

# domestic violence LEGAL SERVICE

## SUBMISSION TO THE AUSTRALIAN PRODUCTIVITY COMMISSION INQUIRY INTO ACCESS TO JUSTICE ARRANGEMENTS

December 2013

### 1. Introduction

This submission supplements the Northern Territory Legal Aid Commission's (NTLAC) submission of December 2013.

The Domestic Violence Legal Service (DVLS) shares NTLAC's view that there are significant access to justice concerns in the NT and widespread unmet legal need. This submission focuses on the area of domestic violence order proceedings and our experience that this area in particular sees high level of unmet legal need with associated high levels of social and economic costs borne by affected individuals and the broader community. In particular, the DVLS submission focuses on the legal needs of defendants, who currently experience an acute lack of legal services that is ultimately to the detriment of victims of domestic violence and the broader community.

For services engaged in providing support to victims, the dearth of legal assistance to perpetrators is a constant source of frustration. The best services for victims, especially for those who choose to stay in their relationships or for separated parents whose parenting arrangements require ongoing contact, will be limited in what they can achieve where perpetrators remain largely unassisted and unchanged through their contact with the criminal justice system.

### 2. About the Domestic Violence Legal Service

DVLS is funded by the Northern Territory Government Department of Attorney-General and Justice and operates under the auspices of the Northern Territory Legal Aid Commission.

DVLS is a standalone specialist legal service (two lawyers and one administration coordinator) providing a free service to victims and people at risk of domestic and family violence in the Darwin and Greater Region.

Annually, DVLS provides court duty assistance, individual legal advice and casework assistance to around 1250 victims and people at risk of domestic and family violence. Around 80 % of clients are women and 20 % men. Around 20 % of clients are Indigenous, and 15 % are born overseas.

In addition to legal assistance, the service provides referrals to victims and defendants who come into contact with the service to a range of other agencies and services, including counselling, parenting programs, drug and alcohol services, family law mediation and family law services.

DVLS also carries out advocacy on DV-related issues, contributes to law and policy reform in DV-related areas, and provides community legal education about NT domestic violence law and legal processes to community groups, government agencies and NGOs.

### **3. Domestic Violence in the Northern Territory**

Domestic violence is a leading cause of immediate and intergenerational harm, economic loss and incarceration, and all the more so in the NT. It is vital that legal and associated services are made available as part of a wider strategy to reduce the impact of and incidence of domestic violence, in line with the Commonwealth and Territory commitments under the *National Plan to Reduce Violence against Women and their Children*.

Recent NT government statistics indicate that over 70% of sentenced prisoners had one or more convictions for domestic violence-related crimes.<sup>1</sup> Moreover, the statistics show that repeat offending is a major factor in DV-related offending. In 2012, Domestic Violence Orders were made against 4123 individuals, of whom 1833 had been previously recorded as a "Domestic Violence Offender". [1] In relation to assaults in the NT, in the June quarter 2013, of a total of 1877 assaults, 1137 were domestic violence-related.<sup>2</sup>

### **4. Unmet legal need – Domestic Violence Order proceedings**

There is an acute unmet legal need for defendants and to a lesser extent victims in domestic violence order proceedings in urban and remote locations in the NT.

Most legal aid organisations do provide advice and assistance to defendants in DVO matters where there is a criminal matter on foot at the same time, though this assistance may be limited in the circumstances where the primary focus is in relation to the criminal proceedings.

In Darwin, the North Australian Aboriginal Justice Agency (NAAJA) have recently reinstated a limited court duty service for Indigenous defendants in Darwin despite, as we understand it, there being no specific funding to cover this service. We understand that no comparable service is available in other parts of the NT.

Where there is no related criminal law proceeding, the lack of legal advice or representation, especially for defendants in remote areas, is highly problematic given domestic violence and domestic violence-related crime is widely recognised as one the major factors in the NT's high Indigenous incarceration rate.

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<sup>1</sup> 1: NT Department of Attorney General and Justice, unpublished factsheet distributed at Domestic and Family Violence Reduction Strategy Consultation, Darwin, 28 November 2013

<sup>2</sup> NT Department of Attorney General and Justice, "Northern Territory Crime Statistics: Data through September 2013", accessed at <http://www.pfes.nt.gov.au/~media/Files/Police/Crime-statistics/131122-NT-crime-statistics-Sep-2013-PDF.aspx> on 03/12/13].

Defendants both in Darwin and the non-urban centres do not have access to a legal or other service with the capacity to assist not only with the immediate court action, but also with taking other actions, such as behaviour change, counselling, parenting, rehabilitation or other programs to assist in minimizing the risk of further domestic violence and domestic violence related criminal offending.

The Commonwealth has recently expanded the reach of Family Violence Prevention Legal Services to a larger number of remote centres. This in some part addresses the gap in services to victims, however, as an NT-wide review will show, there remain some significant gaps for victims in domestic violence order proceedings. As with defendants, when victims do not receive appropriate legal advice, they are less able to seek adequate or appropriate levels of protection, and less likely to be referred to relevant support and other agencies.

#### **5. Unrepresented defendants:**

As it is the case that in most NT urban and non-urban centres there is no court duty service for Indigenous or non-Indigenous defendants in standalone Domestic Violence Order proceedings, most defendants will appear in court unrepresented.

According to the NTLAC guidelines, it is only in exceptional cases and if an applicant satisfies both a merits and means test, that legal aid is granted to defendants in DV matters. Therefore, the defendant needs to have the knowledge and confidence to request an adjournment and then organize the appointment.

For many, accessing the limited available services is simply too daunting, including for reasons of language, homelessness, mental health, low literacy and drug and substance abuse issues. Further, where defendants obtain advice, the quality may vary in part because it is dependent on the defendant knowing to request all relevant statements from Police or the applicant and providing these to the lawyer as the basis for their advice (few defendants will realize this is something they need to do). On the next Court occasion, the defendant will also need to correctly recall the advice provided and be able to communicate this to the Court.

Self represented defendants are often overwhelmed by the reality of speaking for themselves at the bar table. It is not uncommon for defendants who had indicated they would seek an adjournment for legal advice, struggle to articulate this at the bar table and then when either the Magistrate or the Police Prosecutor asks them if they want to consent to the orders sought, they simply agree.

As a consequence, where defendants do not have access to legal assistance at Court, we frequently observe that unrepresented defendants:

- consent to orders without completely understanding the terms of the orders or how long they will run for, putting them at high risk of breaching the orders
- consent to orders for which there may not, on the available evidence, be sufficient grounds for some or all of the orders sought
- consent to inappropriate orders, for example, orders that do not provide them with a mechanism to make arrangements to see their children, with the consequence that a further burden is placed on the Court system when an application to vary is later made or the order is breached
- consent to orders without fully realising the ramifications, such as loss of gun licence for the life of the order plus 5 years, which for some will affect future employment or hunting;

- consent to orders without understanding that breach of the orders is a criminal offence with penalties of up to 2 years' jail and/or a fine of up to \$57,600
- consent to orders without realizing that the only way to change the orders is by application to the Court, with many believing the parties can later agree between themselves to disregard the order when their circumstances change
- consent to orders where the conditions may conflict with bail, parole, suspended sentence or other conditions that the defendant may be subject to. In these circumstances, there is a high likelihood of the defendant breaching either bail or sentencing conditions or the DVO because of confusion and lack of knowledge about the conflicting conditions.
- contest matters where there may be little or no grounds to do so, with the consequence the Court system is further overburdened by the listing of matters for hearing, many of which do not ultimately run. Where the defendant does not appear at their hearing, inappropriate orders may be made in their absence
- miss the opportunity to work on an outcome that facilitates the defendant engaging in positive behaviour change.
- miss the opportunity to receive a full explanation of how to make arrangements to see their children under orders made and/or be referred as appropriate to family law mediation or family law advice
- miss the opportunity for referral to appropriate behaviour change or other support services.

By ensuring defendants have access to well-resourced legal services with the capacity to provide support and referrals more generally, a great deal of offending could be avoided.

## **6. Early intervention**

The timely provision of legal advice and assistance in domestic violence order proceedings would enable to defendants in these matters to understand at an early stage:

- what acts constitute domestic violence and therefore what acts will constitute a breach of a domestic violence order
- ensure orders made are appropriate to the individual family's circumstances to avoid breaches of overly restrictive orders, and
- provide an early point of referral to domestic violence behaviour change programs and other relevant services
- provide an early point of referral to family mediation services and/or family law advice.

Such assistance should be properly funded in order to ensure that services are sufficiently specialized to give a holistic and comprehensive, culturally appropriate service that effectively meets the needs of both victims and defendants. In addition, the special nature of domestic violence and the particular vulnerabilities of victims indicate that funding guidelines for specific DV defendant legal assistance services should always include the requirement for a merits test and providers should be required to ensure their practitioners are trained in family violence issues and family violence risk assessment.

## **7. Justice Reinvestment**

The data clearly shows that recidivism among incarcerated domestic violence offenders is high. This suggests that alternatives to incarceration need to be considered.

In the NT, where there is a high percentage of Indigenous men and women involved in domestic violence matters, the provision of culturally appropriate responses by the legal system is clearly indicated. For this reason, as well as ensuring legal and associated support services are provided in ways that are culturally appropriate, consideration must also be given to culturally appropriate and effective criminal justice responses.

Our observation in working with Indigenous women is that for some, incarceration of the offender, with whom many still wish to pursue the relationship, only places further stressors on the victim. While in prison, the victim may be subject to pressure and harassment from the offender's or her own family. Further, the offender may become more predisposed to violence against the victim when released, not just because of a misguided sense of grievance "that she put me here", but also because of jealousies developing about the victim's actions while the offender is in jail. While the rationale and the behaviour are unacceptable, it is a reality that needs to be addressed in an effective way so that the system actually provides victims with a safe outcome.

As well as sensible legal advice to defendants and access to effective behaviour change programs, this may be achieved by working with Indigenous communities and groups on culturally appropriate responses to domestic violence (for example community courts, circle sentencing) and other forms of restorative justice and justice reinvestment.

Underpinning this is a clear need for research to help guide such initiatives. Such research must investigate the causes of domestic violence offending, and what will or has been effective in achieving behaviour change and in reducing offending and recidivism.

## **8. Conclusion – The way forward**

The consequence of failing to address the access to justice deficits in relation to both victims and defendants is that early opportunities to engage with victims and defendants to break the cycle of domestic violence are lost and the social and economic costs continue to accrue.

Early intervention and effective justice reinvestment approaches in domestic violence order proceedings will have significant benefits in contributing to reduced DV offending and concomitant reductions in DV crime and associated social and economic costs.

As a starting point, NTLAC have recommended a Northern Territory Government review and analysis of the gaps in DV legal services in the NT (**enclosed**). Such a review would clearly identify gaps and priorities in terms of service provision. DVLS supports this recommendation. Such a review would ideally also involve the Commonwealth, as both it and the NTG play a critical role in providing DV-related legal and other services in the NT.

Access to justice through funding of appropriate and effective legal and associated support services for defendants and victims where the gaps exist across the NT will yield benefits in terms of reduced offending, reduced burdens on the Courts and better outcomes for victims and the wider community.

Ancillary to this is the need for research to underpin effective behaviour change and restorative justice approaches to domestic violence offending.

We thank you for considering this submission. Should you require any further information please do not hesitate to contact the writer on 08 8999 7977.

Yours faithfully  
DOMESTIC VIOLENCE LEGAL SERVICE

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Enclosure:

A: Susan Cox letter to Northern Territory Attorney-General, 13 September 2013

B: Attachment to Susan Cox letter, "Domestic and Family Violence: Where are the Gaps?", 3 May 2012.