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# **Family Violence: Strengthening Our Legal Responses**

## **Consultation Paper**

### **Sexual Assault Support Service Inc. (SASS) Submission**

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Sexual  
Assault  
Support  
Service

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## Consultation Paper

### *SASS Submission*

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## Introduction

Sexual Assault Support Service (SASS) is a free and confidential service for people of all ages who have been affected by any form of sexual violence, including intimate partner sexual violence. We also provide counselling to children and young people who are displaying problem sexual behaviour (PSB) or sexually abusive behaviour (SAB), along with support and information for their family members and/or carers.

The range of support options available at SASS includes counselling, case management (including safety planning) and advocacy. We also provide information and support to professionals, and deliver training workshops and community education activities in a range of settings including local schools and colleges.

SASS’s Crisis Response Service provides 24 hour, seven day a week crisis response and support to survivors of recent sexual assault, and their support persons (including family members, friends, and professionals). SASS coordinates forensic medical examinations and police statements, and can assist with referrals to other agencies. The crisis response service is also available for people who are experiencing trauma responses, including high levels of distress or anxiety, as a result of recent or historical sexual assault incidents.

SASS welcomes the opportunity to respond to the *Family Violence: Strengthening Our Legal Responses consultation paper*. Family violence is a significant issue for both adult and child/adolescent clients at SASS. Our service statistics show that of all new referrals in the last half of 2016, approximately 40% of adult female clients and 18% of child/adolescent clients had experienced or were currently experiencing family violence. These numbers only reflect clients who self-identified at the intake stage as having experienced family violence and therefore the actual statistics may be much higher, as through their engagement with SASS women are likely to become more informed about the pervasive nature of family violence and be able to recognise their own experience.

We outline the following points regarding intimate partner sexual violence (IPSV), and note that these provide valuable contextual information in implementing legal responses to family violence:

- Approximately 40-45% of women who suffer physical abuse from an intimate partner are also forced into sexual activities by them.<sup>1</sup>
- Between 5-12% of Australian women experience sexual violence from a partner within their lifetime.<sup>2</sup>
- The presence of sexual violence within a relationship often correlates with the perpetration of more severe physical violence, including lethal violence.<sup>3</sup>
- Women who have experienced IPSV are significantly more likely to have experienced childhood sexual abuse than those who experience physical family violence only.<sup>4</sup>
- Women who experience IPSV often experience more severe negative impacts than those who experience physical family violence alone, including decreased self-esteem and coping skills, increased fear and anxiety problems and high levels of self-blame.<sup>5</sup>
- Women are far less likely to report IPSV than they are to report other forms of family violence, and service providers are generally less likely to specifically ask about it.<sup>6</sup>
- Women who have experienced both sexual and physical family violence have been found to present at support services with lower levels of wellbeing and coping than women who have experienced only physical family violence.<sup>7</sup>

In addition to our specific comments on the issues below, SASS would also like to express our support for the proposal within the Family Violence Reforms Bill (2016) to record offences as a family violence offence on a person's criminal record (i.e. the insertion of a new Section 13A within the *Family Violence Act 2004*).

## **Issue 1: Breaches of protection orders by protected persons**

Q1: should the current legislation be amended to provide that a person protected by a family violence order cannot be charged with an offence of instigating, abetting or aiding the breach of a protection order?

SASS understands that the purpose of a family violence protection order is to protect the victims of family violence. Charging a victim with a contravention of a protection order does not serve this purpose, but instead may put an already vulnerable person at further disadvantage. Whilst we appreciate that the law as it currently stands is designed to deter abuse of court processes, we are concerned that it does not support a victim-focused approach.

SASS therefore recommends that Tasmania adopt the legislative approach taken in South Australia, where a protected person will not be charged with aiding or abetting a contravention of the order *unless* their conduct resulted in another protected person on the order being placed at risk of harm.

## Issue 2: Mandatory reporting of family violence

Q2: Should Tasmania's family violence legislation include provisions for mandatory reporting of family violence?

At this stage, SASS does not support mandatory reporting of family violence. Our reasoning is as follows.

### **Potential to discourage victims from seeking support:**

For some individuals the oversight and proximity of the state is not perceived as trusted and safe. The threat of family violence being reported - and therefore the potential for state intervention into their lives - may discourage vulnerable, isolated people who are victims of family violence from seeking support.

### **Potential negative impact on the therapeutic relationship:**

The requirement to report family violence is also likely to negatively affect the therapeutic relationship between SASS practitioners and clients. Disclosing to a professional such as a counsellor or health worker requires a strong level of trust, and mandatory reporting may jeopardise trust significantly. Furthermore, family violence involves the removal of power, choice and self-determination from the person being abused. Mandatory reporting risks replicating this suppression of power and choice. Instead, it is vital to focus on building family violence victims' ability to trust themselves and to reclaim their autonomy.

### **Capacity of police and sector to cope with demand:**

Mandatory reporting of family violence would require a substantial amount of initial investment and ongoing resources to ensure that reports are properly investigated and responded to, and victims are appropriately supported following reporting. In its current form, it is unlikely that the social services sector could cope with the additional burden of work resulting from mandatory reporting.

### **Potential to exacerbate a family violence situation:**

Mandatory reporting has the potential to exacerbate, rather than address, a family violence situation. The Tasmanian Children's Commissioner has argued that "If police turn up at a doorstep on the report of a mandatory notifier, but not in the heat of the moment in dealing with an immediate family violence offence, there is a serious risk that a victim's private plans to escape or end the violence will be disrupted."<sup>8</sup>

We also note that a number of experts, including the Australian Law Reform Commission,<sup>9</sup> do not support mandatory reporting. The Australian Domestic and Family Violence Clearinghouse also sets out its 'strong' opposition to mandatory reporting of domestic and family violence by health professionals on a number of grounds, including:

- there is no evidence that it improves safety for victims;
- a significant number of victims are opposed to it;
- victims might be deterred or prevented from seeking medical treatment; and

- police do not have the capacity or willingness to investigate all reported cases.<sup>10</sup>

Significant concerns were also raised by participants contributing to the review of the *Family Violence Act 2004* (Tas).<sup>11</sup> These echoed the above sentiments, namely that such a requirement would affect adult therapeutic relationships and deter victims from seeking assistance. On the basis of this feedback, the review paper suggested excising the mandatory reporting provision from the Act.

Whilst it did not support mandatory reporting, the Australian Law Reform Commission did suggest that the effects of the introduction of mandatory reporting requirements in the Northern Territory could be monitored and evaluated, and the results carefully reviewed by Tasmania in considering whether to proclaim the commencement of the Tasmanian mandatory reporting provision. The ALRC suggested that the following matters, among others, would be worth consideration:

- variations in the number of reports made to police;
- how many of these reports are then properly investigated;
- victims' responses (in the short and longer-terms) to the fact that the report was made and to the subsequent police investigation; and
- any variation in the number of persons accessing services, including family violence, medical and counselling services, that could reasonably be attributed to mandatory reporting laws.<sup>12</sup>

SASS supports this suggestion on the basis that this could provide useful direction for Tasmania. SASS would also be interested in investigation of one of more of the following other potential options:

- Mandatory reporting by a prescribed person only where that person suspects that a victim has experienced or is at risk of experiencing serious physical harm.
- Mandatory reporting where a prescribed person knows or suspects that a FVO or PFVO has been breached, or is going to be breached, and that this has or will put the victim at risk of physical harm.

### **Issue 3: Definition of 'family relationship'**

Q3: Should the definition of 'family relationship' in the *Family Violence Act 2004* be extended to a broader number of family members who are victims of family violence?

Q3A: If so, what relationships should be covered?

Whilst SASS does support an expansion of the definition of family relationships, we believe that the distinction must be made between intimate partner relationships and other family relationships. Our reasoning for this is outlined below.

In our experience, family violence comes in many forms – including from a child towards their sibling or parents; within extended family relationships; and from carers towards those they are caring for. Including these relationships within family violence law would enable better

support and response options for victims. Such relationships could be defined as per the definition used in Victoria (see the Victorian *Family Violence Protection Act 2008*, section 8). In particular, we support the definition being extended to include relationships that have come to approximate the type of relationship that would exist between family members. In deciding whether a relationship fits this definition, we suggest that provisions be adopted such those outlined in section 8 (3) (a - i) of the Victorian *Family Violence Protection Act 2008*. This is also important in recognising diverse family structures.

However, we propose that intimate partner relationships remain as a separate category within family violence. Expanding the definition without retaining this distinction takes the focus away from the gendered nature and power dynamics of family violence. Australia has made significant gains in recognising these, and it is vital that this focus and momentum not be lost through expansion of the definition. We would therefore support an expanded definition of relevant relationships within family violence legislation that comprised two separate elements: family violence between intimate partners, and family violence between people in other types of familial or 'family like' relationships. This would enable individuals who experience violence in family (or 'family like') relationships to pursue similar legal recourse and support to those available to intimate partners.

We also note that any expansion of the definition must come with a significant expansion of resources and services directed to supporting victims. Expansion without this concomitant support would result in a large number of victims being identified but having no or limited avenues of support available.

#### **Issue 4: Law of self-defence in the context of family violence**

Q4: Should the Criminal Code Act 1924 be amended to provide that a person may have an honest belief that they are acting in self-defence and that their conduct may be regarded as a reasonable response in the circumstances as the person perceives them to be even if the person is responding to a harm that is not immediate or that appears to be trivial?

SASS supports amending the Criminal Code as described above. As raised within this Consultation Paper, and also within the Tasmanian Law Reform Institute's Final Report into the law relating to self-defence, the historical interpretation and application of this defence has largely excluded claims from (predominantly female) defendants who kill in response to prolonged family violence.

SASS strongly recommends reform to the criminal law in Tasmania to specify that imminence is not necessary where self-defence is raised in the context of family violence. It is crucial that this reform clarifies that actions may be considered to be in self-defence where the threat is not immediate, but instead ongoing or more remote in time. This approach is significantly more consistent with the nature of family violence, which, as the Tasmanian Law Reform Institute indicates, 'is a cumulative and complex experience with the threat of violence ever present'.<sup>13</sup> Specifically, we recommend the adoption of a provision into the Tasmanian *Criminal Code 1924* similar to s322M (1) (a) in the *Crimes Act 1958* (Vic) that explicitly states that the harm responded to by the accused does not need to be immediate. In recommending

this, we agree with authors Hopkins and Easteal that the Victorian reforms, including sections 322M and 322J, go furthest in terms of ensuring engagement with the experiences of abused women.<sup>14</sup>

Furthermore, SASS recommends that reforms be made to the criminal law in Tasmania to provide for jury direction where self-defence is raised in the context of family violence. We feel that this is a critical aspect of the potential reforms. Gross community misconceptions regarding family violence still exist in Australia. Findings from the 2013 National Community Attitudes towards Violence against Women Survey (NCAS) indicate that within the Australian community;

- 51% of respondents agree that most women could leave a violent relationship if they really wanted to;
- 78% agree that it is hard to understand why women stay in a violent relationship; and
- 9% agree that it is a woman's duty to stay in a violent relationship.<sup>15</sup>

These perceptions are highly likely to influence jury attitudes around the experience and dynamics of family violence. They are likely to lead jurors to raise questions such as why the accused did not leave the situation of family violence or seek help to escape the threat – in short, why the accused resorted to lethal violence when other options could have been available. As Hopkins and Easteal highlight,

Viewed from the perspective of the average judge or juror, uninformed about the dynamics and effects of domestic violence, the killing may appear entirely unreasonable; as either irrational or retaliatory. However, from a battered woman's perspective — having lived with serious abuse under the constant threat of violence, having developed a heightened capacity to perceive danger from her batterer, for whom escape has failed or is not a realistic option — there may have been no other reasonable alternative...to determine whether a woman's actions were justified in self-defence requires a holistic appreciation of her predicament.

Jury directions are therefore crucial in attempting to counter the myths and lack of understanding surrounding family violence prevalent in the Australia community, and in enabling a jury to understand why an accused may have acted in self-defence.

SASS specifically recommends that Tasmania adopt similar provisions to those set out in the *Jury Directions Act 2015* (Vic) sections 59-60.

## **Issue 5: Effects of tendering no evidence in family violence cases**

Q5: Should the law be amended to provide, where a matter is discontinued without hearing and an acquittal is entered as a result of no evidence tendered, that the evidence may be admissible as relationship, tendency or coincidence evidence in the family violence context?

SASS supports amendment to the law in this area to enable the court to understand the full context and extent of an offender's behaviour. Family violence offenders normally display a

pattern of controlling, dominating or coercive behaviour over their victims, and it is critical that they be sentenced on this basis. As Eastaugh notes, “Any one ‘incident’ is in actuality just a small part of a complex pattern of control and cannot be adequately understood nor its gravity measured in isolation from that background.”<sup>16</sup>

## **Issue 6: Persistent contraventions of family violence orders**

**Q6:** Should there be the creation of legislative provisions to provide for a court to declare at the time of sentencing a repeat family violence perpetrator to be a persistent perpetrator of family violence?

SASS supports this proposal. We also support the approach proposed in the Consultation Paper that when declaring a person to be a persistent perpetrator of family violence, the court must take into consideration the particulars of the individual perpetrator. Similarly, the Sentencing Advisory Council of Tasmania suggests that “the nature of the conduct giving rise to the breach should also be a factor in fashioning an appropriate response to the persistent rate of breaches of protection orders.”<sup>17</sup>

**Q6A:** If so, what conditions should the court consider in making a declaration?

SASS suggests that the commission of indictable offences, and any escalation in behaviour for non-indictable offences, should warrant an offender being declared to be a persistent perpetrator of family violence.

## **Issue 7: Consequences of a persistent perpetrator of family violence declaration**

**Q7:** What orders should be available to courts following a perpetrator being declared as a persistent perpetrator of family violence?

See our response below.

**Q7A:** Should there be a persistent perpetrator of family violence register and should information about persons on the register be publicly available or available only for limited purposes?

SASS supports the establishment of a persistent perpetrator of family violence register, with information on the register available to police officers and particular members of the public. A similar nationwide scheme in the UK, called ‘Clare’s Law’, was used by more than 4000 women within a year of its establishment, 1300 of whom received a disclosure about their partner’s violent history.

We suggest that this register should contain information about family violence offences only, and include the date of the offence and the sentence imposed. To ensure that the system is not abused, certain access requirements would need to be established. These could include:

- that the person applying prove they are in a relationship with the individual whose record they are accessing; and
- that they agree to keep the information contained in the register confidential.

The implementation of a register would also need to come with clear criteria as to which types of offences would warrant recording; guidance to victims on how to use the information; and support to victims following their access to the register.

SASS suggests that before implementing such a scheme, the Tasmanian Government review the evaluation of the NSW Domestic Violence Disclosure Scheme (evaluation forthcoming in 2017).

Q7C: Should a police officer of the rank of inspector or above or authorised by the Commissioner of Police, have the power to refuse bail in the case of a persistent perpetrator of family violence for a minimum mandatory period?

SASS strongly supports this.

Q7D: If so, how long should this period be following arrest for an offence that constitutes family violence, or following contravention a protection order?

SASS recommends that the time period be a minimum of 24 hours, to enable sufficient time to organise supports for the victim whilst the offender is detained in custody. This would not necessarily need to apply for all breaches, but for particularly serious ones involving a persistent perpetrator.

Q7E: Should a minimum mandatory sentence of imprisonment be imposed for subsequent contraventions of protection orders for the duration of the declaration?

SASS does not support a minimum mandatory sentence as we believe that the court should have autonomy in determining the appropriate sentence. We also note the criticisms of mandatory sentencing for family violence offences outlined by the Sentencing Advisory Council of Tasmania in their 2015 report; namely that it generally does not act as a deterrent, can undermine the independence of the court, requires a substantial increase in funding for incarceration, and, as it does not take the particulars of a case into account, can result in unjust outcomes for the offender.<sup>18</sup>

We endorse the alternative recommendation of the Council to give consideration to developing a set of guiding principles to guide the sentencing exercise in family violence cases. The Council states,

These principles would canvas the purposes of sentencing in this context, the relevance of specific victim and offender related factors and provide guidance on the relationship between particular features of the offending and offence seriousness. The development of such guidelines is likely to foster greater understanding of offending in the family violence context and to enhance public confidence by giving greater transparency to the sentencing process.<sup>19</sup>

## Q7F: If so, what mandatory period of imprisonment should be imposed?

See our response above.

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- <sup>1</sup> Wall, L. (2012). *Asking women about intimate partner sexual violence. ACSSA Resource Sheet*. Australian Centre for the Study of Sexual Assault, p.1.
- <sup>2</sup> Mouzos, J. and Makkai, T. (2004). *Women's Experiences of Male Violence. Findings from the Australian Component of the International Violence Against Women Survey (IVAWS)*. Research and Public Policy Series, No. 56. Australian Institute of Criminology, p.46.
- <sup>3</sup> Wall, L. (2012). *The many facets of shame in intimate partner sexual violence. ACSSA Research Summary*. Australian Centre for the Study of Sexual Assault, p.7; Heenan, M. (2004). *Just "keeping the peace" A reluctance to respond to male partner sexual violence*. Issues, No. 1, March. Australian Centre for the Study of Sexual Assault, p19; Cole, J., Logan, TK., and Shannon, L. (2005). "Intimate Sexual Victimization Among Women with Protective Orders: Types and Associations of Physical and Mental Health Problems". *Violence and Victims*. Vol. 20, No. 6 (December 2005), p.697.
- <sup>3</sup> Australian Law Reform Commission (ALRC) and NSW Law Reform Commission (NSWLRC). (2010). *Family Violence - A National Legal Response. Final Report, Volume 1*. ALRC Report 114, NSWLRC Report 128. Commonwealth Government, p.1106.
- <sup>4</sup> Cole et al (2005), "Intimate Sexual Victimization"; and Howard et al. (2003). "Counseling Services for Battered Women: A Comparison of Outcomes for Physical and Sexual Assault Survivors". *Journal of Interpersonal Violence*. Vol. 18, No. 1. (July 2003), p.719.
- <sup>5</sup> See Wall (2012), *The many facets of shame*, p.3; Howard et al (2003), "Counseling Services"; and Cole et al, (2005), "Intimate Sexual Victimization".
- <sup>6</sup> Wall (2012), *The many facets of shame*, p.1.
- <sup>7</sup> Howard et al (2003), "Counseling Services", p.727.
- <sup>8</sup> Australian Law Reform Commission (ALRC). (2010). *Family Violence A National Legal Response*. ALRC Report 114. Australian Government, pp. 364-65.
- <sup>9</sup> Ibid, pp.359-366.
- <sup>10</sup> Australian Domestic and Family Violence Clearinghouse. (2010). *Response to Northern Territory Proposal for Mandatory Reporting of Domestic Violence by Health Workers* (2008), cited by the Australian Law Reform Commission, p.362.
- <sup>11</sup> Urbis. (2008). *Review of the Family Violence Act 2004 (Tas)*. Prepared for the Department of Justice, Tasmanian Government.
- <sup>12</sup> Australian Law Reform Commission (2010), p.366.
- <sup>13</sup> Tasmanian Law Reform Institute. (2014). *Review of the Law Relating to Self-defence*, Issues Paper No. 20, p.26.
- <sup>14</sup> Hopkins and Easteal, cited by the Australian Law Reform Commission (2010), p.646.
- <sup>15</sup> Webster et al. (2014). *Australians' attitudes to violence against women: Full technical report, Findings from the 2013 National Community Attitudes towards Violence Against Women Survey (NCAS)*. Victorian Health Promotion Foundation, Melbourne, Australia, p.112.
- <sup>16</sup> Easteal (2010), cited by the Australian Law Reform Commission (2010), p.832.
- <sup>17</sup> Sentencing Advisory Council of Tasmania. (2015). *Sentencing of Adult Family Violence Offenders*. Final Report No. 5, p.17.
- <sup>18</sup> Ibid, p.37.
- <sup>19</sup> Ibid.