Lawyers for the People

AUSTRALIAN LAWYERS ALLIANCE

Family Violence Reforms Bill 2018

Submission to Tasmania Department of Justice

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

[1] www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input into the draft of the *Family Violence Reforms Bill 2018* (**'the Bill'**) issued by the Department of Justice for public consultation.

2. The Bill would create a new crime of persistent family violence. It would also amend s125A of the *Criminal Code* to, in effect, allow a jury to return a verdict of guilty for the crime of maintaining a sexual relationship with a young person (**'maintaining a sexual relationship'**) in circumstances where individual members of the jury are not satisfied of the same three unlawful sexual acts on the same three occasions.

The proposed persistent family violence charge

3. The ALA takes the view that the creation of a new crime is unnecessary.

Preliminary observations

4. What is proposed is a serious offence that can only be resolved on indictment. Yet the relatively low threshold that will need to be attained before a person is liable on the proposed elements of the crime mean that it will occur in extremely common, and relatively trivial, circumstances.

The observed 'pattern' of family violence matters

5. The experience of ALA members who practice criminal law in Tasmania is that a very high number of family violence offences come before the court in the following circumstances:

    (1) two persons have been in a relationship of some duration, and have been cohabiting;

    (2) the relationship begins to experience difficulties, albeit short of family violence as defined;

    (3) during an argument one of the parties, or a neighbour, calls the police;

    (4) police respond in accordance with policy and are confronted by two parties who are highly emotional;

(5) one or possibly both of the parties allege some form of physical force, albeit minor force, such as pushing;

(6) police issue a Police Family Violence Order ('PFVO') preventing contact between the parties;

(7) police charge one or possibly both of the parties with common assault;

(8) time elapses and the parties seek to 'withdraw' the charges, but find that they cannot do so;

(9) the parties attempt to revoke the PFVO, but find that doing so involves court proceedings that will not resolve for some time, and certainly not before the hearing of any criminal charge;

(10) the parties attempt to coordinate the resolution of the charges and the revocation of the PFVO, and in doing so breach the PFVO by making telephone calls;

(11) the parties come to be charged with further although relatively inconsequential offending, and accumulate a criminal record for family violence offending;

(12) although a party may be acquitted of the initial allegation that saw the extreme response of the law effectively attempting to sever their relationship, the repercussions continue to flow for some time in the form of attempts at revoking the PFVO and proceedings for subsequent breaches of the PFVO as a result of otherwise innocent contact.

6. Lawyers who appear in specialised family violence courts observe this pattern played out with some variation on a daily basis.

7. It is apparent to those lawyers, and to the ALA, that the responses to family violence, both in the sense of legislative and administrative responses, is that somewhat irrational human behaviour (not uncommon in all its frailties) is being criminalised, despite the fact that the conduct engaged in by the parties is often not 'criminal' within the word's traditional meaning..

The cost of the family violence 'system'

8. The ALA accepts that family violence in the true sense of that expression, and not the legislated sense that encompasses the imposition of economic burdens, is entirely unacceptable.

9. The extreme response that has been playing out in Tasmanian courts with increasing severity since 2004, with the passage of the *Family Violence Act 2004,* has however come at considerable cost to the community.

10. The pattern described above not infrequently includes variations such as one of the parties to the relationship having a disability, and the other party being the carer for that person. The pattern then sees the person with a disability separated from his or her carer, and sometimes made homeless.

11. The operation of the family violence 'system' that has developed since 2004 leaves the parties to the relationship, their family members, their legal representatives, and in some cases, judicial officers, with a profound sense that justice is unable to be done. This is clearly capable of eroding public confidence in the administration of justice.

12. Moreover, it is not uncommon for a person who has been affected by relatively minor family violence, and who did not want to see an overwhelming response from police officers, to be so disillusioned with the family violence 'system' that they express regret at having reported an incident in the first place.

13. It is into this family violence 'system' that the government proposes to introduce the crime of persistent family violence.

A new wave of liability

14. The ALA's immediate concern is that almost every person who comes before the court for family violence offending at any point will be liable for the new crime. It is the exception, and not the rule, for a person to commit a single, stand-alone count of family violence.

15. It follows that a charge of persistent family violence will almost always be available to Tasmania Police and to the Director of Public Prosecutions.

How will the new crime be charged?

16. There are two possibilities in terms of how the new charge would be used, given the potential frequency of its application. Either it will always, or will usually be used; or it will be used less frequently than it is considered to be available, according to prosecutorial discretion.

Consequences of charging the new crime whenever it is available

17. If the charge will always be used, or will usually be used, it is self-evident that this will come at an enormous cost to the taxpayer.

18. The Supreme Court of Tasmania is already experiencing a backlog, and the best case-management efforts of his Honour Chief Justice Blow appear to have done little to alleviate the obvious need for the appointment of more full-time judges.

19. Aside from the direct burdens on the Court, the Legal Aid Commission of Tasmania lacks adequate funding for the demands on its resources. It presently pays the private profession, with which it competes, at (as a minimum) less than half of the hourly rate that most private practitioners charge. It also pays at a rate considerably less for comparable work than other Australian jurisdictions.

20. If the Legal Aid Commission is not adequately resourced for the increased burden that the introduction of the crime of persistent family violence will create, this will inevitably flow-on to other, less serious matters, which will then not be funded, and to private practitioners continuing to leave the criminal defence bar.

21. The direct consequence of less serious matters not being funded, and of private practitioners continuing to leave the criminal defence bar is that more defendants will be unrepresented in court, placing a further burden on the court system.

22. Given amendments to the *Evidence (Children & Special Witnesses) Act 2001* s8A that prevent defendants from cross-examining persons said to be affected by family violence, the potential for injustice in other cases is increased.

Consequences of charging the new crime in limited instances

23. Alternatively, if persistent family violence offending is charged on few occasions relative to the number of cases in which liability could conceivably arise, then what is proposed is to

invest prosecution with the discretion (and the understanding) that persistent family violence offending should only be charged in egregious instances of family violence.

24. If this is what is intended, a better approach than relying on prosecutorial discretion to limit the scope of liability would be to raise the threshold of liability, thereby avoiding liability arising in most of the cases that come before the courts.

25. This raises the next question; namely, the justification for the low threshold that is proposed.

Why should such a low threshold be used?

26. Aside from economic concerns, the ALA is concerned by the notion that three instances of family violence, however minor, will see a person prosecuted on indictment in the Supreme Court.

27. To express these concerns the following hypothetical case study is canvassed:

    Defendant X is charged with common assault on his partner, Complainant Y, after she reports that he has punched her in the face during an argument. Police also make a Police Family Violence Order against X, preventing him from contacting Y directly or indirectly by any means. The following morning Y tells X's mother, 'tell him that I love him and that I only told them he'd hit me because I wanted him out of the house'. The message is passed on, and X asks his mother to reply, 'I love you too and I will fight this all the way'. The parties then engage in telephone calls about how they propose to have the Police Family Violence Order revoked. As a result of the indirect contact by his mother, and as a result of the telephone calls, a further 6 counts of breach of PFVO are charged against X.

28. If X pleads guilty to all of the charges, or is found guilty, is it supposed that the sentencing orders would not deal adequately with the criminality, and that a charge of persistent family violence is instead warranted?

29. It is the experience of ALA members who have worked in Tasmanian courts over many years that the sentencing process in respect of one count of common assault and six counts of breach of Police Family Violence Orders would be tailored to those offences. The offences would then appear in a defendant's record as what they are.

30. Covering them with the label of 'persistent family violence' adds nothing to the legal process.

31. Aside from the observation that the government wishes to *'[employ] a range of strategies to reduce levels of family violence in the State and to [improve] the way Tasmania's justice system*

deals with perpetrators of family violence', on what evidence is it argued that the introduction of the crime will assist in reducing levels of family violence, or improve how the justice system deals with 'perpetrators'?

32. The ALA makes the observation that, within the observed pattern of most family violence cases before the court, elevating relatively minor offending to the Supreme Court of Tasmania for purely ideological reasons connected with punishment of 'perpetrators' does nothing to reduce family violence.

Concern about the manner in which persistent family violence offending could be proven

33. The final aspect of concern about the new crime relates to the manner in which it could be found proven, namely by a jury not needing to be satisfied that the same three family violence acts were committed on the same three occasions.

34. This concern will be articulated below in conjunction with concern about the proposed amendment to s125A in a similar regard.

Conclusion

35. The ALA's opinion is that there is no demonstrated need for the new crime, and that its introduction will prove costly and potentially damaging to the justice system.

The proposed amendment to s125A — the proposed manner for the proving of persistent family violence offending

Introduction

36. That ALA is opposed to the notion that a person could be found guilty of the crime of maintaining a sexual relationship, or the proposed crime of persistent family violence, in circumstances where their jurors do not agree on the same three acts having been committed on the same three occasions.

The critical typological distinction between 'umbrella' crimes and course of conduct crimes

37. Before considering the reasons why the amendments should not be put before parliament, a fundamental distinction must be drawn between 'course of conduct' crimes, and crimes that are an 'umbrella' descriptor for discrete, underlying offences.

38. In *Chiro v The Queen* [2017] HCA 37, Kiefel, Keane, and Nettle JJ said at [22]:

> *'With offences of that [course of conduct] kind, unparticularised evidence of an accused's conduct may be relevant and admissible as establishing a connection between various acts sufficient to amount to a "course of conduct" and there is no need to show that the individual acts which comprise the course of conduct are in themselves unlawful or constitute underlying offences. By contrast, the offence at issue in KBT was not a course of conduct offence properly so called, but one comprised of discrete underlying offences, more similar to the offence of unlawful stalking contrary to Ch 33A of the Criminal Code (Q), and, therefore, was an offence that required unanimity by the jury as to each of the underlying offences found to have been proved.'*

39. Maintaining a sexual relationship and the proposed persistent family violence are not 'course of conduct' crimes. Both are umbrella descriptors for three particularised relevant acts. There is no criminal act in the general relationship itself between the defendant and complainant.

40. Distinction must be drawn between maintaining a sexual relationship and persistent family violence and the crime under the *Criminal Code (Qld)* s229B of maintaining a sexual relationship with a child.

41. The crime under the Queensland *Criminal Code* is a true course of conduct crime, in that the relationship itself is the essential physical element of the crime: *R v LAF* [2015] QCA 140 per McMurdo P at [4].

The significance of the typological difference between 'umbrella' crimes and course of conduct crimes

42. Once this distinction is drawn the fundamental jurisprudential difficulty with the amendments emerges: if the 'umbrella' crimes are constituted by at least three discrete, underlying crimes, the State can only prove guilt beyond reasonable doubt by proving at least three discrete, underlying crimes. Guilt for the 'umbrella' crime is a consequence of proof of guilt beyond reasonable doubt in respect of the three discrete, underlying crimes.

43. Were those underlying crimes tried alone, a unanimous or majority verdict would be required in respect of them. If the jury rejected one of the three underlying crimes, and therefore the 'umbrella' crime, it could still bring in a verdict on the remaining two crimes; a verdict that would still need to be unanimous or by majority.

44. It is instructive to consider the following voting pattern for a trial of maintaining a sexual relationship, were it held today.

	Crime 1	Crime 2	Crime 3	Crime 4	Crime 5	Crime 6	Crime 7	Crime 8	Crime 9	Crime 10
Juror 1	G	NG	G	NG	NG	NG	NG	NG	NG	NG
Juror 2	NG	G	NG	G	NG	NG	NG	NG	NG	NG
Juror 3	NG	NG	G	NG	G	NG	NG	NG	NG	NG
Juror 4	NG	NG	NG	G	NG	G	NG	NG	NG	NG
Juror 5	NG	NG	NG	NG	G	NG	G	NG	NG	NG
Juror 6	NG	NG	NG	NG	NG	G	NG	G	NG	NG
Juror 7	NG	NG	NG	NG	NG	NG	G	NG	G	NG
Juror 8	NG	NG	NG	NG	NG	NG	NG	G	NG	G
Juror 9	G	NG	NG	NG	NG	NG	NG	NG	G	NG
Juror 10	NG	G	NG	NG	NG	NG	NG	NG	NG	G
Juror 11	NG	NG	NG	NG	NG	NG	NG	NG	NG	NG
Juror 12	NG	NG	NG	NG	NG	NG	NG	NG	NG	NG

45. The jury splits 10:2 on each underlying crime. In this particular example, where each juror votes 'not guilty', the juror does not merely think that the State has not proven guilt beyond reasonable doubt, but believes that the defendant is innocent.

46. Were this the voting record, the jury would be required to bring in a verdict of not guilty to the 'umbrella' crime. It would then be asked about each underlying crime in the alternative, and it would have to return verdicts of not guilty in respect of each. The accused would go home, an innocent person.

47. But if the amendments were passed, the jury would have to convict the defendant, because each juror has found at least one underlying crime proven beyond reasonable doubt.

48. To be clear: the conviction for maintaining a sexual relationship, a crime of having committed at least three particular crimes, would rest on a verdict where 10 out of 12 jurors held a positive belief that that the accused was not guilty, and was innocent, of each of the particular crimes in question: but the law would require them to find otherwise.

49. It is the view of the ALA that an amendment such as this grossly distorts the process of reasoning that is undertaken by a fact finder when deciding liability for a crime based on particular acts. As such it risks producing gross miscarriages of justice.

Conclusion

50. The amendment in respect of s125A, and the corresponding amendment in respect of the proposed crime of persistent family violence, should not be put before Parliament. If it is passed it will be a parliament-countenanced form of miscarriage of justice, because it will result in innocent people being convicted and going to gaol.

Yours Sincerely,

Fabiano Cangelosi

Tasmania President & State Director
Australian Lawyers Alliance