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Submitted via email to: [legislation.development@justice.tas.gov.au](mailto:legislation.development@justice.tas.gov.au)

**Submission in response to the Tasmanian Government Department of Justice - Family Violence: Strengthening our Legal Responses Consultation Paper October 2016**

Thank you for this opportunity to provide a submission in response to the Family Violence Consultation Paper published in October 2016.

This submission has been prepared by members of the Monash School of Social Sciences *Gender and Family Violence Research Program: New Frameworks in Prevention*. More details about the Research Program and our current research are provided in the introduction and as an appendix to this submission.

Please find our submission attached to this letter.

In our submission we have drawn on our extensive research examining risk, responses to intimate partner violence, homicide law, law reform and policing.

We would welcome the opportunity to discuss any aspects of this submission or our wider research on family and domestic violence further with the Government.

Kind regards,

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## Submission in response to the Tasmanian Government Department of Justice - Family Violence: Strengthening our Legal Responses Consultation Paper October 2016

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The Tasmanian Department of Justice Review of legal responses to family violence represents an important opportunity to strengthen the law's response in this area and to explore opportunities to improve prevention, policy and criminal justice intervention.

Our submission is structured into five sections:

1. Monash Gender and Family Violence Research Program Overview
2. Breaches of protection orders by protected persons
3. Definition of 'family relationship'
4. Law of self-defence in the context of family violence
5. Consequences of a persistent perpetrator of family violence declaration

Relevant recommendations are included throughout and a summary of recommendations and a list of relevant references are included at the conclusion of the submission.

### Monash Gender and Family Violence Research Program Overview

The Monash School of Social Sciences *Gender and Family Violence Research Program: New Frameworks in Prevention* aims to develop an evidence base for reforms aimed at effectively implementing more risk sensitive approaches to family violence and reducing the associated harms to women and children. The *Gender and Family Violence Program* draws on two areas of strength in the Social Sciences: Criminology and the Centre for Women's Studies and Gender Research. Both areas are nationally and internationally recognised and have well-established networks amongst leading family violence practitioners and academic experts. The team has expertise in quantitative and qualitative methods and in large-scale community engagement projects.

Members of the *Gender and Family Violence Focus Program* are currently engaged in, and have recently completed, a range of projects related to improving responses to intimate partner violence. These projects include:

- **Securing women's lives: Preventing intimate partner homicide**  
Investigators: Jude McCulloch, Kate Fitz-Gibbon, Sandra Walklate, JaneMaree Maher  
(Status: Current. Funded by Australian Research Council)
- **Perpetrator interventions in Australia: A national study of judicial views and sentencing practice for domestic violence offenders**  
Investigators: Kate Fitz-Gibbon, JaneMaree Maher, Jude McCulloch  
Partner Investigators: Victorian Sentencing Advisory Council, Australasian Institute of Judicial Administration  
(Status: Current, Funded by Australia's National Research Organisation for Women's Safety)
- **Women, disability and violence: Creating access to justice**

Investigators: JaneMaree Maher, Claire Spivakovsky, Jude McCulloch, Jessica Cadwallader (People with Disability Australia) (Status: Current, Funded by Australia's National Research Organisation for Women's Safety)

- **Changing responses to domestic violence: Is coercive control the answer?**  
Investigators: Kate Fitz-Gibbon, Sandra Walklate and Jude McCulloch (Status: Current)
- **The killing of women in Victoria: Examining risks of violence and points of intervention**  
Investigators: Kate Fitz-Gibbon (Status: Current, Funded by The Victorian Women's Trust)
- **The Monash Review of the Family Violence Common Risk Assessment Framework in Victoria**  
Investigators: Jude McCulloch, JaneMaree Maher, Kate Fitz-Gibbon, Marie Segrave and James Roffee. (Status: Recently completed, Contracted research with Victorian Department of Health and Human Services)
- **Innovative legal responses to the prevention of intimate partner homicide in the UK, US and Canada.**  
Investigators: Kate Fitz-Gibbon (Status: Recently completed, Fellowship awarded by the The Winston Churchill Memorial Trust)

Further details about each of these projects are provided in Appendix A to this submission.

## Breaches of protection orders by protected persons

It is concerning that since the introduction of the *Family Violence Act 2004* of the 279 convictions obtained for aiding, abetting or instigating a family violence offence, 254 convictions have been imposed upon a female (Sentencing Advisory Council 2015). It is highly concerning that in many of these cases the female convicted was likely the protected person under the original order.

Issues surrounding accessorial liability for breaches of a family violence protection order were examined by the Australian Law Reform Commission (ALRC) and New South Wales Law Reform Commission (NSWLRC) in their 2010 review of legal responses to family violence (ALRC 2010). That Report found that in some jurisdictions, Tasmania included, victims of family violence were being charged with aiding, abetting and/or instigating breaches of an order and that the fear of being charged with accessorial liability in some cases dissuaded women from seeking an order in the first instance or reporting a subsequent breach (ALRC/NSWLRC 2010).

In such cases, the legislation designed to protect women experiencing family violence instead operates to criminalise such women, decrease confidence in the justice system and reduce the likelihood of reporting to police or court engagement in the case of future incidents of family violence. As concluded by the ALRC (2010: 12.36) 'the capacity to charge victims of family violence for breach of a protection order undermines the policy intent of family violence legislation'. Such practices also provide opportunities for family violence perpetrators to (ab)use the law as a means of further perpetrating coercive and controlling behaviour against the victim.

Supporting previous recommendations made by the ALRC/NSWLRC (2010), Victorian Law Reform Commission (2006), NSWLRC (2003) and Women’s Legal Service Tasmania (2015), we recommend that current legislation in Tasmania should be amended to ensure that protected persons cannot be charged with accessorial liability offences for aiding, abetting or instigating the breach of a protection order.

We further recommend that in those jurisdictions where legislation has been enacted to disallow protected persons to be charged with accessorial liability in the breach of a protection order (being New South Wales, South Australia and Victoria) empirical research should be undertaken to examine the impact of such legislation in practice.

## Definition of ‘family relationship’

The definition of ‘family relationship’ in the *Family Violence Act 2004* should be expanded to better capture extant definitions of ‘family members’ across the country. A useful example is the definition adopted in Victoria (as cited on page 18 of the Consultation Paper 2016). The Victorian Royal Commission into Family Violence (2016) found there is a need within the family violence system to better recognise, respond to and serve the needs of persons in diverse communities impacted by family violence and attention to diverse family structures is a critical aspect of this. Some communities, such as Indigenous communities, will be particularly disadvantaged in terms of recognising and addressing the perpetration of family violence if narrow definitions are utilised.

As the Consultation Paper (2016) acknowledges current legislation in Tasmania does not allow for elder abuse or child abuse to be recognised as a form of family violence under the *Family Violence Act 2004*. While it is acknowledged that both forms of abuse are dealt with in other state legislation (in the case of child abuse) or subject to a specific Action Plan (in the case of elder abuse) we believe it is important that these abusive behaviours are recognised in legislation as a form of family violence. While it is appreciated that this will have resource implications and necessitate the introduction of appropriate family violence services to respond to such abuse, we view this as a positive change. Our recent research in Victoria found that there is a lack of specialist services to respond to elder abuse which has contributed to lack of understanding of the risks unique to this context of family violence (McCulloch et al 2016). Legislative recognition of the perpetration of elder abuse in the context of family violence in Tasmania would be an important first step towards addressing such gaps in current knowledge and service provision.

We recommend that the definition of ‘family relationship’ in the *Family Violence Act 2004* should be reformed in line with the definition of ‘family members’ adopted in current Victorian legislation.

## Laws of self-defence in the context of family violence

This review provides an important opportunity to improve legal responses to persons who kill in the context of family violence in Tasmania. This area of law has been the subject of numerous reviews and reforms across Australian state and territory jurisdictions in recent years (see, inter alia, Fitz-Gibbon and Freiberg 2015; Fitz-Gibbon 2014).

Supporting the recommendations of the Tasmanian Law Reform Institute (2015), we recommend:

1. Reform of the self defence provisions in the *Criminal Code Act 1924*;
2. Reform to introduce jury directions in relation to family violence; and
3. Procedural reform to amend the *Evidence Act 2001* to include relationship history and pattern of behaviour evidence in family violence matters.

We believe these reforms would ensure that the criminal courts are better able to understand and respond to the circumstances within which persons (typically women) kill in response to prolonged family violence.

The current focus on imminence of danger in the Tasmanian self-defence legislation, although it is not a legal requirement of the defence, is problematic and fails to reflect the circumstances in which women are most likely to kill an abusive male partner in self-defence. As recognised by the Institute (2015) the legislation fails to understand family violence as an accumulation of abusive behaviours and in doing so, focuses the criminal law and those operating within its bounds on discrete acts of physical violence as opposed to the cumulative harm resulting from prolonged histories of abuse. An understanding of the latter is essential in law for the majority of women who kill in response to sustained family violence and with a genuine belief that they are acting in self-defence. We recommend that the *Criminal Code Act 1924* be amended to align with the Victorian legislation and 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.

While such reform is important in and of itself, we argue there is also a need for broader reform to jury directions and evidentiary laws in Tasmania to ensure that women's experiences of family violence can be admitted and understood within the confines of a criminal justice process.

Reform of jury directions is important to ensure a wider framework is introduced in Tasmania to ensure that where cases do proceed to contested trial there is a more informed understanding of the complex nature and dynamics of family violence among lay members of the jury. Research has consistently evidenced the range of myths and misconceptions surrounding the nature of family violence and the behaviour of family violence victims (see, inter alia, Maher 2014, Tasmanian Law Reform Institute 2015; Taylor and Mouzos 2006; Victorian Health Promotion Foundation 2014). In cases where women kill in response to family violence such myths and misconceptions are particularly problematic as the actions of such women rarely fit within traditionally defined legal categories and defences. As such, where a contested self-defence trial occurs, there is a need to ensure that jurors are able to evaluate the actions of the offender – including reasonableness, intent and belief – within the context of their experiences of family violence (Fitz-Gibbon 2017).

To improve juror understandings of family violence, we support the Institute's (2015) recommendation that Tasmania should introduce reform of jury directions based on the model

adopted in recent Victorian legislation (see *Jury Directions Act 2015*). The Victorian model aims to contextualise family violence, overcome common misconceptions about the nature of family violence and challenge assumptions about how a person *should* react to family violence.

In addition to reforming jury directions, we recommend that Tasmania introduce procedural changes to the *Evidence Act 2001* to allow for evidence relating to the history of violence and prior circumstances to be admitted in cases where a person committed homicide after experiencing abuse by the deceased. Such reforms, we recommend, should be modelled on the Victorian legislation which ‘help[s] to ensure that the contexts of the lives of abused women who kill are better understood and heard throughout the criminal justice process’ (Douglas 2012: 378). The value of the Victorian evidence reforms has been recognised in reviews and scholarly research (see, inter alia, Douglas 2012; Fitz-Gibbon 2017; New South Wales Select Committee 2013). In the Tasmanian context, where no partial defences to murder are legislated for, such evidentiary reform is particularly important to ensure that evidence pertaining to family violence is admissible in the trials of persons who kill in response to prolonged abuse to support their claims of self-defence.

When combined with the expanded definition of self-defence and the aforementioned jury directions reform, these recommended evidentiary reforms will ensure that those operating at all levels of a contested self-defence trial are better able to understand the actions of persons who kill in the context of family violence. Such understanding is paramount if injustices are to be avoided.

## Consequences of a persistent perpetrator of family violence declaration

Persistent contraventions of a family violence order(s) is a clear indicator of a person’s risk of escalating and/or repeated family violence. We commend the Department on examining the various strategies in which such risk can be better identified and responded to by the criminal justice system. Drawing on our recent research examining the merits of the domestic violence disclosure scheme introduced in England and Wales (see Fitz-Gibbon and Walklate 2016), here we respond specifically to the question raised in the *Consultation Paper* (2016: 27-8) about whether a persistent perpetrator of family violence register should be introduced and whether information on that register should be publicly available.

We recommend that the Tasmanian Government does not introduce a persistent perpetrator of family violence register for the purpose of allowing members of the public to request for information on whether their current or former partner has a history of violent criminal offences.

Similar approaches to reform have been reviewed, proposed and implemented in other Australian and comparable international jurisdictions, typically referred to as a domestic violence disclosure scheme. It is important to acknowledge that these schemes - including in England and Wales, Scotland, New Zealand and the pilot currently underway in New South Wales – have not been evaluated. Consequently, to date the impact of a domestic violence disclosure scheme in practice is relatively unknown. In England and Wales, the first jurisdiction to introduce such a scheme, the merits of Clare’s Law has been the subject of very limited scholarly review and analysis. Importantly,

that which has emerged has been largely critical of the Scheme (see, Fitz-Gibbon and Walklate 2016; Grace 2015; Wangmann 2015).

The *Consultation Paper* (2016) details the NSW Domestic Violence Disclosure Scheme pilot and notes that the pilot will be evaluated following two years of operation. This evaluation will provide the evidence base that is currently lacking in this area and allow for informed policy discussion. At a minimum we would recommend that Tasmania hold off on designing and introducing a public family violence register until the findings of that evaluation are available.

One of the main risks of a family violence public register is the potential to inaccurately represent histories of domestic violence with the impact of creating a false sense of security and/or inadvertently misrepresenting a person as a perpetrator. As a South Australian Government Discussion Paper (2016: 45) recently affirmed 'domestic violence predominately occurs behind closed doors'. Research has consistently found that family and domestic violence is significantly underreported (see, for example, Douglas 2008; MacQueen and Norris 2016). High levels of underreporting are further compounded by cases where a crime is reported but no conviction is secured. Based on the recognised underreporting and known attrition at each stage of the justice process, it is entirely plausible that persons who request for information on their partner's violent history from the register could be given a false sense of security where they are told that their partner, either current or former, does not have a recorded history of family violence.

A further risk of a public family violence perpetrator register is that, while aiming to empower persons to make informed relationship choices and avoid risk, it will inadvertently shift responsibility for ensuring safety onto the victim themselves. By requiring a person to request access to information through the Register and to act on that information once received, any family violence perpetrator register places responsibility for action directly with the applicant, who may be experiencing family violence already or if not, is in a relationship where the behaviour of their partner has raised a level of concern. This shifts responsibility onto the individual to ensure their own safety and to 'vet' their partner (Refuge 2012) while also detracting responsibility from the potential perpetrator (Duggan 2012). It is the person within a relationship of concern that assumes responsibility for protecting him or herself. This is a problematic reassignment of responsibility given what is already well known concerning the disempowerment processes accompanying intimate partner violence (Stark 2007).

There is also a concern associated with the assumption that persons with information about their partner's history of violent criminal offences can make informed and safe choice. To this end, a public family violence perpetrator's register runs the risk of encouraging victim blaming in cases where an applicant provided with information through the register decides not to end the relationship and is later victimised by their partner. The criminal justice system, police and courts in particular, have a long history of victim blaming and denigration in responses to violence against women, particularly through the mobilisation of problematic gendered excuses for violence such as 'she asked for it' (Fitz-Gibbon 2014; Fitz-Gibbon and Maher 2015). Any Register that could encourage the proliferation of such excuses should be avoided and failure to act on the part of the victim on information received opens the door to such victim blaming.

At a time when the Tasmanian Government is committing significant resources to improving responses to family violence, we would argue that the financial and resource implications of introducing and administering a public register would be more effectively diverted to support other initiatives and services within the integrated family violence system. We believe that the introduction of a public family violence perpetrators register would be a distraction from other reform activities that are evidence based and merit attention.

## Summary of Recommendations

**This submission makes the following recommendations:**

**Recommendation 1.** Current legislation in Tasmania should be amended to ensure that protected persons cannot be charged with accessorial liability offences for aiding, abetting or instigating the breach of a protection order.

**Recommendation 2.** In those jurisdictions where legislation has been enacted to disallow protected persons to be charged with accessorial liability in the breach of a protection order (being New South Wales, South Australia and Victoria) empirical research should be undertaken to examine the impact of such legislation in practice.

**Recommendation 3.** The definition of ‘family relationship’ in the *Family Violence Act 2004* (Tas.) should be reformed to align with the definition of ‘family members’ adopted in current Victorian legislation.

**Recommendation 4.** The *Criminal Code Act 1924* (Tas.) should be amended to align with the Victorian legislation and 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.

**Recommendation 5.** The Tasmanian Government should introduce reform of jury directions based on the model adopted in recent Victorian legislation (*Jury Directions Act 2015*).

**Recommendation 6.** The Tasmanian Government should introduce procedural changes to the *Evidence Act 2001* (Tas.) to allow for evidence relating to the history of violence and prior circumstances to be admitted in cases where a person committed homicide after experiencing abuse by the deceased.

**Recommendation 7.** The Tasmanian Government should not introduce a persistent perpetrator of family violence register for the purpose of allowing members of the public to request for information on whether their current or former partner has a history of violent criminal offences.

Beyond these specific recommendations, it is also recommended that any further law reform, policy change or prevention initiatives in this area must be evidence based and informed by consultation with those working within the integrated family violence sector and expert advisors.

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## APPENDIX A: CURRENT AND RECENTLY COMPLETED RESEARCH

### Securing women's lives: Preventing intimate partner homicide

Investigators: Jude McCulloch, Kate Fitz-Gibbon, JaneMaree Maher, Sandra Walklate

This project aims to develop a framework for a new systematic preventive approach to intimate partner homicide. Intimate partner violence is the most common type of violence against women worldwide and the leading cause of death amongst Australian women aged between 15 and 44. The project intends to review a decade of intimate partner homicides in Australia to identify potential points of intervention that might have provided opportunities to prevent such killings. This new knowledge is intended to inform and assist in developing a more risk sensitive preventive approach to intimate partner homicides in Australia and overseas, enhancing women's security and preventing their deaths.

(Status: Current, Funded by the Australian Research Council)

### Women, disability and violence: Creating access to justice

Investigators: JaneMaree Maher, Claire Spivakovsky, Jude McCulloch, Jessica Cadwallader (People with Disability Australia)

This project explores the experiences of women with disability in seeking access to justice when they have faced violence and/or sexual assault either inside or outside their relationships. The research team's approach will centre women's voices and experiences, and their insights will be explored in relation to those of service providers and other justice sector stakeholders.

(Status: Current, Funded by Australia's National Research Organisation for Women's Safety)

### Perpetrator interventions in Australia: A national study of judicial views and sentencing practice for domestic violence offenders

Investigators: Kate Fitz-Gibbon, JaneMaree Maher, Jude McCulloch

Partner Investigators: Victorian Sentencing Advisory Council, Australasian Institute of Judicial Administration

This qualitative mixed method study will utilise case analysis of sentencing remarks (homicide and breach convictions), interviews with judicial officers, and documentary and policy analysis to examine the use, influence and management of perpetrator interventions in sentencing of recidivist and high risk DV offenders. The project aims to document the extent to which histories of perpetrator interventions are present, and the influence of these on sentencing, including an exploration of the views of magistrates and judicial officers on their use.

(Status: Current, Funded by Australia's National Research Organisation for Women's Safety)

### Changing responses to domestic violence: Is coercive control the answer?

Investigators: Kate Fitz-Gibbon, Sandra Walklate and Jude McCulloch

This project brings together leading criminologist, social-legal and feminist legal scholars from England, Scotland, New Zealand, Australia and the United States to examine the need and merits of

a new offence of coercive and controlling behaviour (as introduced in England and Wales). It considers the extent to which legislating for new offences can improve legal responses to family violence, what challenges and unintended outcomes may arise in jurisdictions that have introduced a new offence and to what extent an understanding of coercive control can inform and improve practitioner practice.

(Status: Current)

### **The killing of women in Victoria: Examining risks of violence and points of intervention**

Investigators: Kate Fitz-Gibbon

This project examines the killing of women in Victoria over a ten-year period. Using case analysis and interviews with family violence practitioners and relevant stakeholders, the project will generate an in-depth understanding of the risks of violence and points of intervention common to cases of lethal violence against women in Victoria. The findings will provide an evidence base to illuminate women's experiences of lethal violence and to inform support services, prevention initiatives and justice system responses in Victoria.

(Status: Current, Funded by The Victorian Women's Trust)

### **The Monash Review of the Family Violence Common Risk Assessment Framework in Victoria**

Investigators: Jude McCulloch, JaneMaree Maher, Kate Fitz-Gibbon, Marie Segrave and James Roffee

In April 2016 the Monash team were contracted by the Department of Health and Human Services (DHHS) to undertake a comprehensive review of the Victorian Family Violence Common Risk Assessment and Risk Management Framework (the CRAF). The CRAF is widely recognised as the core component of Victoria's integrated family violence system. The tender to review the CRAF was a direct response to the Victorian Royal Commission into Family Violence's recommendation to urgently review the CRAF in order to improve Victoria's response to family violence. The Review completed by Monash in July 2017 examines the use, usability, strength and limitations of the CRAF.

The research included focus groups, victim/survivor interviews, expert interviews, a survey, an advisory group, project website and stakeholder forum. More than 1100 people and over 125 organisations from all over Victoria participated in the Review. The project produced a research brief, extensive literature review, two interim reports, a series of policy recommendations and an in-depth Final Report.

The Final Report can be accessed at: <http://artsonline.monash.edu.au/gender-and-family-violence/craf-review/>

(Status: Recently completed, Contracted research with Victorian Department of Health and Human Services)

### **Innovative legal responses to the prevention of intimate partner homicide in the UK, US and Canada**

Investigators: Kate Fitz-Gibbon

This project investigated the effectiveness of innovative and recently introduced legal responses to intimate homicide in the UK, USA and Canada. The project examined the merits of the offence of coercive control in England, the proposed offence of domestic abuse in Scotland, the New York integrated domestic violence court model and domestic violence death review committees internationally.

The Fellowship Report can be accessed at:

<https://www.churchilltrust.com.au/fellows/detail/4013/Kate+Fitz-Gibbon>

(Status: Recently completed, Fellowship awarded by the The Winston Churchill Memorial Trust)