convenient way of dealing with two minor issues. They have nothing to do with each other. That is quite true.

Madam CHAIR: But they are in the same act.

Ms HARDY: In other jurisdictions you will find lengthy bills that will make a number of amendments right across for example, criminal justice legislation. I was looking at one recently, a bill that was introduced in Queensland in 2008—totally randomly, it was just something I was looking at. There were over 150 provisions in that bill and there were a number of amendments to the Criminal Code, criminal procedure legislation, sex offenders' legislation et cetera.

In other jurisdictions it is very common to have bills that cover a lot of things. It is not as common in this jurisdiction. We thought it was more convenient to, rather than go through the process twice and have everybody debating things separately and in the parliament, it could be done together.

Madam CHAIR: Thank you for that clarification, Ms Hardy. Member for Katherine, do you have any other questions?

Ms NELSON: No.

Mrs FINOCCHIARO: I wanted to ask on the emergency workers one, have we had—you may not know or it may be in the written material—many cases of assaults, well it does not exist yet. Under the section about workers—if you are at work and assaulted—have we had many cases where that has hit that maximum threshold, and that is why there is a need to expand that out to 16 years from 14 years? Have we had an instances of cases hit that 14 mark that maybe would have got more

Ms HESKE: We have not actually researched that question, but I can say from experience as a criminal lawyer, it is vanishingly rare that the court would give out the mandatory maximum penalty. I have never heard of it.

Ms HARDY: It is the maximum penalty.

Ms HESKE: Sorry, my slip of the tongue. The maximum penalty. Even a very serious case tends to fall around about the three quarter mark. I would be confident in saying that I would be very surprised if that happened.

Ms HARDY: The maximum sentence, the High Court has repeatedly said, are for the very worst of the worst cases and we rarely see them, if ever.

Mrs FINOCCHIARO: Yes. That is why I was wondering about the—I understand supporting our emergency workers and if it can act as a deterrent, then great. But I was wondering if we have ever hit the 14 year mark, let alone if it goes to 16 years. The practical effect.

Ms HARDY: It is more a recognition of the dangers of that work. I noted in the submission from the Law Society NT and NT Legal Aid Commission, there was a mention that increasing penalties is pointless because it does not do anything to deter people.

However, I would like to point out that deterrence is not the only relevant factor when a legislature is determining the maximum penalty for an offence. First of all, it represents the legislature's determination of the seriousness of the offence and reflects community standards as to what the seriousness of the offence is. It is why we have life as the sentence for murder and six months imprisonment is the maximum sentence for disorderly conduct. It is reflecting the seriousness of the offence. It is not just about deterrence, it is recognition of how serious the offence is.

Mrs FINOCCHIARO: Thank you.

Madam CHAIR: In regards to the Law Society NT and the NT Legal Aid Commission submissions and hearing from Russell Goldflam in regards to their concerns about juror instructions from a judge. Should this new provision be brought in? Is there any comment from the department in regards to—my question to Mr Goldflam was about education to jurors and clarification. I thought it was for Mr Goldflam to inform me, a non-lawyer of aide memoire that accompanies—which I thought was a great set of tools for the juror to take with them.

Ms HARDY: The aide memoire is incredibly helpful and as Mr Goldflam pointed out, we have a very small judiciary. We only have six permanent Supreme Court judges, all of whom are very experienced in charging juries in criminal matters. To some extent, I am not entirely sure what the problem is because on a day-to-day basis judges have to give complicated directions to juries.

What is a more complicated problem is the fact that in our Criminal Code we have two different sets of criminal responsibility at the moment because the Criminal Code has not been fully converted to Part IIAA. So there are instances where the defendant may be charged with several offences, some of which may be within Part IIAA and others fall within Part II. When the judge has to explain to the jury the different principles of criminal responsibility that apply to the different offences, that is a far more complex issue than the one which will be faced here.

The one punch offence is not identical to the offences of dangerous driving causing death and dangerous navigation causing death. They are both purely strict liability offences. As Mr Goldflam has explained, judges do charge juries in relation to those offences where someone has been charged with motor vehicle manslaughter. I do not know how common it is that people are actually charged with motor vehicle manslaughter as opposed to dangerous driving causing death but it can happen.

There you have an offence of manslaughter where both parts of the offence involved mental or fault elements and dangerous driving causing death, none of it involved the fault element. It is completely strict liability. With

the one punch provision the first element of the offence, the actual violent act does—just like murder and manslaughter—involve an element of intention. So in that regard, that offence one could argue, is more similar to murder and or manslaughter than the purely strict liability offence of dangerous driving causing death.

It is the second part which is the result of the conduct, the causing of the death. For murder it is intention, it has to be proven. For manslaughter, recklessness or negligence. For dangerous—I keep on going to say dangerous act because I started prosecuting back in the old days when Mr Goldflam did as well when it was section 154.

For one punch, the violent act, there is no fault element for the result so it is strict liability. That is the difference between the three of them and to me, it seems like a natural progression. You have to prove intention as to the actual conduct, whatever that conduct might be. It is going to be the same conduct whether you are charged with murder, manslaughter or violent act—it will have to be a violent act for violent act to be an alternative.

If the Crown can prove beyond reasonable doubt that the person intended that conduct then it falls to the second part of whether that conduct was done with the intention of killing that person, with the recklessness or negligence or with no fault element of strict liability.

I appreciate that there are defences in section 161A as well, which do slightly complicate the matter. I think that judges and juries are—the judges certainly are capable of giving the appropriate charges to the juries, particularly when they have far more complex problems when they have to deal with the different criminal responsibility provisions.

Ms HESKE: I just wanted to add to that in terms of the complexity of cases juries deal with, they also deal with complex fraud cases and those all go before juries. You also have a really wide range of matters where the judges have to issue complex directions. They have to explain to juries when you can use things for a hearsay purpose and a non-hearsay purpose.

All those kinds of complexities arise in cases all the time and juries handle those situations. I would not say this particularly stands out among that mix as being more complicated than many of the situations that they get all the time.

Madam CHAIR: Thank you very much. Member for Spillett, are there any further questions.

Mrs FINOCCHIARO: No.

Madam CHAIR: Member for Katherine, I am just checking there are no further questions.

Ms NELSON: No.

Madam CHAIR: Thank you very much for appearing before us this afternoon. We really appreciate you taking the time. Ladies and gentlemen, that concludes our public hearing into the Criminal Code Amendment Bill 2018.

Thank you.

The committee concluded.
