



Tasmanian Council of Social Service Inc.

TasCOSS Submission to *Family Violence Reforms Bill 2021*

October 2021



**INTEGRITY
COMPASSION
INFLUENCE**

About TasCOSS

TasCOSS's vision is for one Tasmania, free of poverty and inequality where everyone has the same opportunity. Our mission is two-fold: to act as the peak body for the community services industry in Tasmania; and to challenge and change the systems, attitudes and behaviours that create poverty, inequality and exclusion.

Our membership includes individuals and organisations active in the provision of community services to Tasmanians on low incomes or living in vulnerable circumstances. TasCOSS represents the interests of our members and their service users to government, regulators, the media and the public. Through our advocacy and policy development, we draw attention to the causes of poverty and disadvantage, and promote the adoption of effective solutions to address these issues.

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Introduction

Thank you for the opportunity to make a submission in relation to the Family Violence Reforms Bill 2021 ('the Bill').

The Bill proposes to amend several pieces of legislation, including the *Family Violence Act 2004*, the *Criminal Code Act 1924*, the *Evidence Act 2001* and the *Sentencing Act 1997*.

Background and overview

Legislative reform has been identified as a strategy for responding to family violence in Tasmania,¹ and TasCOSS supports the review of existing legislation to ensure Tasmanian laws are in line with community expectations around family violence. The Bill contains a series of proposed amendments to various pieces of legislation, with the aim of reducing family violence and ensuring the criminal justice system is responsive to the needs of victim survivors of family violence.²

Introduction of a 'serial family violence perpetrator' scheme

The principal amendment proposed is the introduction of a scheme which can see offenders classified as 'serial family violence perpetrators', outlined in s4A of the Bill. The objective of the scheme is to allow the Courts and community to recognise that '*serial family violence perpetrators present a high risk of repeat and escalating offending*',³ and to '*provide for a heightened justice response proportionate to the severity of a perpetrator's family violence offending and assessed risk of future family violence*'.⁴

Under s29A, a Court or a Judge may declare an offender to be a 'serial family violence perpetrator' in the following circumstances:

- The offender is 18 years or older;
- The offender has plead guilty to, or has been found guilty of, a family violence offence;
- The offender has relevant priors for family violence offences committed within the previous 10 years
 - o On that conviction, either two indictable family violence offences (for example, stalking pursuant to s30 *Criminal Code 1924*) committed on different dates, or three summary offences (for example, common assault pursuant to s35 *Police Offences Act 1953*), or a single conviction for persistent family violence pursuant to s170A *Criminal Code 1924*
 - o Prior convictions for offences outside of the previous 10 years can be considered in 'exceptional circumstances', having regard to the following:
 - The level of risk presented by the offender
 - Their criminal record, antecedents and character
 - The nature of the offences
 - Any other matters considered relevant

¹ Tasmanian Government, *Safe Homes, Families, Communities: Tasmania's action plan for family and sexual violence 2019-2022*, (Action plan, July 2019) 28.

² Fact Sheet, Family Violence Reforms Bill 2021 (Tas).

³ Ibid.

⁴ Ibid.

If a Court or a Judge decides to make a declaration pursuant to this section ('SVFP declaration'), this declaration will be recorded on an offenders' criminal record. The SVFP declaration will remain in force for up to five years. Section 29D of the Bill also introduces a scheme for the SVFP declaration to be reviewed, either on application by the offender or the prosecution, which can result in the declaration being extended or discharged.

The Bill also proposes changes to other pieces of legislation which have impacts for people subject to the declaration. For example, s17 of the Bill amends the *Corrections Act 1997*, making a declaration a factor to be considered when decided whether to release a prisoner on parole. Pursuant to s6 of the Bill, a SVFP declaration is also to be considered an aggravating factor for the purpose of sentencing upon conviction for a family violence offence.

In a case where an SVFP declaration is made, the Bill directs a court or a judge to make a Family Violence Order (FVO) in respect of the offender subject to the declaration, regardless of whether an application (either by police or by an affected person) is before the Court, as long as they are satisfied on the balance of probabilities that the relevant threshold for the making of an order under the Act has been met.⁵

Other changes introduced by the Bill

A number of further reforms are proposed in the Bill. The definition of 'harassment' is to be amended and broadened, and further offences are defined as potential 'family violence offences'. The Bill removes s54 from the *Criminal Code 1924*, which will therefore allow for offenders to be charged and convicted with the offence of property damage in relation to property owned jointly with their spouse. The Bill also makes an amendment including 'persistent family violence' as an offence which enlivens the reporting scheme under the *Community Protection (Offender Reporting) Act 2005*, where the act of persistent family violence also constitutes an existing offence as per the Schedule of the Act.

The Bill also proposes changes to family violence orders and police family violence orders ('PFVOs'). The conditions that can be imposed by police in PFVOs are broadened in s14, which includes a further condition that can be included in a PFVO prohibiting a person from 'engaging in any other conduct specified in the order that constitutes, or may constitute, family violence'. Section 9 of the Bill also allows for a Court or a Judge to include participation in a relevant rehabilitation program as a condition of a FVO in situations where certain conditions are met.

Key Issues

TasCOSS supports the Government's commitment to reducing family violence, acknowledging the significant impact family violence has on individuals and communities in Tasmania.

⁵ The threshold is outlined in s16 (1) of the Family Violence Act 2004:

(1) A court may make an FVO if satisfied, on the balance of probabilities, that –
(a) a person has committed family violence; and
(b) that person may again commit family violence.

TasCOSS supports many amendments contained in the Bill. For example, we agree that removing s54 from the *Criminal Code Act 1924* is a positive step towards making this legislation more consistent with other Tasmanian laws and community expectations. We also support the sections of the Bill which broaden both the definition of harassment and the inclusion of certain offences as family violence offences. However, we are concerned about the effectiveness of certain provisions of the Bill in achieving the stated objectives.

This submission will not address all proposed amendments but will instead focus on the following key areas: the need for more comprehensive and meaningful rehabilitation programs; the proposed repeal of s39A of the *Family Violence Act 2004*; and the potential unintended consequences of the proposed amendments, particularly those relating to the introduction of the SFVP declaration scheme, and whether these reforms are the most effective means of achieving the stated objectives of the Bill.

Rehabilitation programs

TasCOSS supports the introduction of provisions which allow for participation in a rehabilitation program to be included as a condition of an FVO. This is a change that was identified by and recommended in the Safe Homes, Families, Communities framework,⁶ and the introduction of this provision will hopefully increase access to and funding of these specialist, targeted programs to address problematic behaviours which contribute to family violence offending. TasCOSS also considers specialist education and training to be a fundamental part of the primary prevention work needed to address the underlying causes of and contributing factors towards family violence. It is important, however, that programs are adequately funded and resourced so that the availability of the programs remains consistent with demand. In particular, we urge the Government to ensure programs can be delivered effectively throughout Tasmania, particularly in rural and remote areas where service delivery of behavioural change programs for family violence offenders has been limited.⁷

We also encourage the Government to consider introducing legislative provisions to encourage the inclusion of rehabilitation programs as a condition of orders made upon sentencing, such as a condition forming part of a sentence deferral under s7A of the *Sentencing Act 1991*, or a condition forming part of an adjourned undertaking under s7(f) of the *Sentencing Act 1991*. We acknowledge that courts and judges are already vested with this power by virtue of several provisions under the *Sentencing Act 1991*: for example, the power to make participation in a program a special condition of a Community Corrections Order under s42AP (1) (b), or a condition of a suspended sentence under s24 (2) (c). We also note that there is already a specific sentence available for judges and Courts in relation to family violence offending: pursuant to s7 (ea) of the *Sentencing Act 1991*, a Court or a Judge may, upon conviction for family violence offences, sentence an offender to a rehabilitation program order. However, in our view, there would be a benefit to introducing specific legislative provisions (either in the *Family Violence Act 2004* or the *Sentencing Act 1991*) requiring courts and judges to consider

⁶ Tasmanian Government, *Safe Homes, Families, Communities: Tasmania's action plan for family and sexual violence 2019-2022*, (Action plan, July 2019) 25.

⁷ For example, the Men Engaging in New Strategies (MENS) program run by Relationships Australia and targeted towards low to medium risk offenders is currently only offered in Hobart and Launceston.

whether such conditions would be appropriate for family violence offenders. Examples of the potential benefits include the following: firstly, an increase in the numbers of people participating in rehabilitation programs is likely to assist with community education and awareness of issues relating to family violence; secondly, rehabilitation conditions in sentencing orders provides an opportunity for courts and decision-makers to play a role in ensuring the accountability of family violence offenders;⁸ and thirdly, legislative provisions requiring decision-makers to turn their minds to rehabilitation conditions allow for judicial discretion in relation to whether participation in a program is necessary, acknowledging the reality that some offenders will not be suitable candidates for a rehabilitation program.

Finally, TasCOSS acknowledges the need for specialist family violence services to support both the safety of victim survivors and the effective rehabilitation of family violence offenders. We also acknowledge the funding and resource limitations of the organisations delivering these services. To reduce the rates of family and sexual violence the Government must also commit to further resourcing for primary prevention initiatives, for victim survivor family violence counselling services, and to enable women's legal services to do more case work and provide more comprehensive assistance in the community.

The proposal to repeal s39A of the Family Violence Act 2004

Section 39A of the Family Violence Act 2004 was introduced by the Family Violence Amendment Act 2017 and relates to the electronic monitoring of family violence offenders.

Pursuant to s16 (3) (c) of the Family Violence Act 2004, a Court may require a person against whom a FVO is made to do the following:

(c) submit to being electronically monitored by wearing and not removing, or always carrying, an electronic device which allows –

(i) the Commissioner of Police; or

(ii) a police officer, State Service officer, State Service employee or other person, or a person of a class of persons (whether police officers, State Service officers, State Service employees or other persons), authorised by the Commissioner of Police –

to find or monitor the geographical location of the person.

The effectiveness of the above scheme was to be reviewed within 18 months, and s39A of the Family Violence Act stipulates that a report in relation to electronic monitoring was to be provided to the Minister and subsequently tabled in Parliament. Section 11 of the Bill seeks to repeal this section.

TasCOSS has reviewed the report tabled in Parliament, entitled 'Review of the effectiveness of electronic monitoring as a condition for perpetrators in Family Violence Orders, under section 16(3)(c) of the Family Violence Act 2004'. The report makes some provisional findings that the rate of high-risk incidents of family violence has decreased since the introduction of the electronic monitoring

⁸ For a useful discussion of judicial perspectives in relation to rehabilitation programs, see Australia's National Research Organisation for Women's Safety (ANROWS), 'The views of Australian judicial officers on domestic and family violence perpetrator interventions' (Issue 13, June 2020).

provisions,⁹ and notes that victim support agencies, including Victims Support Services and the Family Violence Counselling and Support Service, are supportive of the continuation of the electronic monitoring provisions.¹⁰ However, we note the report also highlights the need for more data to accurately assess the full impact of the trial,¹¹ and referred to the independent evaluation to be conducted by the Tasmanian Institute of Law Enforcement Studies (TILES). TasCOSS has attempted to obtain copies of the interim and final reports by TILES and understand these reports are not currently available for public access or review.

TasCOSS recommends s39A remain in force until such time as the TILES final report has been published and made available for consideration by all relevant stakeholders, so that the effectiveness of the scheme can be thoroughly reviewed. Further consideration should also be given in particular to the recommendations from Australia's National Research Organisation for Women's Safety regarding electronic monitoring in the criminal justice system in Australia.¹²

The 'serial family violence perpetrator' scheme

TasCOSS recognises the need for courts and judges to respond to family violence offending in ways that are consistent with community expectations, and commensurate with the harm family violence is causing to individuals, families and groups. There is strong support among our member organisations for a scheme such as that proposed which assists the Court in recognising recidivist family violence offenders, as this may assist the Court to respond in a way which more effectively addresses both specific and general deterrence. TasCOSS also acknowledges that several of the member organisations who do support the introduction of the SFVP declaration scheme are specialist family and sexual violence services working directly with victim survivors. However, TasCOSS questions whether the SFVP declaration scheme is the most appropriate or effective response. We are concerned about the potential for the provisions to cause unintended consequences which may contribute to further disadvantage and marginalisation within the criminal justice system.

The SFVP declaration scheme appears similar to recently enacted legislation from Western Australia. The *Family Violence Legislation Reform Act 2020* (WA) introduced several changes to WA legislation, including amendments to the *Sentencing Act 1991* (WA) allowing for a Court to make a declaration in relation to an offender, upon conviction for a family violence offence, that the offender be classified as a 'serial family violence offender'. There is limited information available relating to the impact of these changes in WA, given the legislation was only recently amended.

As outlined above, the Bill contains several proposed changes to legislation which introduces a relatively complex scheme. It is unclear from the wording of the Bill how certain elements of the proposed changes will work in practice. For example, s7 of the Bill introduces provisions which allow courts and

⁹ Department of Justice, Review of the effectiveness of electronic monitoring as a condition for perpetrators in Family Violence Orders, under section 16(3)(c) of the Family Violence Act 2004 (2019), 31-34.

¹⁰ Ibid, 36 – 38.

¹¹ See, for example, ibid 7 and 28.

¹² Australia's National Research Organisation for Women's Safety (ANROWS), 'Electronic Monitoring in the Context of Domestic and Family Violence: Report for the Queensland Department of Justice and Attorney-General' (2018), 79-80.

judges to retrospectively classify certain offences as family violence offences under the Act. If an offender's prior convictions are re-classified as family violence offences, this also impacts whether a SVFP declaration can be made. It is unclear how these changes would operate in practice – for example, how to ensure that courts and judges would have sufficient information before them to determine whether an offender's prior convictions would satisfy the definition of a 'family violence offence', and who would bear the responsibility of ensuring that this information is provided to all relevant parties prior to any hearing in relation to these matters.

The making of a SFVP declaration will have significant impacts for offenders, and we are concerned the legislation doesn't outline a clear procedure to provide certainty for how and in which circumstances these declarations will be made. We are also concerned about the retrospective element introduced by the proposed amendments to s13A of the *Family Violence Act 2004* and the uncertainty this provision may create in sentencing. The most recent available data also suggests that breaches of Police Family Violence Orders (PFVOs) and Family Violence Orders (FVOs) are the most common family violence offences,¹³ and the Bill confirms these offences will be considered relevant offences which may give rise to a SVFP declaration. The Sentencing Advisory Council has raised concerns about the offence of breaching a PFVO, given these offences may be occurring in situations where an offender has not been to Court and may not have understood the implication of the PFVO at the time it was put in place,¹⁴ and has recommended significant changes to the PFVO scheme under the Family Violence Act to address these concerns. These recommendations have not been adopted in the Bill.

We are particularly concerned about the potential criminalisation of victim survivors through the scheme. Pursuant to s13C of the Family Violence Act, victim survivors of family violence can be charged with the offence of breaching either a FVO or PFVO in situations where the breach may place children named in the order at risk. Statistics used by the Sentencing Advisory Council in their report, 'Sentencing Adult Family Violence Offenders', show that the majority of people being charged with aiding, abetting or instigating a family violence offence (e.g. breach of an FVO) are women.¹⁵ In our view, breaches of this nature should not form part of the SFVP declaration scheme, as this may result in the further criminalisation of victim survivors. A related concern is the provision directing courts and judges to put FVOs in place when making a SFVP declaration. We are concerned about the possibility of FVOs being made by the Court in situations where such orders may not be supported by victims or their family, or possibly even without their knowledge. Victim survivor groups continue to call for family violence reforms that support victim survivors of family violence to make choices to enhance safety without taking away agency in their relationships, even if exercising that agency means a choice to remain in relationship with an offender who has perpetrated family violence. Best-practice models in other

¹³ Sentencing Advisory Council, 'Sentencing of Adult Family Violence Offenders' (Final report, October 2015) 13.

¹⁴ Pursuant to s14 of the Family Violence Act 2004, police can make a PFVO and issue it to a person if they are satisfied the person has committed, or is likely to commit, family violence. This order can then remain in force for a period of up to 12 months, and can contain various conditions, including a condition excluding a person from their residence or from contacting a particular person.

¹⁵ Sentencing Advisory Council, 'Sentencing of Adult Family Violence Offenders' (Final report, October 2015) 54.

jurisdictions highlight the importance of practices and services which actively engage victim survivors in decision-making processes about their safety.¹⁶

The introduction of the SFVP declaration scheme is likely to result in changes to sentencing practices for family violence offenders. While the existence of the scheme is likely to reinforce the serious nature of this type of offending, we are concerned about the effectiveness of imprisonment as an appropriate response to family violence. Notwithstanding the fact there will be occasions where a term of imprisonment is an appropriate and proportionate sentence, the potential impact of the Bill fails to acknowledge the reality that imprisonment often has a negative impact for victim survivors of violence,¹⁷ without addressing the underlying causes contributing towards the offending.

We are also concerned about the potential unintended consequences the introduction of the SFVP declaration scheme could have on marginalised community groups who are already over-represented in the criminal justice system. In particular, TasCOSS highlights the over-incarceration of Aboriginal Tasmanians,¹⁸ and the need for any proposed legislative reforms in the area of criminal justice to be proportionate and justified, given the Government's commitment to reducing the Aboriginal prison population as a key outcome to be achieved through the Tasmanian Implementation Plan of Closing the Gap initiatives. We urge the Government to consider proposals for reform which recognise the particular experience of Aboriginal communities and draw on existing expertise from within this community.

The scheme does represent an opportunity for courts and judges to reinforce community standards in relation to family violence and send a strong message to the community at large that such offending will not be tolerated, and as such several TasCOSS members support the proposed scheme. However, given the potential unintended consequences discussed above, and in the absence of an evaluation of the outcomes of the WA scheme, TasCOSS recommends the Government commission a scoping study of how the scheme has been implemented in WA and the scheme's effects prior to enacting legislation in Tasmania. In our view, this would give stakeholders and the community a better understanding of how the scheme will work in practice, and whether the scheme is effective in achieving the stated outcomes of reducing family violence and ensuring the criminal justice system is responsive to the needs of victim survivors of family violence.

If the Government does not adopt this recommendation, TasCOSS recommends amendments to avoid as many unintended consequences as possible, particularly in relation to how the scheme may impact victim survivors. Firstly, we recommend the Bill include a review mechanism of the SFVP declaration scheme after a certain period (for example 3 years), which will provide an opportunity to assess the

¹⁶ For example, see Victorian Government, 'MARAM Foundation Knowledge Guide: Guidance for professionals working with child or adult victim survivors, and adults using family violence' (February 2021) 7.

¹⁷ Sentencing Advisory Council, 'Sentencing of Adult Family Violence Offenders' (Final report, October 2015) 38.

¹⁸ Australian Bureau of Statistics data from 16 June 2021 show current Aboriginal and Torres Strait Islander imprisonment rate in Tasmania is 788 per 100,000 adult prisoners, a 10% increase since the last quarter. The general imprisonment rate (of all prisoners in Tasmania) is 150 per 100,00 people, a 3% increase since the last quarter. Data accessed on 27 September 2021 at [Corrective Services, Australia, June Quarter 2021 | Australian Bureau of Statistics \(abs.gov.au\)](https://www.abs.gov.au/Corrective-Services-Australia-June-Quarter-2021)

impact of the scheme. Secondly, we strongly recommend amendments to ensure victim survivors are not captured as part of the scheme. Part 4A should be amended to make it clear that victim instigated breaches should not be included as family violence offences for the purposes of the SFVP scheme, to avoid further criminalisation of victim survivors. Victim survivors should also be given the opportunity to be heard if the Court is considering putting an FVO in place at the time of making a SFVP declaration, and this should be a discretionary decision for the judge or the Court.

Furthermore, we encourage the government to consider alternatives to address the root causes of family violence which are less likely to result in further criminalisation and/or stigmatisation of certain groups. We make this recommendation in light of the findings of the recent Women's Safety Summit, which highlighted the need for effective and consistent engagement to prioritise primary prevention,¹⁹ and also urged Governments to 'explore alternative transformative strategies to prevent and address violence'.²⁰

Recommendations

In light of the above, TasCOSS recommends the following amendments to the Bill:

- The Government should commission a scoping study relating to *the Family Violence Legislation Reform Act 2020 (WA)*, and make the findings of the study publicly available, prior to enacting Part 4A of the Bill. Following the publication of the report findings, the Government should allow Tasmanian community members and organisations to make further submissions in relation to the SFVP scheme prior to enacting any legislative reform.
- If the Government does not follow the above recommendation, Part 4A should be amended:
 - o Instances where a victim has been charged with breaching an FVO or PFVO by enabling, abetting or instigating the breach should not be included as a relevant offence for the SFVP declaration scheme
 - o the wording of s29C (1) (a) should be amended to make it discretionary for courts and judges to put in place a FVO when a SFVP declaration is made, and victim survivors should be notified and given the opportunity for their views to be heard in Court
 - o A review mechanism should be introduced allowing for Part 4A of the Bill to be independently reviewed within three years, and a copy of the review to be made public
- The Government should consider including specific provisions in the *Sentencing Act 1991* requiring decision-makers to consider whether an offender, upon conviction for a family violence offence, may be a suitable candidate for a rehabilitation program and to consider including participation in such a program as part of their sentence.

¹⁹ Statement from Delegates - National Summit on Women's Safety (September 2021) 5.

²⁰ Statement from Delegates - National Summit on Women's Safety (September 2021) 4.

- The Government should review the recommendations of the Sentencing Advisory Council's report, 'Sentencing of Adult Family Violence Offenders' and engage with stakeholders about the recommendations contained within the report.
- The Government should expand the number and scope of rehabilitation and behaviour change programs for people who use family violence and ensure that programs are available throughout Tasmania and adequately resourced to deliver effective training and education.
- Section 11 of the Bill should be removed and s39A of the Family Violence Act to remain in force. The Government should also release all relevant information and reports relating to the electronic monitoring scheme under s16 (3) (c) as soon as practicable, so that the scheme can be carefully reviewed and its effectiveness considered by relevant stakeholders.
- If further amendments to the Family Violence Act 2004 are to be proposed, or amendments to other pieces of legislation relating to family violence, the Government should commit to extensive community consultation, including consultation with specialist family violence service providers, to ensure the proposed reforms are targeted at addressing key concerns. More time should be given to organisations to respond to proposed reforms, noting that the organisations working in this area are heavily committed during work hours with frontline service delivery, with several staff members who work part-time.
- Any further legislative reviews and implementation of new legislation should prioritise engagement with Aboriginal community-controlled organisations and service providers delivering front-line support services to Aboriginal victim survivors of family violence.