



Submission

Family Violence Reforms Bill 2018

August 2018

women's
legal
service
tasmania

Introduction

Women's Legal Service Tasmania is a not-for-profit organisation providing free and confidential legal advice to women in all areas of Tasmania. As well as telephone advice, WLST can also provide ongoing legal assistance with casework and representation.

WLST provides clients with information about their legal and non-legal options, including referral to other legal services and law firms, or to appropriate support services.

WLST represents women from low socio-economic backgrounds, those who are unable to afford legal assistance and those who do not qualify for a grant of legal aid. The majority of our casework is in family law, often with a focus on family violence.

WLST is committed to making the legal system more accessible and responsive to the issues affecting women in Tasmania.

We wish to provide you with a submission from our service drawing on our experiences assisting women in Tasmania.

Our submission is primarily focused on how the proposed amendments to the *Criminal Code Act 1924* and the *Evidence (Children and Special Witnesses) Act 2001* will impact victims of family violence.

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SUBMISSION:

Amendment to Criminal Code by inserting a new offence of Persistent Family Violence

The proposed *section 170A* is a new offence aimed at strengthening family violence laws in Tasmania.

The proposed reforms also seek to amend *section 125A* of the *Criminal Code (Maintaining sexual relationship with young person)*, arising from recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse and the High Court decision of *Chiro v The Queen [2017] HCA 37*.

While we suspect the introduction of these two amendments at the same time was not intended to make them operationally synonymous, analysis of the two provisions highlight some helpful parallels and some issues with the practical construction of *section 170A*.

Sexual offending against children often comes to light through an initial complaint, leading to the revelation of other offences and sometimes other complainants upon police investigation. Individual charges are laid and the case is then forwarded to the Director of Public Prosecutions to discretionally determine whether a charge of Maintaining will proceed upon indictment.

It seems unlikely that an offender will always commit (at least) three distinct serious family violence offences in a short space of investigative time, prior to any of the offences being dealt with. This may foreseeably occur in the instance of breaching a family violence order, however it is unclear whether multiple breaches alone will suffice to enliven the discretionary *s170A* charge. Where the offences are unable to be neatly referred to the Director as a group of fresh offences, will police be able to refer a combination of fresh offence(s) and the offender's criminal history? The construction of *s125A* suggests not, as pursuant to *section 125A(6)(b)*, an offender may not be charged with Maintaining and the other alleged acts which give rise to the Maintaining charge upon indictment. If *s170A* can be enlivened with a combination of fresh offences and criminal history, this issue of duplicity will need to be considered.

The new *s170A* relies on a number of definitions used in the *Family Violence Act 2004*, including the definition of 'family violence offence' which appears to limit its reach to three or more summary offences only. Arguably *s170A* needs its own expanded definition to encompass a wider range of offences. There are a number of other serious offences appropriately characterised upon their facts as family violence offences, which do not appear in the *Family Violence Act 2004*, namely Wounding, Rape and Grievous Bodily Harm. While the intention of the new section is sound, restricting its ambit to summary offences only makes it unclear where the indictable *170A* sits on the spectrum of seriousness or the gravity of the sentence it might attract. The entry of *170A* into the Code is otherwise redundant as the individual alleged acts themselves could be charged and attract a higher penalty.

What constitutes 'Persistent' is also undefined and requires clarity. Over what period of time? Can there be multiple complainants? What features over and above simpliciter charging will satisfy the Director in charging Persistent Family Violence. If a combination of fresh offences and criminal history can be relied upon to seek the Director's discretion, who will be responsible for identifying patterns of offender behaviour, a nexus between offences and gathering information for referral to the Director. The amendments indicate that Family Violence Offences from other states may be included, which makes this task even more onerous.

Family Violence is generally systematic, persistently occurring and offenders are often undeterred by court orders and sanctions. It's accepted that over time, the factors that will support the Director's

discretion to charge will become clearer, however it would be helpful to define the range of general factors that may be relied upon.

It is preferred that a consistent approach to bail is maintained, in that the presumption against bail for a family violence offender remains.

WLST is concerned that women defending themselves to family violence may be unintentionally caught within the ambit of s170A by virtue of dual charging in family violence incidents. WLST routinely sees police also charging women in particular with the offence of assault when defending themselves against acts of family violence or protecting children. Persistent family violence may already be an issue in these relationships, prior to charges being laid. A victim who is reluctant to report may therefore find themselves the subject of a charge pursuant to s170A rather than the perpetrator whom they have not reported.

Ideally s170A would operate to provide a decrease in the incidence of Family Violence in Tasmania and WLST agrees that amendments such as these are a step toward this. Therefore, it is necessary for sentences to punish but also encourage positive change amongst offenders.

Amendment to section 125A of the Criminal Code

The proposed amendment to section 125A of the Criminal Code is supported in that it simplifies the role of jurors, which may in turn lead to more successful prosecutions. When presented with the overly legalistic task of unanimously agreeing to at least three offences out of a range of technically constructed offences, the likelihood of misinterpretation and confusion is arguably high.

The sentencing Judge will no longer be required to ask the jury which of the alleged acts they have relied upon. The Judge will determine which three acts are proven beyond a reasonable doubt and broadly sentence taking in to account the nature and character of the acts. Presumably a directed verdict would be given prior to juror's consideration of the facts in circumstances requiring it.

Amendment to Part 3 of the Evidence (Children and Special Witnesses) Act 2001

These amendments operate to exclude a defendant from cross-examining a complainant in a family violence context. WLST supports this amendment however accepts that this creates a need for greater access to legal representation. Complainants in family violence proceedings are often traumatised and their capacity to give evidence can be compromised by the presence of the defendant. In the worst circumstances cross-examination is a form of subjecting the victim to further abuse.

Putting contradictions to a witness is a fundamental principle of procedural fairness, and the importance of this role is best undertaken by counsel in our view. It is a concern however, that counsel may be brought in to act in the limited capacity of cross-examining without the time and resources to provide due consideration to the matter holistically. WLST recommends that this service be provided by a legal entity adequately resourced to meet the specific demands of the role to a high standard.

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