

21 September 2022

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By email to Erin.McAuley@nt.gov.au

Dear Ms McAuley,

Draft Sentencing and Other Legislation Amendment Bill 2022 – Submission of the Northern Territory Women's Legal Services

A Background

On Thursday 15 September 2022, members of the Northern Territory Women's Legal Services ('NTWLS', an alliance of CAWLS, KWILS and TEWLS) attended a briefing on the release of the *Draft Sentencing and Other Legislation Amendment Bill 2022* ('the Draft Bill').

During the briefing, we were invited to provide feedback by way of submission due Monday 19 September. Of particular concern and as raised with the Department, none of the three NTWLS had, at that stage, been provided with a copy of the Draft Bill. Following receipt of the Draft Bill and our request for an extension of time to respond to same, we were provided until Thursday 22 September.

Consequently, we can only provide a preliminary response to the Draft Bill and remain concerned that we have not had an appropriate opportunity to fully consider the implications on victim-survivors as the specialist DFSV legal services who have advocated strongly for a staged approach to the repeal of mandatory sentencing.¹ in our submission provided in response to the initial NT Law Reform Committee's ('NTRC') consultation ('NTWLS January Submission').

This document serves to outline two broad areas; NTWLS' concerns regarding the limited consultation and opportunity for feedback in respect of the Draft Bill, despite the NTWLS January Submission highlighting the importance of victim and domestic, family and sexual violence ('DFSV') specialist service feedback in this process, and, our preliminary feedback to the Draft Bill and current processes.

¹ NTWLS submission to the NT Law Reform Committee's consultation (the 'NTRC Consultation') in January 2021 (the 'NTWLS January Submission').

B Limits on consultation

1. Limited scope of the NTLRC Consultation

The briefing indicated that the NT Government is committed to a staged implementation to the recommendations made in the NTLRC's March 2021 Report.²

First, we note that the NTLRC Consultation period was short and not well publicised. NTWLS only became aware of that consultation through informal channels and had to seek an extension to participate. That the NTLRC only received 25 written submissions highlights the very limited nature of the consultation. We are aware that, late in the consultation process, the NTLRC presented to the Crimes Victim Advisory Committee ('CVAC'), however CVAC did not have time to consider the consultation paper in detail or provide a written submission.

Importantly, there was no independent evaluation of the impact of mandatory sentencing on safety or recidivism that underpinned the work or recommendations of the NTLRC.

As noted in the NTWLS January Submission:

'The potential reform of mandatory sentencing is a significant law reform issue which has the potential to cause conflict and exacerbate tensions within the broader community and to reduce victim safety. It is vitally important that the general community is engaged, and for mandatory sentencing in particular, that the proposals have the support of victims of crime. NTWLS is concerned that a failure to engage victims of crime will divide the community and reignite a polarising 'law and order' debate.'

This did not occur through the NTLRC Consultation process, and, to our knowledge, no additional community consultation has taken place. This concern has not been resolved for NTWLS.

2. Cross-Agency Implementation group

In the 15 September briefing, presenters noted that a Cross-Agency Implementation Group was formed to assist with reforms. We have no further information about this Group or how it has, or will, engage with the NGO sector.

3. Failure to identify relevance of Womens Legal Services in Ernst & Young consultation

The 15 September briefing further explained that Ernst & Young had commenced a 'gaps analysis' relating to existing community-based programs. It is alarming that, once again, NTWLS were not identified early in the process as a key stakeholder: we only learnt of this review during a Cross-Agency Working Group meeting on 30 August and had to expressly request that NTWLS be contacted to take part in the analysis process.

² Northern Territory Law Reform Commission, *The NTLRC Report No. 47 Mandatory Sentencing and Community Based Sentencing Options Final Report*, (NTLRC Reports) March 2021.

This failure suggests a misunderstanding on the part of the Department as to the nature and scope of our work, and the value of the information and expertise we can provide on risk, safety and wellbeing for victims of crimes that currently fall under the mandatory sentencing regime.

C Preliminary feedback on Draft Bill & Process

As repeatedly expressed in the NTWLS January Submission, the NTWLS supports the repeal of mandatory sentencing *in principle*. As front-line DFSV services, we hear every day the impacts of the justice system on women victim-survivors, both as victims of offences and as the accused/convicted. Through this lens of gender-based violence, we advocate strongly for the need to properly resource victim support and legal advice for victim-survivors of DFSV.

NTWLS holds concern for the overrepresentation of First Nations people in the justice system, and particularly, First Nations women who may be more likely to be misidentified as perpetrators of violence,³ compounding issues for the largest growing prison population.⁴

We support the intentions of the Draft Bill's reforms, however, continue to hold concern about the implementation process and the essential consideration of the reform's impact on the victims of these crimes.

1. Implementation timeline

We are concerned that while the Draft Bill proposes a staged approach, as well as implementation and strengthening of victim supports, there is no clarity as to the practical timeline of same.

Without clear commitments in respect of the development and funding of victim support services, particularly in remote communities, we cannot support the Draft Bill. Central to this is an acknowledgement that an estimated 70-90% of incarcerated women have experienced DFSV.⁵ In our submission, victim support services need to be fully developed, funded and in place *before* a Bill to repeal mandatory sentencing is passed.

2. Resourcing victim support services

In our view, the 15 September briefing was offender-focused, with reference to victim-survivors vague and lacking. For example, victim safety was highlighted as a key objective, as well as

³ Nancarrow, et. al. *Accurately identifying the "person most in need of protection" in domestic and family violence law* (Research report, Issue 23/3030), ANROWS, 2020, p10. Nancarrow, H. notes Aboriginal and Torres Strait Islander women overrepresented as respondents and subject to charges for breaching protection orders in most jurisdictions.

⁴ Haward-Wagner, D and Brown, C. '*Increased incarceration of First Nations women is interwoven with the experience of violence and trauma*', The Conversation, (online 6 August 2021) <<https://theconversation.com/increased-incarceration-of-first-nations-women-is-interwoven-with-the-experience-of-violence-and-trauma-164773>>.

⁵ Australia's National Research Organisation for Women's Safety (2020) *Womens' imprisonment and domestic, family, and sexual violence: Research synthesis* (ANROWS Insights, 03/2020). Sydney: ANROWS.

priority for DFV offender programs, however, the reference that followed to a 'partner contact service' stood in opposition to same.

In the context of Central Australia's trialled 'partner contact services', there are concerns in respect of the capacity to balance the needs of support groups for offenders and the need to protect victim-survivors in community settings. For example, CAWLS holds concerns about the effectiveness of 'partner contact services' operating to support the work of the Specialist Domestic and Family Violence Court in Alice Springs. Although there appears to be much positive discussion around the 'evaluation' of the pilot approach, our practical experience has been that the pilot has been severely limited by geographical and resourcing constraints. Currently, there is no data to reflect numbers of victims linked into the 'partner worker' and for how long for, given the course is sixteen weeks. The numbers that have participated are too low to be statistically significant, and we have no real understanding of how the approach could be practically expanded to other parts of the Territory without significant investment in education and training, legal services and socio-legal supports. Our advocacy for funding in this area has been repeatedly met with advice that there is no funding available.

Against this background, it is not sufficient or reassuring to simply state that programs will include safeguards to monitor and prioritise the safety of victim-survivors. Further detail, including a clear understanding of the costs of establishing and maintaining those programs, including in very remote settings, needs to be developed before any finalisation of the Draft Bill. Further, we submit that specialist DFSV legal assistance is required for victims of crime to communicate their views to the court. The views of the victim should be paramount in sentencing.

In our view, and noting our experience and expertise, the consequences of repealing mandatory sentencing without establishing and maintaining appropriate supports for victim safety and wellbeing will be an increase in the DFSV homicide rate for the Territory. Should that occur against the background of the repeal of mandatory sentencing, there will be a further rupture and distrust between the community and the justice system.

Consequently, we reiterate that the NTWLS does not support the repeal of the Bill until Stages 1 – 3 of the 'expansion and alignment' of programs are **complete**. The development of programs must be done carefully, logically and include the voices of victim-survivors. The references to new programs including the statement that 'New NGO's and private sector programs will be sourced regularly to create dynamic system that evolves' is too vague, and based on experience, we are doubtful that the funding to make this a reality will be forthcoming.

3. Feedback on specific provisions of the Draft Bill

3.1 Proposed s 121(2)(b) – restricting increased maximum penalty by reference to timing of breach

We submit that the evidentiary basis is unclear in respect of the time limit contained in the proposed s 121(2)(b). This section has the effect of increasing the maximum penalty for a contravention of a DVO to imprisonment for three years if the person is guilty of at least three contraventions, while simultaneously restricting the applicability of the increased maximum by requiring that the three contraventions have taken place over a period of 28 days.

The cycle of DFSV, which often involves breaches of a respective DVO, is not confined to 28 days. We have many clients who are harassed and intimidated in breach of existing DVOs over more prolonged periods. An offender is no less culpable because he breached an existing DVO on three occasions over three months than if he breached the DVO on three occasions during a 24-hour period. We acknowledge that multiple breaches over a shorter period can be linked to escalating risk of death or serious injury, however, this assessment also relates to the nature of the breaches. Three significant breaches over a period longer than 28 days will still signify a relevant escalation.

We recommend that the time stipulation in s 121(2)(b) be removed.

3.2 Proposed s 121 (4) – restricted definition of harm

We note that the proposed s 121(4) provides a very restricted definition of harm by referring to an example of harm being sexual or other assault.

This narrow definition of harm is inconsistent with recognition in the recent DFSV legislative review paper,⁶ where it is noted that DFSV causes a broad range of harm, of which sexual and physical harm are only two forms.⁷

The proposed s 121(4) is in effect reintroducing the hierarchy of harm which the proposed changes in the broader consultation paper seek to eliminate. In our submission, this inconsistency will potentially undermine any cultural shift within the justice system that proposed changes to the definition of DFSV seek to achieve. In effect, every breach of a DVO should be considered a threat to harm the protected person. If the proposed s 121(4) is to remain, substantial work is needed to redraft it to reflect the evidence based high risk factors for DFSV related homicide.

4. Rehabilitation Programs and Men’s Behaviour Change

4.1 Part 3 – Rehabilitation program in relation to domestic and family violence

Under this proposed part of the Draft Bill, offenders on an Order may be subject to a condition to attend a rehabilitation program in relation to domestic and family violence. The proposed s 16 requires a program facilitator to report to police and the probation and parole officer if they become aware that the offender is committing DFSV while subject to the Order.

We express concern that the threshold for requiring the program facilitator to report is unclear. Given that they may be privy to sensitive information from the relevant offender during the program, we submit that this threshold should be clearly set out to avoid any doubt about when the requirement is triggered. Noting that all adults in the NT hold mandatory reporting obligations in relation to DFSV, this is presumably a lower threshold for reporting and as such,

⁶ Northern Territory Government, Review of Legislation and Justice Response to Domestic and Family Violence in the Northern Territory – Consultation Paper, August 2022.

⁷ See above, p 52.

should be specified. Further, in any consideration of victim-survivor safety, it will be important to receive clarity as to how this information is then reported to the court.

4.2 Proposed s 17 – Bring the offender before court for review

We express concern regarding the nature of the commitment to ‘monitor’ offenders attending a Men’s Behaviour Change program and require further information about the practical implementation of same. It will be important to understand whether a review of the offender’s engagement and commitment to the Men’s Behaviour Change program would include a report outlining whether there has been any police intervention in respect of DFSV, even in cases where no statement has been made by the victim.

4.3 Proposed s 18 – Satisfactory completion of rehabilitation program in relation to domestic and family violence

Further to the above, the proposed s 18 sets out what is ‘successful’ completion of a rehabilitation program. It is not clear how the information s 18(c) is to be put before the court and how this information will be obtained. We query whether it would be appropriate for victims to be consulted as a part of this process where it is safe to do so.

D Conclusion

We confirm that the NTWLS would be pleased to be involved in liaising/coordinating victim groups and to provide further feedback in respect of the Draft Bill.

We trust this submission has been of assistance and we respectfully request the opportunity to be involved in any ongoing consultation process.

We look forward to hearing from you in due course.

Yours faithfully,

Janet Taylor

Siobhan Mackay

Caitlin Weatherby-Fell

Chief Executive Officer

Chief Executive Officer

Chief Executive Officer

Central Australian Women’s
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Katherine Women’s
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Top End Women’s Legal
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