13 September 2021

Department of Justice
Office of the Secretary
GPO BOX 825
HOBART TAS 7001
via email: haveyoursay@justice.tas.gov.au

Dear Brooke,

Re: Family Violence Reforms Bill

The Tasmanian Aboriginal Legal Service (TALS) is an Aboriginal and Torres Strait Islander Legal Service (ATSILS) providing quality, culturally appropriate, accessible, equitable, and non-judgemental services to Aboriginal & Torres Strait Islander people. TALS specialises in criminal, civil, family law matters including community legal education, advocacy and policy changes to support Aboriginal people in the justice system. We are a member-based, independent, not-for-profit, and incorporated organisation that advocates for law reform. Our goal is to halve Aboriginal Tasmanians' rate of negative contact with the justice system in a decade.

Family violence in Aboriginal and Torres Strait Islander communities is a scourge wreaking untold damage and trauma among communities. Nationally, Aboriginal and Torres Strait Islander women are more than three times as likely to suffer family violence compared with non-Indigenous women; 3 in 5 Aboriginal & Torres Strait Islander women have experienced physical or sexual violence by a male intimate partner; they are 11 times more likely to die as result of assault and their children are at greater risk of exposure to family violence.[1]

In Tasmania the National Aboriginal and Torres Strait Islander Health Survey (NATSIHS) showed that in 2018-19, 16.7 per cent of Aboriginal women in Tasmania aged 15 years and over reported experiencing physical harm or being threatened with physical harm in the last 12 months. Of the approximately 10,250 Aboriginal women (aged 15 years and over) in

[1] Our Watch- Changing the Picture as found at, https://media-cdn.ourwatch.org.au/wp-content/uploads/sites/2/2020/09/20231759/Changing-the-picture-Part-2-AA.pdf

Tasmania in 2019, about 1,700 might have experienced physical harm or experienced being threatened with physical harm.[2]

The Tasmanian Aboriginal Legal Service wants to ensure people resorting to family violence are held accountable for their behaviour. If an Aboriginal person commits an offence, they should be dealt with by the law just as any other person. We know Aboriginal women can have intimate partner relationships with Aboriginal men or non-Aboriginal men, however we must not forget that historically Aboriginal men are stereotyped as abusers. There needs to be understanding that Aboriginal men can very easily become generational victims. It is with that knowledge we are nervous with the proposed benchmark to be set when making a determination on whether a person is a Serial Family Violence Perpetrator.

We recognise when we are discussing victim/survivors and perpetrators in this light we want to support women and children to make sure they are safe. However, we promote the perpetrator having a fair hearing to address their behaviours and prevent violence and trauma from recurring. It is challenging for us to consider all these complex factors. It should be noted that TALS does not condone family violence. But we want to ensure all factors are taken into consideration.

This piece of legislation requires further consideration and consultation with experts in the field to consider all the parameters related to SFVP declarations. For example, the degree and levels to which it becomes severe enough for a perpetrator to be labelled a SFVP. These degrees include the number of offences.

TALS also wishes to identify the relatively high number of Aboriginal & Torres Strait Islander people who are involved in the system in comparison to other Australians and believe we have a significant stake in how the Bill is developed and implemented. The Closing the Gap principles should be considered—and specifically the promotion of Aboriginal & Torres Strait Islander agency to make change through collective action with governments.

Penalties for Family Violence Crimes

Family violence offences can result in various criminal charges depending on the circumstances of the crime, the harm involved, and a defendant's prior convictions. TALS agrees there should be SFVP declarations to support this to enforce restraining orders, bail conditions and firearm restrictions. However, there is a need for legislators to further consider the criteria for becoming a SFVP.

The *FAMILY VIOLENCE REFORMS BILL 2021*

1. The Government is seeking comment in respect of the introduction of legislation that focuses on family and sexual violence that will amend provisions to several pieces of legislation but particularly the *Family Violence Act 2004.*
2. It is suggested that TALS should provide comment in relation to the following proposed amendments:

[2] Department of Justice Tasmania Round table Workbook 2020.

a. The power for the Court to make a 'Serial Family Violence Perpetrator Declaration';
b. Mandated behavioral change program participation as a condition of a Family Violence Order;
c. Expansion of the definition of "harassing";
d. The extension of list of conditions available under Police Family Violence Orders; and
e. Ability to amend past offences to 13A offences on Records of Prior Convictions.

Serial Family Violence Perpetrator Declaration

3. The Government is seeking to provide the Court with the power to declare a person to be a 'Serial Family Violence Perpetrator'. As is stated in the explanatory note, the Serial Family Violence Perpetrator (SFVP) declaration established in this Bill is designed to identify perpetrators who repeatedly commit family violence offences against a single partner or multiple and successive partners.
4. A SFVP declaration is recorded on a person's criminal record and will restrict their ability to possess a firearm, be considered as an aggravating factor at sentencing for a subsequent family violence offence committed while the declaration is in force and be considered in a parole application. It will also inevitably affect whether bail is granted if a person declared to be a SFVP is taken into custody on a subsequent family violence matter.
5. A person can be declared a SFVP for a period of up to five years if they are at least 18 years old and the person:
    a. has been convicted of at least two indictable family violence offences committed on separate days; or
    b. three family violence offences committed on separate days if they are summary offences or a combination thereof; or
    c. they have plead or been found guilty of the crime of persistent family violence at section 170A of the Criminal Code.
6. This effectively means a person can be declared a SFVP for a lengthy period of five years for sending three text messages in contravention of a FVO, or in instances where two parties may provoke violent behaviour from one another over a relatively short period, but where otherwise they may have led, and continue to lead, a completely non-violent lifestyle. This situation would unfairly prejudice people who may, for example, be aiming to end a toxic relationship and remove their belongings from a house they shared with another family member and the situation turns quickly sour and results in physical violence upon the removal of their personal possessions. This threshold is far too low and gives no consideration to the often reciprocal nature of family violence matters and their escalation.
7. The legislature has given little indication of any applicable practice directions proposed to be given to the Court. We cannot be certain whether the SFVP declaration will affect a client who may face court in unrelated matters, such as drug related charges or common assault charges. To consider the status of a SFVP declaration and then deny bail on a common assault charge, would unfairly prejudice our clients' rights to the presumption of innocence in circumstances unrelated to family violence. This should be further clarified or restricted in its scope within the legislation.

8. Clause 10 of the Bill (which creates a proposed section 29A of the Family Violence Act 2004) provides that the Court can make a SFVP declaration if they consider it to be "warranted". This term is not defined. We are concerned that this is ambiguous and that without guidance, inconsistency in how these provisions are applied is highly likely. This is very likely to disadvantage our clients.
9. Where a risk assessment is to be used and tendered to the court this also needs to be referenced. There is a body of literature now that questions the validity of risk assessments in cultural contexts more broadly – Aboriginality should not be in and of itself considered a risk. There is also some literature available that suggests that domestic violence risk assessment tools need further evaluation and review (Ringland 2018).
10. The Court also now has the power to order a report to inform whether it should make such a declaration. Reports can be a double-edged sword whereby they can be of assistance at times but also be highly prejudicial at other times. A report of this nature will inevitably address the likelihood of recidivism and given the low threshold on which a person can be declared a SFVP, it is likely that such reports will be ordered frequently and will therefore prejudice our clients where such reports are not favorable. Discretion as to who can compile the reports and what they seek to address should be restrictive under the legislation so as not to promote or allow any prejudicial bias to our client base.
11. As previously stated, we consider that the threshold of committing three summary family violence offences on separate days as being an incredibly low threshold for making a SFVP declaration. For example, this could encompass a person who sends three text messages on three separate days to a person in breach of a Police Family Violence Order. It is also problematic in terms of continuing offences (such as emotional abuse or intimidation) as this Bill contains no provision for such offences. We suggest that the following alternatives should be considered:
    a. Removing SFVP declarations altogether in relation to summary offences and retaining it for indictable offences only;
    b. Increasing the number of summary offences required for the making of a declaration; or
    c. Introducing a prescribed list of offences (such as Common Assault, emotional abuse or intimidation etc.) so that SFVP declarations can only be made in circumstances of actual physical violence or serious emotional abuse at the upper end of the summary offences scale.
12. We accept that it may be appropriate to make SFVP declarations in relation to persons who are convicted of two indictable family violence offences or whom have been convicted of persistent family violence in the Supreme Court.
13. A person's record is already considered in bail applications and the declaration would simply make it easier to identify quickly.
14. A person who is convicted of a family violence offence is already extremely unlikely to be granted a firearms license or be able to possess a firearm and it is a condition of a family violence order in 99% of cases that we see that a person not possess a firearm.
15. The making of a SFVP declaration where the offences are trivial in nature (such as breaching Police Family Violence Orders and Family Violence Orders by text message, being at the premises at the invitation of a protected person, or by making social media

posts, could result in offenders falling into a spiral of continuing criminality due to the consequences of being declared to be a Serial Family Violence Perpetrator.

We consider that the legislation needs to be clear about the types of offending where a Serial Family Violence Perpetrator declaration can be made and the necessary level of seriousness of offences which form part of the making of the declaration. This cannot be left to the Director of Public Prosecutions to make decisions about in guidelines. Guidelines can be made, varied and rescinded without consultation with the community and it is important that instead of the issuing of such guidelines, the legislation should distinguish between offences which cause serious physical and/or emotional harm and those which are more trivial in nature. This would ensure that any Serial Family Violence Perpetrator declarations are made in situations which are appropriately serious.

Mandated participation in behavioural change programs

16. The Bill proposes that the Court should have the power to require individuals to participate in behavioral change programs (such as the Family Violence Offender Intervention Program) as a condition of a Family Violence Order.
17. The practical consequences of this are that if an individual is subjected to a condition in an order requiring them to participate, and they fail to do, they have committed an offence punishable by imprisonment.
18. At present, if the Court wishes to require individuals to engage in such programs, they are sentenced to a Community Correction Order which has a condition in it that they participate. If they do not participate, they can be brought before the Court on the application of Community Corrections. The person can then be called on to explain why they did not engage. We do not see why the current arrangements are not working and question the need for this change.
19. We consider that allowing conditions of this nature to be incorporated into Family Violence Orders will deter individuals from consenting to Family Violence Orders without admissions and that it will not accomplish anything that isn't already happening.
20. We also note that the Bill does not prohibit such conditions from being imposed as conditions within Interim Family Violence Orders, which can be made without the Court needing to be satisfied of anything. It would be harrowing if individuals could be required to participate in programs before they have been convicted of a family violence offence.
21. If this amendment is pursued, the funding levels of existing programs should be considered – given that many of our clients have difficulties participating due to living in rural/remote areas and do not have access to transport. It is also noted that certain programs, such as FVOIP, have not previously been available to individuals who are not male and those who are in same-sex or diverse relationships.
22. There is limited availability across Australia and in Tasmania of BCP's with a focus on the cultural experiences of Aboriginal family violence offenders. This means that the drivers of violence in the Aboriginal context are culturally nuanced and require a dedicated program response. To mandate Aboriginal offenders to a program that ignores context with regard to their cultural or familial background may exacerbate their likelihood to disengage with the program and increase the likelihood of repeat offending.

23. Aboriginal BCP's should be available across the state, or failing that, the current program employ Aboriginal staff to cater to the needs of Aboriginal offenders. The latter approach needs to include an evaluation over time to ensure that both the staff and offenders are getting the most out of the program.

Expansion of the definition of 'harassing'

24. The Government proposes to expand the definition of 'harassing' in the Family Violence Act to include conduct which is of an "unwelcome nature".
25. We consider that this is an ambiguous term and that this would significantly expand the scope of what is currently considered 'harassing' at law.
26. It is not clear whether this would impose an objective or subjective test.
27. We consider that it needs to be prescriptive – i.e. it should be phrased in a manner such as "you must not communicate in ways in which you have previously been advised not to".

Extension of conditions available under Police Family Violence Orders

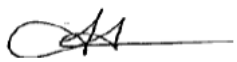
28. We have serious concerns currently about the ability of Police to be able to have such a significant impact on people's liberty. As is the case in other jurisdictions, we see that the power of Police should be limited to short periods until such time that the matter can come before a Court. We therefore do not support Police Family Violence Orders in their current state.
29. The proposed amendment, which would allow Police to include additional conditions, is vague and unclear. It represents an extension of Police power. We suggest that if it is pursued, the amendment should be made clear so that it is evident what it is that the Government is seeking to achieve from this amendment.

Ability to amend past offences to 13A offences on Records of Prior Convictions

30. The Government is proposing that the Court should be able to record prior offences as 'family violence offences' when individuals come before the Court and their prior record indicates that there are offences that they have committed which are family violence offences.
31. We consider that such measures should include provision for procedural fairness and natural justice – and as such, if the Prosecution intend to make an application that prior matters be declared as family violence offences pursuant to section 13A of the Family Violence Act, the Prosecution should serve the defendant or their counsel with all material that they seek to rely upon.
32. It would be procedurally unfair to allow for such applications to be made with no notice and where the defendant has no real way to respond.

TALS would like to discuss the matters raised in our submission to demonstrate the need for further extension of the TOR and time to adequately respond.

Yours faithfully,



Tracey Dillon
Chief Executive Officer