

Evidence (National Uniform Legislation) Amendment Bill 2015 (the Consultation Bill)

The Consultation Bill (refer attached) amends section 19 of the *Evidence (National Uniform Legislation) Act* to ensure that a victim of an offence involving domestic violence is compellable as a witness and cannot object to giving evidence under section 18 of the *Evidence (National Uniform Legislation) Act*.

Background

In order for a witness to give evidence in court, they must be competent and compellable, meaning the witness is both capable of giving evidence and may be required at law to do so. Traditionally at common law, a spouse was incompetent (and thus could not be compelled) as a witness for or against the defendant. However, an exception to this common law rule existed in criminal proceedings, where it was alleged that the defendant had used personal violence on the spouse. The common law position has been gradually altered by statute with the *Evidence (National Uniform Legislation) Act* codifying the common law in relation to evidence.

Sections 12 and 13 of the *Evidence (National Uniform Legislation) Act* deem that every person is competent to give evidence unless they are for some reason incapable, for instance due to a mental, intellectual or physical disability. Section 12 also provides that if a witness is competent they are compellable and, therefore, may be required to give evidence regardless of whether they choose to or not. Section 18 of the *Evidence (National Uniform Legislation) Act*, however, operates as an exception to this presumption and provides that a spouse, de facto partner, parent or child of the defendant may object to being required to give evidence.

Upon the witness making an objection, the presiding judge must determine whether the witness should be required to give evidence by considering:

- (a) the likelihood that harm would or might be caused (whether directly or indirectly) to the person, or to the relationship between the person and the defendant, if the person gives evidence; and
- (b) whether the nature and extent of the harm outweighs the desirability of having the evidence given.

Section 18 is only applicable in criminal proceedings and therefore does not apply to domestic violence order applications, which are civil proceedings under the *Domestic and Family Violence Act*.

Section 19 of the *Evidence (National Uniform Legislation) Act*, however, provides exceptions to section 18 if:

- the victim in proceedings for an offence is under 16 years;
- the proceedings are for a contravention of a domestic violence order; or
- the proceedings are for an offence against section 43BI (incitement) or a provision of Part VII of the Criminal Code (attempts and preparation to commit offences, conspiracy, accessories after the fact) and the intended offence is one in which the victim would be under 16 years.

Accordingly, in a trial for a breach of a domestic violence order, a spouse will still be compellable as a witness. However, if the trial is for an alleged assault against the spouse, the spouse may rely on section 18 to avoid giving evidence.

Other jurisdictions which have, like the Northern Territory, adopted the *Uniform Evidence Act* generally provide that spouses may not rely on section 18 to avoid giving evidence in cases relating to offences against children and domestic violence offences. The equivalent Tasmanian provision (section 19 of the *Evidence Act 2001*) further restricts the operation of section 18 if the defendant's spouse, parent or child is the victim, whether it be in relation to violence or the threat of violence or an offence alleged to have been committed in relation to property of the spouse. Similarly, in New South Wales, the operation of section 19 of the *Evidence Act 1995* is not restricted to a breach of domestic violence order and includes any offence of personal violence committed against a spouse.

It is accepted that there may be situations where it is undesirable to disrupt an otherwise healthy relationship (ie if a spouse is called to give evidence against a defendant who has been charged with a criminal offence in which they are not the victim). However, the Northern Territory Government holds particular concern that allowing victims of domestic violence to be excused from giving evidence hinders the successful prosecution of individuals who commit offences against their family members by enabling pressure from the accused and family members to influence proceedings, thus continuing the cycle of violence and putting victims at greater risk in the long-term.

The Consultation Bill:

- (a) provides for the amendment of section 19 of the *Evidence (National Uniform Legislation) Act* by inserting new section 19(2) which operates as an exception to section 18 and provides that alleged victims of domestic violence are unable to object to giving evidence and, are therefore, compellable as witnesses (see clause 4);
- (b) adopts the definition of 'domestic violence', as defined in section 5 of the *Domestic and Family Violence Act*, so that all forms of domestic violence are captured, rather than just assault (see clause 4);
- (c) amalgamates the transitional provisions of the *Evidence (National Uniform Legislation) Act* and establishes divisions for which all future transitional provisions may fall under (see clauses 5 and 6); and
- (d) provides transitional provisions for new section 19(2) (new sections 216 and 217) (see clause 7).

Proposed risk management strategy

In drafting the proposal, the following potential risks have been identified and considered:

- (a) victims of domestic violence who are compelled to give evidence may experience repercussions from either the accused or other family members;
- (b) compelling victims to give evidence may dissuade those victims from reporting incidences of, or seeking assistance for, domestic violence; and
- (c) victims of domestic violence who are unwilling to give evidence may be at risk of proceedings for contempt of court.

The following risk management strategies have been developed to address these potential risks:

- (a) a community education strategy will be implemented which aims to make it clear to the victim, accused and family members that victims have no choice but to give evidence. The strategy will involve information fliers, community posters, information sessions and workshops with support workers. The Department of the Attorney-General and Justice will also work with the judiciary in order to raise awareness of the operation of the provision to persons who are present in court;
- (b) the Northern Territory Government has contributed \$12 million to the Safety is Everyone's Right 2014-17, Whole-of-Government Northern Territory Domestic and Family Violence Strategy. Through this initiative, intensive support will be provided to victims throughout the court process and will continue following the conclusion of proceedings;
- (c) mandatory reporting provisions under the *Domestic and Family Violence Act* aim to ensure that domestic violence incidences are reported; and
- (d) the Director of Public Prosecutions will continue to exercise discretion as required under the Office of the Director of Public Prosecutions Guidelines regarding whether to initiate and continue prosecution proceedings, with a particular focus on the victim's wishes, safety and fitness to give evidence in domestic violence cases (noting that any assessment will be conducted in conjunction with the Witness Assistance Service).

Making a submission

You are invited to provide comments on both the Consultation Bill and the proposed risk management strategy to the Department of the Attorney-General and Justice. Comments can be as short or informal as an email or letter, or can be a more substantial document. Comments do not have to address all aspects of the Consultation Bill.

Comments can be sent to:

Director, Legal Policy
 Department of the Attorney-General and Justice
 GPO Box 1722
 DARWIN NT 0801

However electronic copies of comments are preferred and should be sent whenever possible by email to Policy.AGD@nt.gov.au

The closing date for comments on this Consultation Paper is <insert date>.

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Non-confidential feedback or comments are likely to be made publicly available and published on the Department of the Attorney-General and Justice website. The Department of the Attorney-General and Justice may draw upon the contents of such and quote from them or refer to them in reports, which may be made publicly available.