CAWLS Submission to the Department of the Attorney General and Justice

Review of the *Domestic and Family Violence Act*

Central Australian Women's Legal Service, July 2015

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About CAWLS

The Central Australian Women's Legal Service (CAWLS) is a not for profit organisation funded by the Commonwealth Attorney-General's Department, the Department of Prime Minister and Cabinet and the Northern Territory Government. CAWLS provides free legal advice and assistance to all Central Australian women in the areas of domestic and family violence, family Law and children, family Law and property, discrimination, victims of crime, child protection and housing. CAWLS is based in Alice Springs, in the Northern Territory, and services women across Central Australia and the Barkly Region.

During the reporting period of 2013-2014, 40% of casework conducted at CAWLS related to assisting in domestic violence matters. CAWLS provides a drop-in domestic violence advice clinic five days a week for women who are seeking legal advice or support in relation to domestic violence. We also provide a duty lawyer service to women needing assistance with domestic violence matters at the local court in Alice Springs and other remote court locations in the Barkly region. CAWLS provides assistance in obtaining Domestic Violence Orders (DVO's), varying existing DVO's, and providing advocacy on a victim's behalf in domestic violence police matters where appropriate. We also assist with crisis intervention and referrals, support and practical assistance in relation to accommodation. Where needed, advice is also provided about urgent and related Family Law or Department of Children and Families matters.

CAWLS also provides community legal education and professional development in relation to domestic and family violence, seeking to raise awareness about the issue, how the law works in this area, and the assistance available.

Domestic and family violence in the Northern Territory

CAWLS welcomes this legislative review, and is grateful for the opportunity to offer comments as to how the law could be more responsive and operate more effectively in assisting survivors of domestic and family violence in the NT. Domestic and family violence continues to occur with disturbing frequency throughout Australia. Whilst domestic and family violence affects men, women and children, research shows it is women who are represented overwhelmingly as victims of it.[1] We

[1] Anna Ferrante et al, Crime Research Centre, University of Western Australia, *Measuring the extent of domestic violence* (Hawkins Press, 1996) 104

are aware of 48 women in Australia who have lost their lives in 2015 due to violence that in most cases was committed by a current or ex-partner.[2] We also note with concern the frequency of other non-physical kinds of abusive behaviour, with research indicating that one woman in four has experienced emotional abuse by a current or former partner.[3]

The Northern Territory is host to particularly alarming rates of domestic and family violence, which form a core area for CAWLS casework, community legal education and advocacy. Shockingly, women from Aboriginal and Torres Strait Islander backgrounds are 45 times more likely to experience domestic and family violence[4] and 35 times more likely to be hospitalised as a result of domestic and family violence than non-Aboriginal and Torres Strait Islander women.[5] As a service we are acutely aware of these figures, given that approximately 50% of CAWLS clients identified as being Aboriginal or Torres Strait Islander during the most recent reporting period of 2013-2014. CAWLS currently visits Tennant Creek on a monthly basis. Tennant Creek is host to the highest rate of domestic violence in the Northern Territory in relation to annual assault offences that occur in a domestic violence context.[6] Domestic violence was present in 74% of assaults in Tennant Creek in 2011-12, and in Alice Springs, domestic violence was associated with 57.8% of assault offences.[7]

We offer this background information to provide context as to our relevant work and experience in the area. Our submission below includes a number of suggested reforms, aimed to ensure that the legal system and associated processes appropriately and effectively respond to the needs of victims, whilst better safeguarding the rights of those that have experienced domestic and family violence.

We note that the Issues Paper released by the Department of the Attorney General and Justice included an extensive range of recommendations about legal responses to domestic and family violence that were made by the Australian and NSW Law Reform Commissions in 2010. We note that some of these recommendations already reflect practice guidelines in the NT. We have confirmed our support in relation to some of the attached recommendations. We have not made reference to each and every one of the attached recommendations, and note that where no comment has been provided this is not intended to indicate a

[2] Destroy the Joint, Counting dead women in Australia, accessed on 13 July 2015 at: https://www.facebook.com/notes/destroy-the-joint/counting-dead-women-australia-2015/819933134721099

[3] Australian Bureau of Statistics, *Personal Safety* Survey, 2012, Table 15: Experience of Partner Emotional Abuse, Type of Partner

[4] Jane Mulroney, 'Australian Statistics on Domestic Violence' (Australian Domestic & Family Violence Clearinghouse topic paper, 2003) 10.

[5] Fadwa Al-Yaman, Mieke Van Doeland and Michelle Wallis, 'Family violence among Aboriginal and Torres Strait Islander peoples', (Research Paper AIHW cat. No. IHW 17, Australian Institute of Health and Welfare Canberra, 2006) 71.

[6] Between 2011-12 this rate was 10,128 offences per 100,000 people, 500% greater than the overall rate of offences in the Northern Territory.

[7] Northern Territory Annual Crime Statistics, Issue 1: 2011-12, 57.

favourable or adverse view regarding that particular recommendation. We note that a number of the recommendations attached to the Issues Paper relate to general law and procedure concerning sexual offences, and we offer some brief feedback in that regard also.

We have structured our submission in three separate sections:

1. The *Domestic and Family Violence Act 2007* (NT): Current procedural issues and suggestions for improvement
2. Establishing new systemic initiatives
3. Australian and NSW Law Reform Commission Recommendations

For the purposes of this submission, we have used the terms 'domestic and family violence' and 'domestic violence' interchangeably, but draw upon the definition of 'domestic violence' as defined in the *Domestic and Family Violence Act 2007* (NT), acknowledging the references to family relationships under this Act.

We thank you for the opportunity to comment on these important matters.

1. The *Domestic and Family Violence Act 2007* (NT) – Current procedural issues and suggestions for improvement

A preamble to domestic and family violence legislation

CAWLS submits that a preamble to the *Domestic and Family Violence Act* would be a positive inclusion, situating domestic and family violence within a human rights framework; and recognising the gendered nature of domestic violence and its damaging effect on communities and children.

A good example can be found in the preamble to the Victorian *Family Violence Protection Act 2008*.

> In enacting this Act, the Parliament recognises the following principles—
>
> (a) that non-violence is a fundamental social value that must be promoted;
> (b) that family violence is a fundamental violation of human rights and is unacceptable in any form;
> (c) that family violence is not acceptable in any community or culture;
> (d) that, in responding to family violence and promoting the safety of persons who have experienced family violence, the justice system should treat the views of victims of family violence with respect.
>
> In enacting this Act, the Parliament also recognises the following features of family violence—
> (a) that while anyone can be a victim or perpetrator of family violence, family violence is predominantly committed by men against women, children and other vulnerable persons;
> (b) that children who are exposed to the effects of family violence are particularly vulnerable and exposure to family violence may have a serious impact on children's current and future physical, psychological and emotional wellbeing;
> (c) that family violence—
> (i) affects the entire community; and
> (ii) occurs in all areas of society, regardless of location, socioeconomic and health status, age, culture, gender, sexual identity, ability, ethnicity or religion;
> (d) that family violence extends beyond physical and sexual violence and may involve emotional or psychological abuse and economic abuse;
> (e) that family violence may involve overt or subtle exploitation of power imbalances and may consist of isolated incidents or patterns of abuse over a period of time.
>
> In placing domestic and family violence in a human rights context, it would also be useful to state that Australia is a signatory to the following international instruments: Universal Declaration of Human Rights; United Nations Declaration on the Elimination of Violence Against Women; United Nations Convention on the Rights of the Child; United Nations Principles for Older Persons.

An alternate example of such context can be found in the South Australian *Intervention Orders (Prevention of Abuse Act) 2009*. At s10(1), a number of "Principles for intervention against abuse" are included, which would be of benefit in the NT also.

10—Principles for intervention against abuse

(1) The following must be recognised and taken into account in determining whether it is appropriate to issue an intervention order and in determining the terms of an intervention order:

(a) abuse occurs in all areas of society, regardless of socio-economic status, health, age, culture, gender, sexuality, ability, ethnicity and religion;

(b) abuse may involve overt or subtle exploitation of power imbalances and may consist of isolated incidents or patterns of behaviour;

(c) it is of primary importance to prevent abuse and to prevent children from being exposed to the effects of abuse;

(d) as far as is practicable, intervention should be designed—

(i) to encourage defendants who it is suspected will, without intervention, commit abuse to accept responsibility and take steps to avoid committing abuse; and

(ii) to minimise disruption to protected persons and any child living with a protected person and to maintain social connections and support for protected persons; and

(iii) to ensure continuity and stability in the care of any child living with a protected person; and

(iv) to allow education, training and employment of a protected person and any child living with a protected person, and arrangements for the care of such a child, to continue without interruption; and

(v) if the defendant is a child—

(A) to ensure the child has appropriate accommodation, care and supervision; and

(B) to ensure the child has access to appropriate educational and health services; and

(C) to allow the education, training and employment of the child to continue without interruption.

Definition of domestic and family violence – further detail and examples as to different kinds of abusive behaviour

We wish to highlight the extended list of examples provided in s8 of the South Australian *Intervention Orders (Prevention of Abuse) Act 2009*. It would be useful if the current definition of domestic and family violence in the NT legislation were expanded to encourage a greater understanding of the way such behaviour can manifest.

One useful practical explanation can be found at s8(5) of the SA legislation, *Unreasonable and non-consensual denial of financial, social or personal autonomy—examples*

> Without limiting subsection (2)(c), an act of abuse against a person resulting in an unreasonable and non-consensual denial of financial, social or personal autonomy may be comprised of any of the following:
>
> (a) denying the person the financial autonomy that the person would have had but for the act of abuse;
> (b) withholding the financial support necessary for meeting the reasonable living expenses of the person (or any other person living with, or dependent on, the person) in circumstances in which the person is dependent on the financial support to meet those living expenses;
> (c) without lawful excuse, preventing the person from having access to joint financial assets for the purposes of meeting normal household expenses;
> (d) preventing the person from seeking or keeping employment;
> (e) causing the person through coercion or deception to -
> (iii) sign a power of attorney enabling the person's finances to be managed by another person; or
> (iv) sign a contract for the purchase of goods or services; or
> (v) sign a contract for the provision of finance; or
> (vi) sign a contract of guarantee; or
> (vii) sign any legal document for the establishment or operation of a business;
> (f) without permission, removing or keeping property that is in the ownership or possession of the person or used or otherwise enjoyed by the person;
> (g) disposing of property owned by the person, or owned jointly with the person, against the person's wishes and without lawful excuse;
> (h) preventing the person from making or keeping connections with the person's family, friends or cultural group, from participating in cultural or spiritual ceremonies or practices, or from expressing the person's cultural identity;
> (i) exercising an unreasonable level of control and domination over the daily life of the person.

DVO Application Process

Service of defendants in DVO Applications

Currently, when an Application for a DVO is initiated the defendant will be served with a copy of our client's application and supporting affidavit. CAWLS hold concerns about defendants being provided with a copy of the supporting affidavit before the matter reaches court, and before any orders are in place. Supporting affidavits frequently include sensitive information which could potentially aggravate the defendant. There is also a significant risk that sensitive information could be

circulated within the community, given that such paperwork may be served through being left with another resident of the defendant's house.

There is little certainty around when a defendant will be served with paperwork, however sometimes this does occur before the first court appearance. At this stage, there will not have been an opportunity for the Applicant to seek an interim DVO for their safety, and service of the Defendant prior to this occurring can put the Applicant at risk if the Defendant becomes upset at what is contained in the affidavit material. In terms of administrative factors, we also note the concerns raised with us by NT Police regarding the amount of paperwork needing to be served on Defendants.

If the defendant attends court or engages a lawyer to respond to the Application, the supporting affidavit could be provided at that stage. If a defendant does not intend to defend the application or participate in the proceedings there is limited utility in making such sensitive information available.

The *Domestic and Family Violence Act* makes no reference to an affidavit being served with the Application. Section 30 refers to 'How an application is made', and states that an Application for a CSJ DVO must:

(a) be made in the approved form; and
(b) be filed in the court.

Section 31 refers to 'Notice of hearing of application' and states "as soon as practicable after the application is files, a clerk must give written notice to the parties to the DVO of the time and place for the hearing of the application."

The *Justices Act* is also silent on whether or not a supporting affidavit must be filed at the time the Application is lodged. Despite the absence of a direction to do so, it seems to be common practice in the NT for supporting affidavits to be served upon the defendant alongside the Application.

In our submission, this is unnecessary and the defendant would not be prejudiced in any way by being provided a copy of the supporting affidavit at court or upon seeking legal advice. The legislation should be amended to expressly indicate that the Defendant should only initially be served with a copy of the DVO application, with a copy of the supporting affidavit to be provided once the defendant attends court or upon request of the defendant or their legal representative.

Provision of relevant material re: Defendant's criminal history

In outlining matters to be considered in making a DVO, s19(2) of the *Domestic and Family Violence Act* provides that the issuing authority "must" consider a number of factors, including the defendant's criminal record.

Despite the requirement that an issuing authority "must" consider this, current practice in relation to applications not initiated by police involves the applicant or their representative being required to obtain this material. In our submission this is an unfair onus, given that this matter must be considered by the court pursuant to the legislation. The available mechanism for an applicant or their representative to obtain such material is a subpoena, which can cause delays in finalising the application. This practice should be revised, and a new procedure implemented for making this information available to the Court without relying on the protected person or Applicant to facilitate this.

Who may seek protection through the Domestic and Family Violence Act? Including acts of non-domestic or family violence in the Act

Victims of sexual violence who are not currently or never have been in a domestic or family relationship are currently not able to seek an order restraining the offender through the *Domestic and Family Violence Act*.

These victims must apply for a Personal Violence Restraining Order under the *Justices Act* for an order prohibiting the defendant from having contact with them. This legislation requires the victim to attend mediation, unless the court grants an exemption. If an exemption is not granted, the process can take some time to finalise and there is no scope to seek an interim Personal Violence Restraining Order. This can leave victims feeling vulnerable and hinder recovery post-sexual assault.

CAWLS believes that this is not an appropriate avenue for victims of sexual violence to seek protection, especially if a victim has not reported the matter to police or the defendant has not been charged with a crime. To enable survivors of sexual assault to seek protection through an appropriate avenue, we submit that victims of sexual assault should be able to access protection through a process similar to that available to a victim of domestic or family violence. Whether this should be enabled through a reform of the *Domestic and Family Violence Act*, or the *Justices Act* is a matter that needs to be explored. The *Justices Act* could be amended to provide a more expedient and appropriate avenue for victims of sexual assault to obtain orders for their protection. The *Justices Act* could also be amended to make provision for interim orders pending determination of an application, and unequivocally exclude sexual assault matters from those needing to go through mediation (without requiring the applicant to seek such an exclusion).

If this suggestion were to be enabled through a reform of the *Domestic and Family Violence Act*, a useful point of comparison may be found in the South Australian *Intervention Orders (Prevention of Abuse) Act 2009*. At s8, there is a distinction made between domestic and family violence and non domestic and family violence, defined as follows:

> 'Meaning of abuse- domestic and family violence and non domestic and family violence'
>
> An act of abuse may be committed by a defendant against a person with whom the defendant is not and was not formerly in a relationship (including in circumstances where the defendant imagines such a relationship) and as such an act of abuse referred to in this act as an act of non domestic abuse.

Whilst we do not submit that all kinds of non domestic and family violence abuse be included in the *Domestic and Family Violence Act*, we would welcome a dialogue as to providing scope for victims of non domestic and family violence sexual abuse to seek protection via the same method as that available to those seeking a DVO.

Final Orders

We wish to raise several points with regard to the range of conditions available as features of a DVO. These points raised are also primarily drawing on clauses in the *Intervention Orders (Prevention of Abuse) Act* 2009 SA.

'No sunset clause' DVO's

Currently s27 of the *Domestic and Family Violence Act* requires an end date to be attached to DVO's made in the NT. Much of our client base are victims of domestic violence on a repeated and ongoing basis. From childhood to adulthood our clients experience violence throughout their lives.

CAWLS clients often live in remote locations outside Alice Springs, without their own transport and with no access to a private phone or internet. Many of our clients do not speak English as a first language, and sometimes not at all. Women in these positions face significant logistical, cultural and geographic barriers to engaging with the legal system and utilising it to safeguard their own rights.

If these barriers are overcome, with initial instructions being provided regarding an initial DVO application, it may be that the client is not in a position to engage with the system or provide updated instructions at the time that the order expires – even if there are still ongoing safety concerns and a risk of further violence. Allowing the court to set no end date to a DVO would provide more security to victims and their families, allowing them to be protected by an order against the defendant indefinitely.

In SA, 'no sunset clause' orders are enabled under s11 of the *Intervention Orders (Prevention of Abuse) Act* 2009 SA. This section outlines the 'Ongoing effect of an Intervention Order', stating that:

> (1) A DVO is ongoing and continues in force (subject to any variation or substitution of the order under this Act) until it is revoked.
> (2) Consequently, an issuing authority may not fix a date for the expiry of a DVO order or otherwise limit the duration of an order.

In our submission, there should still be scope for an end date to be affixed to a DVO to allow an application to reflect the wishes of the client. In some cases, a client may want a more finite DVO such as one lasting for a period of 12 months. However, we submit that the NT legislation should permit a 'no sunset clause' DVO to be sought pursuant to client instructions.

The SA legislation also enables a court to impose a time frame in which a defendant cannot apply to vary or revoke a DVO. For example, a defendant may not be able to seek a variation until 6 or 12 months has lapsed since the granting of the DVO. The SA legislation prevents a defendant from making an application to vary or revoke the order until after the date fixed in the order. Additionally, the legislation provides that the court may dismiss such an application if not satisfied that there has been a significant change in circumstances since the making of the order:

> (4) On an application for variation or revocation of an intervention order (other than an interim intervention order) by the defendant, the Court may, without receiving submissions or evidence from the protected person, dismiss the application –
>
> (a) if satisfied that the application is frivolous or vexatious; or
> (b) if not satisfied that there has been a substantial change in the relevant circumstances since the order was issued or last varied.

In our experience we have a number of clients coming in seeking variations to DVO's, some because of genuine unworkable conditions but others because of family pressure or pressure imposed by the defendant to remove the order. Allowing the court to fix a date after which an order can be varied or revoked would place an onus on the defendant to show a significant change in behaviour that would warrant a variation or revocation.

Requirement for defendants to attend counselling or behaviour change programs as part of an order made by the court

Whilst the current NT *Domestic and Family Violence Act* enables conditions to be sought requiring defendants to attend counselling or behavioural change programs as part of an order, this is not an actual requirement. Legislation in other jurisdictions such as Victoria requires a defendant to undergo assessment for a behavioural

change program if the court is minded to grant the application for an order. If found suitable to engage in the program, the Defendant would then be required to complete the program as part of the conditions on the order. The inclusion of such a requirement would place a responsibility on the defendant to address their abusive behaviour, hopefully reducing the risk of reoffending. Should this approach be adopted in the NT, it would be essential that adequate resourcing be provided for such programs to be appropriate to the Central Australian context and meet the cultural and geographic needs of defendants.

Evidentiary matters

Operation of Vulnerable Witness Provisions

Under s110(1) of the *Domestic and Family Violence Act* an adult who is a vulnerable witness can elect to give evidence to the court from a place outside the court by audiovisual link (CCTV).

The NT Department of the Attorney General and Justice indicates that Tennant Creek is the only court outside Darwin, Alice Springs and Katherine where CCTV facilities are available.[8] As such, in rural and remote areas protected persons and vulnerable witnesses may not be able to access the full protection of the vulnerable witness provisions in the Act.

Where protected persons and vulnerable witnesses are in grave fear of the defendant, the ability to engage with the court process remotely is crucial to ensuring protected persons and vulnerable witnesses feel able to participate in court processes.

We submit that courts hearing applications for DVO's, PVRO's or hearing evidence in relation to family violence must be equipped with facilities to allow witnesses to give evidence in accordance with s110(1) of the Act. Currently, where these facilities are unavailable the Act makes provision for the use of a screen or partition to prevent a vulnerable witness from being seen by the defendant. This affords victims with little protection from potential re-traumatisation.

Whilst the Act makes provision to protect vulnerable witnesses from being seen by the defendant whilst giving evidence, there are no protections in the Act for vulnerable witnesses before or after giving evidence. Vulnerable witnesses and protected persons are often required to share waiting areas with defendants. This allows scope for the defendant to further intimidate the vulnerable witness or protected person. The operation of a designated safe room for vulnerable witnesses and protected persons is a simple practical measure to improve the safety of the court process for vulnerable witnesses and protected persons.

[8] Accessed at http://www.nt.gov.au/justice/documents/publications/Consultation-Report-Review-of-Vulnerable-Witness-Legislation_section-21B.PDF, on 15 July 2015

The following excerpt from an ABC report on inadequate court room facilities in Victoria provides an insight into the impact this lack of facilities has on vulnerable witnesses:

> "I knew he would have been angry because I had taken the order out on him. I knew he'd be angry, I was freaked out,"
>
> "The court space doesn't make you feel safe. He is there maybe at the most a few metres from you".
>
> "I tried to spend as much time outside the court room. It is not a safe setting at all. There is no privacy, everyone in this town knows everybody."

[9]

This report also indicates that Court Services Victoria is reviewing the allocation of resources and court facilities in Victoria.[10]

The NT is home to great numbers of domestic violence victims, and it is essential that court logistics be improved to be more responsive and accessible. In Queensland, safe rooms have been established in courts hearing such matters, with the QLD Courts Domestic Violence Protocols 2012 providing the following guidance on operation of safe rooms:

> The maintenance of the safe room is the responsibility of the registrar; however the day to day running of the safe room should be managed in consultation with DV prevention workers.
>
> It is the responsibility of the registrar to ensure the safe room is available for women at the court whether they are the aggrieved or the respondent and to ensure the best use of facilities available to accommodate a male aggrieved or respondent appropriately.
>
> If the aggrieved and the respondent in a proceeding are both female, only the aggrieved should be accommodated in the safe room.
>
> It is up to the party to decide if they require the use of the safe room and is not up to court staff or security officers.
>
> If the courthouse does not have a designated safe room, another room within the courthouse should be used. For example, an interview room, jury room or witness room.

[9] Accessed at http://www.abc.net.au/news/2015-03-02/family-violence-victims-sit-near-offenders-vic-county-courts/6271952, on 15 July 2015
[10] Accessed at http://www.abc.net.au/news/2015-03-02/family-violence-victims-sit-near-offenders-vic-county-courts/6271952, on 15 July 2015

If the courthouse does not have any rooms available, the registry must create a private and safe space within the courthouse. This may mean allowing access to a registry area to wait such as the break room. If possible, a screen or partition should be used to provide the parties with some privacy.

Registrars should liaise with police, local domestic violence services and DV prevention workers to develop safety protocols suited to the local environment.

It may be necessary for the aggrieved to wait at the police building close by and be escorted over to the courthouse.

[11]

We strongly advocate for the provision of a safe room for vulnerable witnesses and protected persons in the NT at courts hearing applications for Domestic Violence Orders, Personal Violence Restraining Orders or hearing evidence in relation to family or sexual violence.

Cross examination of vulnerable witnesses by unrepresented Defendant

Under s114 of the Act, where a defendant is unrepresented the court may make an order that the Defendant cannot directly cross examine a witness who is in a domestic relationship with the defendant. The court may order that the defendant question the witness through the court or another person authorised by the court.

This section is discretionary; there is no requirement on the court to ensure such arrangements are in place. This section only applies to a witness who is in a domestic relationship with the defendant and does not provide any protection to other witnesses appearing in support of the protected person i.e friends of the protected person or witnesses to violent incidents. In our submission these provisions are inadequate.

In comparison, Victorian *Family Violence Protection Act* (2008) provides the protection to witnesses from direct cross-examination by Defendants. The following provisions prevent direct cross examination by defendants and require the Defendant to be provided with legal representation by Legal Aid Victoria for the purposes of cross examination. We submit that the following special rules for cross examination of protected witnesses replace the current s114 of the *DFVA*.

[11] Accessed at http://www.courts.qld.gov.au/_data/assets/pdf_file/0014/162230/domestic-violence-protocols-for-staff.pdf, on 17 June 2015

S. 70(1) amended by No. 42/2014 s. 118.

1) The following persons are protected witnesses for the purposes of a proceeding under this Act or a litigation restraint order proceeding—
   - (a) the affected family member or the protected person;
   - (b) a child;
   - (c) any family member of a party to the proceeding;
   - (d) any person declared under subsection
   - (e) to be a protected witness for the proceeding.

2) The court may at any time declare a person to be a protected witness if the court is
   - (1) satisfied the person—
     - (a) has a cognitive impairment; or
     - (b) otherwise needs the protection of the court.

(3) A protected witness must not be personally cross-examined by the respondent unless—
   - (a) the protected witness is an adult; and
   - (b) the protected witness consents to being cross-examined by the respondent or, if the protected witness has a guardian, the protected witness' guardian has consented to the cross-examination; and
   - (c) if the protected witness has a cognitive impairment, the court is satisfied the protected witness understands the nature and consequences of giving consent and would be competent to give evidence; and
   - (d) the court decides that it would not have a harmful impact on the protected witness for the protected witness to be cross-examined by the respondent.

4) If a respondent who is prohibited from cross-examining a protected witness under subsection (3) is not legally represented, the court must—
   - (a) inform the respondent that the respondent is not permitted personally to cross-examine a protected witness; and
   - (b) ask the respondent whether the respondent has sought to obtain legal representation for the cross-examination of a protected witness; and
   - (c) if satisfied the respondent has not had a reasonable opportunity to obtain legal representation, grant an adjournment on its own initiative or if requested by the respondent.

Representation of respondent - S71

1) If the respondent does not obtain legal representation for the cross-examination of a protected witness after being given a reasonable opportunity to do so, the court must order Victoria Legal Aid to offer the respondent legal representation for that purpose.

2) Despite anything in the Legal Aid Act 1978 , Victoria Legal Aid must offer to provide legal representation in accordance with subsection (1).

   Note

   See section 8 of the Legal Aid Act 1978 which provides that legal aid may be provided by Victoria Legal Aid by making available its own officers or by arranging for the services of private legal practitioners.

3) However, Victoria Legal Aid may apply all or any of the conditions under section 27 of the Legal Aid Act 1978 to the representation of the respondent as if the respondent had been granted legal assistance under that Act.

4) If the respondent refuses the legal representation offered under subsection (1), or otherwise refuses to co-operate, the court must warn the respondent that if the respondent is not represented and not permitted to cross-examine the protected person about events relevant to the application the subject of the proceeding, neither the respondent nor the respondent's witnesses may give evidence about those events.

In submitting that this approach should be adopted in the NT, we emphasize the need for adequate resourcing to enable this legal assistance to be provided.

Other good examples of provisions to support and protect victims of family violence during the court process can be found in the South Australian *Intervention Orders (Prevention of Abuse) Act 2009*. These would also be an improvement to the currently inadequate provisions in the NT legislation. At s29:

29—Special arrangements for evidence and cross-examination

1) The Court may order that special arrangements be made for taking the evidence of a person against whom it is alleged the defendant has committed or might commit an act of abuse or a child who it is alleged has been or might be exposed to the effects of an act of abuse committed by the defendant against a person.

2) Without limiting the kind of order that may be made under this section, the Court may make 1 or more of the following orders:
   a) an order that the evidence be given outside the Court and transmitted to the Court by means of closed circuit television;
   b) an order that the evidence be taken outside the Court and that an audio visual record of the evidence be made and replayed in the Court;
   c) an order that a screen, partition or one-way glass be placed to obscure the view of a party to whom the evidence relates or some other person;
   d) an order that the defendant be excluded from the place where the evidence is taken, or otherwise be prevented from directly seeing and hearing the witness while giving evidence;
   e) an order that the witness be accompanied by a relative or friend for the purpose of providing emotional support;
   f) if the witness suffers from a physical or mental disability—an order that the evidence be taken in a particular way (to be specified by the Court) that will, in the Court's opinion, facilitate the taking of evidence from the witness or minimise the witness's embarrassment or distress.

3) Special arrangements made under this section may relate to the evidence of the witness as a whole or to particular aspects of the evidence of the witness, such as cross-examination and re-examination.

4) Cross-examination of a person against whom it is alleged the defendant has committed or might commit an act of abuse or a child who it is alleged has been or might be exposed to the effects of an act of abuse committed by the defendant against a person is—

a) to be by counsel; or

b) if the defendant is not legally represented in the proceedings—to be undertaken—

i) by the defendant submitting to the Court, in the manner required by the Court, the questions the defendant proposes the witness be asked in cross-examination and the Court (or the Court's nominee) asking the witness those of the questions submitted that are determined by the Court to be allowable in cross-examination; or

ii) as otherwise directed by the Court.

Providing evidence in chief via pre-recorded video statement

CAWLS would support reforms to enable a victim of domestic and family violence to give their evidence in chief via a pre-recorded video statement. Relevant processes would need to be carefully developed, however such an approach could involve the victim providing a recorded statement as soon as possible after the domestic violence offence, which would then be available for viewing by prosecution and defence at the police station prior to the matter being heard. This statement could then be played in a closed court as a substitute to evidence in chief that would ordinarily be given in person. At contested hearing, cross examination about the evidence in chief could then be conducted with the victim who may or may not be physically present in court subject to vulnerable witness provisions.

The possibility of giving evidence in this way could mitigate a victim's fear and apprehension of attending court, in that much of their evidence will be provided via pre-recording, they will spend less time giving oral evidence and will not be required to tell the whole story from start to finish.

We note the questions and concerns that were raised by Women's Legal Services NSW in response to the introduction of the *Criminal Procedure (Domestic Violence Complainants) Bill 2014* in November 2014.[12] Whilst we are supportive of initiatives that make the legal system more accessible to victims of crime, we agree that such reforms would need to be implemented very carefully because of unintended consequences that could arise.

Some of these unintended consequences, as outlined by the Women's Legal Services NSW, could include:

- the risk of trauma compromising a victim's ability to recall all of the details of a domestic violence offence, and the adverse inferences that could be drawn as to a victim's credibility if all details are not included in the statement taken at that time;

[12] Accessed at http://www.wlsnsw.org.au/wp-content/uploads/WLSNSW-comments-re-Criminal-Procedure-DV-Complainants-Bill-2014-Nov-14.pdf on 15 July 2015.

- the risk of re-traumatisation in the event that a victim is present at court when the recorded evidence is being played;
- the risk that a video recording will focus primarily on physical injuries and damage to property, which could shift the focus away from psychological harm caused to the victim;
- the use of pre-recorded evidence in proceedings beyond the prosecution of a domestic violence offence or parallel proceedings to obtain a DVO – such as care and protection proceedings. Any legislative reforms should clearly indicate the parameters in which the recording can be used; and
- unauthorised viewing or distribution of the recorded statement. It is essential that such a reform be accompanied by legislation setting out relevant offences for the misuse of recorded material – including threats to copy or distribute the recording

These risks would need to be considered if similar provisions were to be proposed in the NT.

2. Establishing new systemic initiatives

A national Domestic Violence Order registration scheme

A protected person on a Domestic Violence Order (DVO) should be afforded protection regardless of their location. CAWLS is regularly approached for assistance by women who reside in remote communities in the tri-state border area and who move regularly between different locations in the jurisdictions of the NT, SA and WA. Defendants in these matters are often similarly mobile.

Indigenous women residing in remote communities face significant existing barriers in terms of engaging with the legal system, and the requirement that separate applications be initiated to enable the registration of one order in other jurisdictions can be onerous and confusing. Women are often unaware that the ambit of a DVO stops at the border of the jurisdiction in which it was granted, leaving them exposed and without the protection of a DVO without realising it. A national DVO registration scheme would afford more effective, cohesive and streamlined protection to all protected persons, particularly Indigenous women living in remote communities.

Once a DVO (or equivalent) becomes enforceable in one jurisdiction, it should be registered on a national database so that it can be enforceable in other jurisdictions without the procedural requirement of being registered separately. This would enable DVO's to be more responsive and adaptable to the needs of those seeking protection, extending protection as needed regardless of where the protected person is located.

A formal domestic and family violence death review process

CAWLS has long advocated alongside other specialist domestic and family violence services for the establishment of a formal domestic and family violence death review process in the NT. Whilst each domestic violence related death is factually different, separate deaths can be viewed as related in that similar risk factors may be present. A domestic violence death review process would enable the identification of systemic issues, and gaps or barriers to service provision. Findings could then inform recommendations as to how any shortcomings could be addressed, with a view to improving responses to domestic and family violence and preventing similar fatalities from occurring.

Domestic violence death review processes exist in most other Australian jurisdictions. Given the disproportionately high rates of domestic and family violence in the NT it is crucial that one be established here.

3. Australian and NSW Law Reform Commission Recommendations

Recommendations: Family Violence – A National Legal Response

Attached to the issues paper released by the Department of the Attorney General and Justice are an extensive number of recommendations arising from the 2010 review by the Australian and NSW Law Reform Commission.

We understand that these recommendations were attached as possible points of discussion for submissions being made in relation to the current review. We note that a number of the recommendations already reflect current practice guidelines in the NT. Where we have remained silent on any given recommendation, this is not intended to indicate a view in favour or against the recommendation.

We do wish to generally confirm our support for the following recommendations:

- **7-1**: State and Territory family violence legislation should contain guiding principles, which should include express reference to a human rights framework, drawing upon applicable international conventions.
- **7-2**: State and Territory family violence legislation should contain a provision that explains the nature, features and dynamics of family violence including: while anyone may be a victim of family violence, or may use family violence, it is predominantly committed by men; it can occur in all sectors of society; it can involve exploitation of power imbalances; its incidence is underreported; and it has a detrimental impact on children. In addition, family violence legislation should refer to the particular impact of family violence on: Indigenous persons, those from a culturally and linguistically diverse

background; those from the gay, lesbian, bisexual, transgender and intersex communities; older persons; and people with disabilities.

- **7-4**: State and Territory legislation should articulate the following common set of core purposes: to ensure or maximise the safety and protection of persons who fear or experience family violence; to prevent or reduce family violence and the exposure of children to family violence; and to ensure those who use family violence are accountable for their conduct.
- **9-3**: State and Territory governments should ensure that support services are in place to assist persons in need of protection to apply for a protection order without involving police. These should include services specifically for: Indigenous persons; and persons from culturally and linguistically diverse backgrounds.[13]
- **10-3**: State and territory legislation should impose an obligation on police and prosecutors to inform victims of family violence promptly of: decisions to grant or refuse bail; and conditions of release, where bail is granted. Victims should also be given or sent a copy of the bail conditions. Where there are bail conditions and a protection order, police and prosecutors should explain how they interact.
- **12-1**: State and territory legislation should provide that protected person cannot be charged with or found guilty of an offence of aiding, abetting counselling or procuring the breach of a protection order.
- **12-2**: Federal, state and territory police and directors of public prosecution should train or ensure that police and prosecutors respectively receive training on how the dynamics of domestic and family violence might affect the decisions of victims to negate the existence of domestic and family violence or to withdraw previous allegations of violence.
- **12-3**: Police codes of practice or operating guidelines, and prosecutorial policies should ensure that any decisions to charge or prosecute victims of family violence with public justice offences – such as conspiracy or attempts to pervert the course of justice, where the conduct alleged to constitute such offences is essentially conduct engaged in by a victim to reduce or mitigate the culpability of an offender – should only be approved at the highest levels within state or territory police services, and by directors of public prosecution, respectively.
- **13-3**: State and territory sentencing legislation should provide that the fact that an offence was committed in the context of a family relationship should not be considered a mitigating factor in sentencing.
- **14-1**: State and territory criminal legislation should ensure defences to homicide accommodate the experiences of family violence victims who kill, recognising the dynamics and features of family violence.

[13] The successful adoption of this recommendation would require secure, ongoing and sustained funding for specialist Domestic Violence Legal Services and Women's Legal Services to enable the continuation of this important work.

- **18-1**: state and territory courts should ensure that application forms for protection orders include information about the kinds of conduct that constitute family violence.
- **18-3**: State and territory legislation should prohibit the respondent in protection order proceedings from personally cross examining any person against whom the respondent is alleged to have used family violence.
- **29-5**: state and territory victims compensation legislation: should define an 'act of violence' to include family violence and ensure that evidence of a pattern of family violence may be considered; should not provide that acts are 'related' merely because they are committed by the same offender, and should provide that victims have the opportunity to object if claims are to be treated as related; and should ensure that victims' compensation claims are not excluded on the basis that the offender might benefit from the claim (other measures should be adopted to ensure that offenders do not have access to victims' compensation award).

Recommendations: Sexual Offences

We note that a number of the recommendations attached to the Issues Paper relate to sexual offences. We confirm our support for the following recommendations (irrespective of whether the sexual offence occurs in a domestic or family relationship), noting again that where we have remained silent about a recommendation this is not intended to indicate a position for or against:

- **25-1**: State and territory sexual assault provisions should include a wide definition of sexual intercourse or penetration, encompassing: a) penetration (to any extent) of the genitalia (including surgically constructed genitalia) or anus of a person by the penis or other body part of another person and/or any object manipulated by a person; b) penetration of the mouth of a person by the penis of a person; and c) continuing sexual penetration as defined in paragraph (a) or (b).
- **25-2** Federal, state and territory sexual offence provisions should provide a uniform age of consent for all sexual offences.
- **25-5** Federal, state and territory sexual offence provisions should set out a non-exhaustive list of circumstances that may vitiate consent including, at a minimum: a) lack of capacity to consent, including because a person is asleep or unconscious, or so affected by alcohol or other drugs as to be unable to consent; b) where a person submits because of force, or fear of force, against the complainant or another person; c) where a person submits because of fear of harm of any type against the complainant or another person; d) unlawful detention; e) mistaken identity and mistakes as to the nature of the act (including mistakes generated by the fraud or deceit of the accused; f) abuse of a position of authority or trust; and g) intimidating or coercive conduct, or other threat, that does not necessarily involve a threat of force, against the complainant or another person.

- **25-7**: State and territory sexual offence provisions should provide that the judge must, if it is relevant to the facts in issue in a sexual proceeding, direct the jury: a) on the meaning of consent, as defined in the legislation; b) on the circumstances where there may be no consent, and the consequence of a finding beyond reasonable doubt that one of these circumstances exists; c) that the person is not to be regarded as having consented to a sexual act just because (i) the person did not say or do anything to indicate that she or he did not consent; or (ii) the person did not protest or physically resist; or (iii) the person did not sustain physical injury; or (iv) on that, or an earlier, occasion the person consented to engage in a sexual act – whether or not of the same type – with that person or another person.
- Where evidence is led, or an assertion made, that the accused believed that the complainant was consenting to the sexual act, then the judge must direct the jury to consider: d) any evidence of that belief; e) whether the accused took any steps to ascertain whether the complainant was consenting or might not be consenting, and if so, the nature of those steps; f) the reasonableness of the accused's belief in all the circumstances, including the accused's knowledge or awareness of any circumstance that may vitiate consent; and g) any other relevant matter.
- **25-8**: State and territory legislation dealing with sexual offences should state that the objectives of the sexual offence provisions are to: a) uphold the fundamental right of every person to make decisions about his or her sexual behaviour and to choose not to engage in sexual activity; and b) protect children, young people and persons with a cognitive impairment from sexual exploitation.
- **25-9**: State and territory legislation dealing with sexual offences, criminal procedure or evidence, should contain guiding principles, to which courts should have regard when interpreting provisions relating to sexual offences. At a minimum, these guiding principles should refer to the following: a) sexual violence is a form of family violence; b) there is a high incidence of sexual violence within society; c) sexual offences are significantly under-reported; d) a significant number of sexual offences are committed against women, children and other vulnerable persons, including those from Indigenous and culturally and linguistically diverse backgrounds, and persons with a cognitive impairment; e) sexual offenders are commonly known to their victims; f) sexual offences often occur in circumstances where there are unlikely to be any physical signs of an offence having occurred.
- **26-2**: Commonwealth, state and territory Directors of Public Prosecution should ensure that prosecutorial guidelines and policies:
  a) facilitate the referral of victims and witnesses of sexual assault to culturally appropriate welfare, health, counselling and other support services at the earliest opportunity;
  b) require consultation with victims of sexual assault about key prosecutorial decisions, including whether to prosecute, discontinue a prosecution, or agree to a charge or fact bargain;

c) require the ongoing provision of information to victims of sexual assault about the status and progress of proceedings;
d) facilitate the provision of information and assistance to victims and witnesses of sexual assault in understanding the legal and court process;
e) facilitate the provision of information and assistance to victims and witnesses of sexual assault in relation to the protective provisions available to sexual assault complainants when giving evidence in criminal proceedings;
f) ensure that family violence protection orders or stalking intervention orders are sought in all relevant circumstances; and
g) require referral of victims and witnesses of sexual assault to providers of legal advice on related areas, such as family law, victims' compensation and the sexual assault communications privilege.

- **26-3**: Federal, state and territory governments and relevant educational, professional and service delivery bodies should ensure ongoing and consistent education and training for judicial officers, lawyers, prosecutors, police and victim support services in relation to the substantive law and the nature and dynamics of sexual assault as a form of family violence, including its social and cultural contexts.
- **26-4**: State and territory legislation should prohibit:
  a) any child; and
  b) any adult complainant, unless there are special or prescribed reasons, from being required to attend to give evidence at committal hearings in relation to sexual offences.26-6: permit the tendering of pre-recorded evidence of interview between sexual assault complainant and investigators as the complainant's evidence in chief
- **26-7**: Federal, state and territory legislation should permit child complainants of sexual assault and complainants of sexual assault who are vulnerable as a result of mental or physical impairment, to provide evidence recorded at a pre-trial hearing. This evidence should be able to be replayed at the trial as the witness' evidence. Adult victims of sexual assault should also be permitted to provide evidence in this way, by leave of the court.
- **27-1**: legislation should provide that complainants cannot be cross examined re: sexual reputation
- **27-2**: Federal, state and territory legislation should provide that the complainant must not be cross-examined, and the court must not admit any evidence, as to the sexual activities—whether consensual or non-consensual—of the complainant, other than those to which the charge relates, without the leave of the court.

Conclusion

Domestic and family violence is an issue of grave national concern. Given the especially high rates of domestic and family violence in the Northern Territory, it is essential that relevant legislation and legal processes are examined to ensure that responses afforded to victims are informed, appropriate and respectful. Victims of domestic and family violence engaging with the legal system should be supported, and every effort should be made to avoid the risk of being re-traumatised through legal processes. The barriers to reporting and seeking assistance regarding domestic violence are multiple, and fear of an unresponsive legal system should not be one of them.

We thank you for the opportunity to share our views and experiences on these issues, and look forward to hearing the outcomes of this review.