LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY
Mrs Giulia Jones MLA (Chair), Ms Bec Cody MLA (Deputy Chair), Ms Elizabeth Lee MLA, Mr Chris Steel MLA

Inquiry into Domestic and Family Violence—Policy approaches and responses

Submission No. 13
ACT Director of Public Prosecutions

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ACT Legislative Assembly
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Via email: committees@parliament.act.gov.au

Dear Dr Cullen

Re: Inquiry into Domestic and Family Violence – policy approaches and responses

Please find attached my submission to the above inquiry.

Yours faithfully,

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Encl.

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Submission of the ACT Director of Public Prosecutions to the ACT Legislative Assembly Standing Committee on Justice and Community Safety Inquiry into Domestic and Family Violence – policy approaches and responses

INTRODUCTION

1. As the ACT Director of Public Prosecutions I am responsible for prosecuting almost all family violence related offences in the ACT.[1] Family violence offences cover a range of offences. In the main they involve personal violence offences, property offences or breaches of protection orders. The majority are prosecuted and finalised in the Magistrates Court. The very serious family violence offences such as murder and the infliction of grievous bodily harm are dealt with in the Supreme Court.

2. The majority of murders in the ACT are family violence related. The first part of 2015 was a particularly terrible period in the ACT for family violence homicides with three family violence murders in March of that year, followed by another in April. Those four matters were only finalised this year.

3. The ACT has seen a sharp increase in family violence prosecutions over the past six years. In 2011/12 503 family violence matters were commenced. In 2015/16 that had increased to 710, having increased from 517 the year before, an increase of 37%. For the most recent financial year it has plateaued to 687 but I anticipate the figures will continue to go up. The increase in prosecutions is not simply due to an increase in prevalence. As I noted in my annual report of 2015/16:

> These figures reflect the increased reporting of family violence and the commitment of this Office to prosecuting these offences. The increase is due, I would suggest, to the greater awareness of family violence in the community. Family violence was brought into sharp focus with a series of family violence related homicides in the early months of 2015. These shocking events and the greater awareness of family violence appear to have led to increased levels of reporting.

4. This Office has had a particular focus on the prosecution of family violence offences since the inception of the Family Violence Intervention Programme (FVIP) in 2000. We have a dedicated Family Violence Unit with six prosecutors and dedicated paralegal support. They work closely with two witness assistants who are involved in some of the family violence matters. Notwithstanding the specialisation of the Unit, the extent of family violence prosecutions is such that it cannot be kept within the Unit. There are simply too many family violence cases. All prosecutors in the Office are involved in the prosecution of family violence matters to some extent.

5. This Office has been at the forefront of Australian prosecutors in our innovative approaches to the prosecution of family violence matters for many years. An important part of our approach has been to take away the pressure placed on victims of family violence where they felt they had to make decisions about whether a prosecution should continue. Once a charge is laid the prosecution will proceed if there is sufficient evidence to put before the court.[2] It is often the case that due to family pressure complainants will request that charges be dropped. Our approach is to generally proceed if there is

[1] The Commonwealth DPP prosecutes matters involving Commonwealth offences, which occasionally might have an FV component.
[2] This is subject to public interest considerations although it is generally in the public interest that family violence offences are prosecuted.

evidence sufficient to found a prosecution. In this way, complainants are relieved of the pressure to decide what will happen with the charges. It is now widely understood in the legal community that a request from a complainant to withdraw charges is not a sufficient basis to discontinue the prosecution and as a result, the majority of family violence charges result in pleas of guilty being entered.

6. Other Australian jurisdictions are now adopting some of our practices.

7. I keep abreast of developments in other jurisdictions in the area of family violence and often make recommendations to the Attorney General and the Justice and Community Safety Directorate. Legislative amendments relevant to the prosecution of family violence offences that have emanated from my Office are as follows:

   - Introduction of family violence evidence in chief interviews in 2016;
   - Introduction of evidence in chief interviews for all complainants in sexual and violence offences in 2017;
   - Insertion of the offence of strangulation into the Crimes Act in 2015;
   - Prosecution power to review bail in 2016.

8. In addition my Deputy, Margaret Jones, is a member in the Family Violence Intervention Programme Coordinating Committee and a member of the Victim's Advisory Board, and the Sexual Assault Response Programme.

9. I will address terms of reference (a) and (b) in this submission. I have no comment in relation to the remaining terms of reference.

(a) ADEQUACY AND EFFECTIVENESS OF CURRENT POLICY APPROACHES AND RESPONSES IN PREVENTING AND RESPONDING TO DOMESTIC AND FAMILY VIOLENCE IN THE ACT

10. As referred to above, my Office has been actively involved in suggesting legislative reform to improve the experiences of victims of family violence when going to court and to improve the quality of evidence. From 2009 victims of family violence have been able to give evidence from a remote room linked to the court via an AV link. This was a major reform in the ACT that is yet to be fully adopted by other Australian jurisdictions. This reform made an enormous difference to victims giving evidence. The Family Violence Evidence in Chief (FVEICs) interviews introduced in 2016 is another reform having a major impact on prosecutions in family violence matters.

11. The ACT thus has an enviable record of reform in this area. However, there are a number of reforms that greatly strengthen the community's response to family violence which I will now address. I should say that most of these matters have already been raised by me in a law reform context:

1. Introduction of intermediaries for child and other vulnerable witnesses

Intermediaries are a communication conduit between lawyers and a child or vulnerable witness. Intermediaries have been utilised in England and Wales for 15 years, where the system is working particularly well and has complete acceptance in the legal community. They are people with specialist qualifications such as child psychologists and speech therapists. Questions of the child witness are put by the legal representatives. The intermediary rephrases the question so that it is put at a level that the child clearly understands.

2. *Permitting the use of relationship evidence*

We know that when family violence occurs it is rarely a one off incident. It is usually the case that many incidents of physical violence occur before a victim contacts police. Relationships in which family violence occur are often marked by emotional abuse, controlling and coercive behaviours and intimidation and threats. However when a court hears evidence of an offence, evidence is limited to that one particular incident that was reported. The court will generally not be permitted to hear evidence of the broader context in which the alleged offence occurred. Seemingly strange behaviour on the part of the complainant is therefore unexplained and can be used against a complainant to undermine their credibility. Queensland has legislated so as to permit such evidence to be led.[3] It is subject to the test of relevance.

3. *Streamlining the hearing and disposition of FV matters*

The recent desktop review undertaken by the Family Violence Intervention Programme Coordinating Committee noted delays in the finalisation of family violence matters. It found that 25% of the family violence cases considered were finalised in excess of 40 weeks from the date of the incident. It is desirable that family violence matters be heard as quickly as possible. Parties may still be cohabitating, or trying to move on with their lives. A quick resolution allows everyone involved to move on.

To deal with these delays, the review recommended block listing of family violence hearings and the abolition of case management hearings (CMH) in family violence matters.

Block listing has been an outstanding success in the Supreme Court, significantly reducing the delay in listing trials. It involves the over listing of trials during a relatively short period. Having an actual date ensures accused persons and their lawyers focus on the issues and the strength of the prosecution case. In the Supreme Court listing periods 50% of accused plead guilty on or before the date of the trial. Sometimes the figure can be considerably higher. If that same process were adopted for family violence hearings in the Magistrates Court, the very long delays we currently see could be reduced considerably. The Magistrate Court has started to move towards block listing – the first block listing in family violence matters is due to be held later this year. However this will only work if the block listing in the Magistrates Court takes place outside of the four Supreme Court criminal trial listing periods. Due to the perilous state of my Office's resources it cannot cover simultaneous intensive listing periods.

CMHs are a step along the way to the hearing of the matter that are not necessary and significantly add to delays. They are a poor use of resources of the court and my Office. I have suggested the abolition of CMHs for family violence matters in my recent annual reports. They were abolished for all other Magistrates Court matters in January 2015 and there is no reason to continue on with the practice in family violence matters.

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[3] **132B of the Evidence Act 1977**
Evidence of domestic violence 132B Evidence of domestic violence
(1) This section applies to a criminal proceeding against a person for an offence defined in the Criminal Code, chapters 28 to 30.
(2) Relevant evidence of the history of the domestic relationship between the defendant and the person against whom the offence was committed is admissible in evidence in the proceeding.

4. *Prohibiting or limiting the issuing of subpoenas on Victim Support SACT*

Victims of family violence are able to apply for financial assistance pursuant to the *Victims of Crime (Financial Assistance) Act 2016*. There is currently no prohibition or limitation on the issuing of subpoenas by defendants in criminal proceedings involving family violence or sexual offences on Victim Support ACT, nor is there any restriction on cross examination of complainants by defendants in relation to a complainant's claim for financial assistance. Indeed cross examination on claims for financial redress is the now the norm in trials where historic institutional child sexual abuse is involved, as these victims have often made some claim for financial redress. There have been cases where Victim Support ACT has been required to produce records of a personal nature relating to a client in answer to a subpoena issued in criminal proceedings where the client is the complainant in the matter. Cross examination on claims for financial redress is the now the norm in trials where historic institutional child sexual abuse is involved, as these victims have often made some claim for financial redress. The concern is that complainants in family violence hearings will likewise be cross examined about claims for financial assistance.

5. *Victim impact statements – increasing their use by protecting them from being produced on subpoena*

The recent desktop review undertaken by the Family Violence Intervention Programme found that victim impact statements (VIS) were underutilised in family violence proceedings. Previously police obtained the VIS early on in the proceedings. This meant that if the defendant pleaded guilty early on in the proceedings, the VIS was on the prosecutor's file and could be tendered in sentencing proceedings (which are often finalised on the day the plea is entered). There were some instances of lawyers for defendants obtaining the VIS on subpoena, then using that document to cross examine the complainant on differences between the VIS and the statement given to police by the complainant in relation to the offence. The VIS serves a very different purpose from a statement given to police about the actual offence. Following this practice developing, police have ceased to take the VIS until the offence is found proved. As sentencing proceedings are often finalised on the day the plea is entered, often a VIS is not obtained. An amendment to ensure that a VIS cannot be sought on subpoena would mean that police once again can obtain VIS early on in the proceedings.

6. *Targeting of less serious family violence offenders for intervention*

As part of sentencing, the court can order that an offender comply with directions of Community Corrections including attendance at programmes aimed at family violence offenders. In the ACT these programmes are focussed on the more serious offenders with records of previous offences. Offenders who are appearing in court for a first offence, and where that offence is not one of the more serious offences, are rarely required to attend programmes. This is in contrast to alternative models operating elsewhere where less serious and first time offenders are targeted by programmes.

Currently, an offender may come to court once or twice, enter a plea of guilty, and have the sentencing dealt with in 15 minutes or so. It is difficult to see how that in itself would bring about long lasting behavioural change.

We are missing out on opportunities to intervene with offenders at this early stage where behavioural change might be possible. Instead, the focus is on more entrenched, serious offenders. This is not to say that there is no place for intervention for the more serious offenders, but in terms of effectiveness, early intervention should play a significant role. It

seems likely that the majority of family violence offenders and their families would benefit from some sort of programme.

7. Sentencing

Recommendation 13-3 of the Australian Law Reform Commission's report *Family Violence – A National Legal Response (report 114)* (the ALRC report) published in 2010 recommended that sentencing legislation should provide that the fact the offence was committed in the context of a family violence relationship should not be considered to be a mitigating factor. I agree with this recommendation. The *Crimes (Sentencing) Act* could be amended along these lines.

In addition consideration could be given to including a further criterion relevant to sentencing in family violence matters – the extent to which the conduct is part of an ongoing relationship of intimidation, violence or control. That would make it clear that the court could take into account the ongoing nature of the relationship when sentencing, including taking into account conduct which while not criminal, is part of the exertion of power and control in the relationship (for example emotional and financial abuse, restricting access to family and friends and other features common to family violence).

8. Training for the judiciary and profession

Recommendation 26–3 of the ALRC report recommended that Federal, State and Territory governments and relevant educational, professional and service delivery bodies should ensure ongoing and consistent education and training for judicial officers, lawyers, prosecutors, police and victim support services in relation to the substantive law and the nature and dynamics of sexual assault as a form of family violence, including its social and cultural contexts. I strongly support this principle. It is particularly important for new members of the judiciary who may have had little experience in the area of family violence to receive appropriate and comprehensive education and training.

Training is also important for agencies that interact with victims of family violence, such as Corrective Services staff, including Community Corrective Services, and members and staff of the Sentence Administration Board.

(b) IMPLEMENTATION OF THE ACT GOVERNMENT'S 2016-17 FUNDING COMMITMENTS TO PREVENT AND RESPOND TO DOMESTIC AND FAMILY VIOLENCE IN THE ACT, IN PARTICULAR HOW OUTCOMES ARE BEING MEASURED

12. My Office received additional funding of $1.36m across four years ($340,00pa) in the 2015/16 budget which was stated to be for the purposes of "enhancing the Director of Public Prosecutions' (DPP) capacity to institute and conduct prosecutions of alleged family violence perpetrators so that the DPP's ability to contribute to co-ordinated criminal justice responses to family violence victims is strengthened". In my 2015/16 annual report I stated, in reference to this funding, after noting the 37% increase in family violence prosecutions from the 2014/15 period:

> In light of that, it has to be said that the small increase for the FV area of the Office in the last budget was modest indeed, and unfortunately will not compensate for the increase in work.

13. That remains the case. The additional funding was quickly absorbed by my Office. Family violence prosecutions are conducted by all prosecutors in my Office from the most junior who appear regularly in family violence bail matters, through to my Executive who prosecute family violence homicide cases. Family violence cases represent a large proportion of the time of prosecutors in my Office. They tend to require more time per matter then other matters, and take longer to progress through the Magistrates Court.

14. My Office has been recently been subject to an independent Strategic Review into the operations of the Office. The review found that the Office does not have sufficient resources to meet the work required of it, and a significant injection of funds is required. Without being properly resourced, and being sufficiently resourced to ensure we retain prosecutors at sufficiently senior levels, there will inevitably be challenges in maintaining the current high quality in family violence prosecutions.

Jon White SC
Director of Public Prosecutions
21 September 2017