

2021

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

DOMESTIC VIOLENCE AGENCIES AMENDMENT BILL 2021

**EXPLANATORY STATEMENT
and
HUMAN RIGHTS COMPATIBILITY STATEMENT
(*Human Rights Act 2004*, s 37)**

**Presented by
Yvette Berry MLA
Minister for the Prevention of Domestic and Family Violence**

DOMESTIC VIOLENCE AGENCIES AMENDMENT BILL 2021

The Bill is a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

OVERVIEW OF THE BILL

In June 2016, the ACT Government committed to introducing a Domestic and Family Violence (DFV) Death Review mechanism in the *ACT Government Response to Family Violence*. This response addressed a number of reports, including the *Report of the Inquiry: Review in the System Level Responses to Family Violence in the ACT* by Laurie Glanfield AM (April 2016).

In December 2016, the Australian Human Rights Commission released a comprehensive report titled *A National System for Domestic and Family Violence Death Review*, which (among other findings) highlighted the importance of every jurisdiction in Australia having a domestic and family violence death review mechanism.

The Human Rights Commission report also called for consistency across jurisdictions in how data is collected and collated to allow for a national analysis and the identification of factors including cross-jurisdictional gaps or system deficiencies. The ACT is a member of the National Domestic and Family Violence Death Review Network, which undertook extensive work in 2018 to develop a National Minimum Dataset (NMD) of domestic and family violence deaths. The ACT Government is committed to contributing to national research and analysis of domestic and family violence deaths and incidents which result in serious harm, and have committed to capturing the information required by the NMD in the Family Violence Incident Register established by this Bill.

Ongoing funding for the ACT Domestic and Family Violence Death Review was secured in the 2019-20 Budget, to be established in 2020-21.

The purpose of this Bill is to establish this death review function in the ACT, named in the Bill as the Domestic and Family Violence Incident Review. The broad purpose of this incident review mechanism is to take a system-wide perspective and make recommendations that aim to improve responses to DFV in relation to policy, procedure, legislation, system and services, data collection and management, and public awareness. This Bill provides for the review and analysis of both DFV deaths, and incidents which occur in the context of DFV and which result in serious harm to a person. This broad review function reflects the practice of several other Australian jurisdictions under their respective review mechanisms, noting that the term ‘death review’ is still the commonly used and preferred shorthand for these functions.

The Bill also establishes a Domestic and Family Violence Review Coordinator (DFVR Coordinator) to work with and oversee a small team who will undertake the

reviews. The Bill outlines that the DFVR Coordinator will be a public servant, but will be independent in the exercise of their functions and report directly to the Assembly via the Minister for the Prevention of Domestic and Family Violence.

While several jurisdictions in Australia locate their death reviews in Coroner's Courts, it was determined that – at least in the implementation stages – DFV expertise and the ability to directly influence DFV policy were the paramount considerations. As a result, the government's intention is that the Coordinator-General for Family Safety will be appointed as the first DFVR Coordinator for the ACT.

A review of deaths occurring in the context of DFV was undertaken in the ACT in 2016 by the Domestic Violence Prevention Council. The Council found that without legislated information gathering powers it was extremely difficult to obtain the information they required to undertake the review.

As the Australian Human Rights Commission noted in its report, broad information access powers are critical for a death review mechanism to function effectively, stating:

Domestic and Family Violence Death Review Teams rely on information from various databases and sources to conduct quantitative and in-depth case reviews of domestic and family violence deaths. Death Review Teams rely on enabling legislation that provides access to information from all agencies where the deceased and the perpetrator had contact. They also require access to policies and procedure documents from agencies where these policies may have bearing on domestic and family violence.

These findings underpin the need for the information gathering and sharing powers provided to the DFVR Coordinator by this Bill.

While there are not yet figures on how many people suffer serious harm from a DFV incident (as defined in this Bill), we can expect this figure to be high, with 41% of all assaults recorded in the ACT in 2019 being related to DFV. The overarching purpose of the ACT's DFV Incident Review mechanism is to reduce these numbers by contributing to the prevention of the perpetration of DFV in our community.

Children and Young People Death Review

There is already a death review mechanism operating in the ACT, which reviews the deaths of children and young people. The ACT Children and Young People Death Review Committee was established in 2011, with the purpose of identifying patterns, trends and research needs to prevent the deaths of children and young people, and to make recommendations to government and the community. This Committee was consulted with in the development of the DFV incident review model so that their experiences and learnings from the past decade could be drawn upon.

Terms and acronyms

DFV means domestic and family violence

DFVR Coordinator means the Domestic and Family Violence Review Coordinator

Register means the register of domestic and family violence incidents held under division 3A.4

TPP means Territory Privacy Principles

CONSULTATION ON THE PROPOSED APPROACH

In 2018, the Justice and Community Safety Directorate (JACS) prepared and distributed a paper for consultation titled *Family Violence Death Review (FVDR) Draft Models for the ACT*. It was a comprehensive paper which detailed the need for the ACT to establish a death review, presented interjurisdictional analysis, and proposed a number of draft models for stakeholders to provide comment on.

In January 2021, the Office of the Coordinator General for Family Safety in the Community Services Directorate (CSD) drew on the information presented by JACS, current research and best practice examples, and input from external stakeholders to develop a position paper, which was circulated to all ACT Government Directorates for comment.

Consultation has also been undertaken with agencies in every other jurisdiction in Australia (except Tasmania) which undertake systemic reviews of DFV incidents. This has occurred both through the ACT's participation in the National Death Review Network, as well as meetings with interstate representatives focussed on particular aspects of the ACT's draft model.

All comments received during these consultation processes have been closely considered in the development of the model which this Bill establishes. Questions and issues raised by stakeholders during this process have also formed the basis for further research and analysis in development of the model.

CONSISTENCY WITH HUMAN RIGHTS

Human rights were considered at each stage of the development of this Bill, including by consultation with the ACT Human Rights Commission. The limitations contained in this Bill meet the criteria set out in section 28 of the *Human Rights Act 2004* (ACT) ('HRA'), and are therefore considered to be reasonable and demonstrably justifiable.

Rights engaged

The Bill engages and promotes the right to life (section 9 of the HRA), the right to protection from cruel, inhuman or degrading treatment (section 10 of the HRA), the right to protection of the family and children (section 11 of the HRA), and the right to liberty and security of person (section 18 of the HRA).

The Bill also engages and limits the right to privacy (section 12 of the HRA) and the right to liberty and security of the person (section 18 of the HRA).

Rights Promoted

A key objective of the DFV incident review is to prevent serious harm or deaths which occur in a DFV context. DFV takes many forms, including physical violence and abuse, sexual violence or abuse, emotional or psychological abuse, economic abuse, threatening behaviour, and coercion or any behaviour that controls or dominates the family member and causes them to feel fear for the safety of themselves or another person (see section 8(1), *Family Violence Act 2016* (ACT)).

This Bill establishes a DFVR Coordinator with a range of powers, including to obtain and analyse information to identify trends and patterns in DFV incidents which have resulted in a victim's serious harm or death, to identify measures which may have helped to prevent the serious harm or death, and – on the basis of the trends, patterns and measures identified – to make and implement policy or law reform recommendations to prevent future serious harm or death.

There are several human rights contained in the HRA which are aimed at protecting and promoting the personal safety of individuals, including protecting them from violence and abuse, protecting them from being deprived of life arbitrarily or unlawfully, and protecting every person's right to be free and safe. These include the right to life, the right to protection from cruel, inhuman or degrading treatment, and the right to liberty and security. The right to protection of the family and children in the HRA also recognises that certain groups of people – including children – deserve particular protection due to their unique vulnerabilities. It is common that a person who perpetrates DFV against another person violates one or more of these rights.

It is considered that the Bill engages and promotes these rights. Through their powers and functions, the DFVR Coordinator can take steps to prevent any foreseeable and intentional infliction of serious harm or death of vulnerable persons in the DFV context in the ACT. As children may also be the direct victims of family

violence, or they may witness family violence perpetrated by one of their family members against another, the DFVR Coordinator will also seek to protect children from all forms of violence and abuse.

Rights Limited

Section 12 Right to Privacy

Nature of the right (sections 28(2)(a) HRA)

Section 12(a) of the HRA provides that everyone has the right to not have their privacy, family, home or correspondence interfered with unlawfully or arbitrarily. This means that no interference can take place except in circumstances authorised by law.

The term 'unlawful' means that no interference can take place except in circumstances authorised by law. 'Arbitrary interference' also refers to interference with privacy and family that, even if provided for by law, is not reasonable, necessary, and proportionate in the circumstances.

Sections 16E DFVR Coordinator – functions, 16K Register of domestic and family violence incidents, and 16L Register of domestic and family violence incidents – content

Nature of the limitation (section 28(2)(c) HRA)

Sections 16E, 16K and 16L engage and limit the right to privacy, as they enable the DFVR Coordinator to collect personal information about people involved in DFV incidents (section 16E(b)), keep a register of a range of personal information about people involved in DFV incidents (including identifying information and health information) (sections 16E(a), 16K and 16L), and use the personal information collected for analysis (section 16E(c)).

Legitimate purpose (section 28(2)(b) HRA)

The legitimate purpose of sections 16E, 16K and 16L is consistent with the overall objectives of the Bill, which is for the DFVR Coordinator to increase recognition of the impact of and circumstances surrounding DFV, identify preventative measures to reduce DFV, and make recommendations to prevent or reduce the likelihood of DFV deaths and serious harm incidents. In order to work toward these outcomes, the DFVR Coordinator needs to have broad access to information about the personal circumstances of those involved in fatal and serious DFV incidents, and to store this information (as far as it is relevant to the DFV incidents) on a register for research and analysis.

Rational connection between the limitation and the purpose (section 28(2)(d) HRA)

There is a clear connection between the limitations or interferences and the legitimate purpose.

It is often the case in DFV incidents that many different agencies and people hold small pieces of information about the violence or abuse which is being perpetrated. It is only when these pieces of information are brought together that anyone assessing risk or reviewing service system responses can have a full picture of the circumstances. For example, a teacher may have noticed changes in behaviour in a child which do not meet mandatory reporting requirements but, if viewed in light of information which other people hold about the child's parents, might indicate to a person skilled in risk assessment that members of this family were affected by family violence, and possibly at high risk of serious harm.

By allowing the DFVR Coordinator to collect, keep and use personal information about people involved in DFV incidents in the ACT, particularly the range of personal information allowed for by these provisions, the DFVR Coordinator will be able to create the full picture of circumstances in DFV incidents. In turn, this will assist the DFVR Coordinator to conduct their functions to prevent or reduce DFV deaths and incidents resulting in serious harm by enabling trends and patterns in DFV incidents to be recognised. Recording comprehensive information on the register will allow both point-in-time analyses and comparisons over time for DFV incidents, further enabling the DFVR Coordinator to use the data collected for research work and action with other Australian jurisdictions at a national level, in accordance with the nationally agreed upon Minimum Dataset.

Proportionality and safeguards (section 28(2)(e) HRA)

The limitations or interferences on the right to privacy in section 16E, 16K and 16L are necessary, reasonable, and proportionate in pursuit of the legitimate purpose.

The goal of reducing the prevalence of DFV incidents in the community is critical given the broad reaching and dramatic impacts, and it is reasonable that these provisions engage and limit the right to privacy to the extent that is necessary to enable the DFVR Coordinator to conduct their functions and to work toward this goal.

The wide range of personal information of people involved in DFV incidents to be included on the register under section 16L is so vital to the DFVR Coordinator's functions that they would not be able to adequately conduct their functions without the breadth of personal information sought. It will not be possible to know how DFV impacts certain vulnerable population groups without recording information about whether a relevant person is Aboriginal or Torres Strait Islander, a member of the LGBTIQ+ community, an older person, homeless, a recent migrant to Australia or so on. This information also needs to be overlaid with health information about the people involved, including mental health and drug and alcohol use. Historical information about the people involved (both perpetrators and victims) is also extremely relevant, as it will assist in identifying issues such as whether people who have particular life histories (for example those who have been the subject of Care and Protection Orders) are more likely to become victims or perpetrators of DFV than other people.

Although the complete list of personal information which will be relevant in each matter will depend on the life history and circumstances of each individual, it is not intended that any information be recorded on the register which is not relevant to the DFV incident. For example, a health diagnosis of which the DFVR Coordinator is aware the person had, but which the Coordinator considers had no relevance to that person's experience of DFV, will not be recorded. As with the new Part 3A of the *Domestic Violence Agencies Act 1986* (DVAA) more broadly, this information will only be included on the register if it is necessary for the DFVR Coordinator to exercise their functions, which are aimed toward promoting public safety by preventing the perpetration of DFV incidents.

Despite there being no less restrictive means reasonably available to the DFVR Coordinator to collect, keep and use information on a register so as to protect the health and safety of persons in the ACT by preventing DFV incidents, there are several safeguards in the Bill which minimise the extent of sections 16E, 16K and 16L's limitations or interferences on the right to privacy. They include:

- restrictions on the types of authorised persons permitted to access to the register of DFV incidents (section 16M);
- not allowing the DFVR Coordinator to require a family member of an affected person of DFV incident to give information to the Coordinator (section 16P(3)(a));
- not allowing the DFVR Coordinator to require a person to give the Coordinator information about a serious harm incident without the consent of the person harmed (section 16P(3)(b));
- requiring the DFVR Coordinator to ensure that any information sharing agreement with a corresponding interstate entity is only agreed to where the agreement protects the information under Part 3A of the DVAA and any other Territory law, such as the *Information and Privacy Act 2014* with the TPPs, and the *Health Records (Privacy and Access) Act 1997* (section 16Q);
- prohibiting any person who holds protected information about someone else as a result of exercising a function under Part 3A of the DVAA from using or disclosing information with any other person except as allowed under the part, or in certain other restricted circumstances, with offences attaching to any unauthorised disclosure (section 16U);
- requiring that any report prepared by the DFVR Coordinator for the Minister does not include any information which would disclose the identity of people involved in a DFV incident, or allow the identity of a person involved in a DFV incident to be easily worked out (sections 16V(4) and 16W(2)); and

- requiring the Minister to review the operation of Part 3A of the DVAA as soon as practicable after the end of its third year of operation, which provides an opportunity for the Minister to review the human rights impacts of the part (section 16Y).

Further, any information collected as part of the DFVR Coordinator's functions must be used, managed, and disclosed in accordance with the TPPs as provided in the *Information Privacy Act 2014*.

Division 3A.3 – Advisory committees and independent advisers, and section 16G – Delegation by DFVR Coordinator

Nature of the limitation (section 28(2)(c) HRA)

Under section 16M, members of any advisory committee/s and independent advisers appointed under sections 16H and 16I will be permitted to have access to the register if they are authorised by the DFVR Coordinator. So too will public servants who have been delegated to exercise the DFVR Coordinator's functions under section 16G. As the domestic and family violence incident register will contain personal information about people involved with registrable family violence incidents, the right to privacy is limited because of the access to, and use of, the personal information of people involved in DFV incidents by committee members, advisers and delegates.

Legitimate purpose (section 28(2)(b) HRA)

The legitimate purpose of the provision of access to the register under section 16M to advisory committees, independent advisers and public servants is so that they are able to assist the DFVR Coordinator to exercise their functions, in the overall pursuit to protect persons' health and safety by preventing DFV incidents. The power for the DFVR Coordinator to appoint advisory committees and independent advisers further ensures an independent oversight of the review process and recognises that DFV is complex and multi-faceted, and for each matter reviewed there will be different sectors and agencies involved, and different expertise required to conduct a comprehensive review.

Rational connection between the limitation and the purpose (section 28(2)(d) HRA)

Similarly to the reasoning provided for sections 16E and 16K, advisory committee members, independent experts and public servants exercising the DFVR Coordinator's functions must have access akin to the DFVR Coordinator to the personal information of people involved in DFV incidents about which they are called upon to provide advice. This will allow the team of public servants delegated by the DFVR Coordinator to exercise the Coordinator's functions in aiming to reduce and prevent DFV incidents, to do so effectively. This will also enable committee members and advisers to exercise their functions and provide advice to the DFVR Coordinator

on one or more matters under review, as outlined in their agreement with the Coordinator.

Proportionality and safeguards (section 28(2)(e) HRA)

The limitations or interferences on the right to privacy in Division 3A.3 are necessary, reasonable and proportionate to the legitimate purpose and there are no less restrictive means available to permit the DFVR Coordinator to acquire assistance and specialist advice which support the undertaking of their functions without providing advisory committee members, independent experts and public servants access to the register.

Public servants are delegated with exercising each of the DFVR Coordinator's functions, as listed in section 16E. It is not possible effectively exercise these functions to reduce and prevent DFV incidents without the same access to information as the DFVR Coordinator. Moreover, the provision of access to the register and its information to advisory committees and independent advisers appointed under sections 16H and 16I is integral as it will enable their preparation of specialist advice for the DFVR Coordinator in an area about which the DFVR Coordinator requires such advice or assistance. In turn, their specialist advice will assist the DFVR Coordinator to properly conduct their reviews, prepare reports for the Minister, and make meaningful recommendations about what could be done to increase the safety and wellbeing of the ACT community by better responding to and preventing DFV.

The access to the register provided to public servants, committee members and independent advisers is reasonable and proportionate, as public servants with delegated functions can only exercise the same functions as the DFVR Coordinator and committee members and independent advisers will only be appointed on a case-by-case basis (rather than establishing a committee which will review all incidents). Section 16M also does not provide committee members and independent advisers with unfettered or complete access to the register. They will only be authorised by the DFVR Coordinator to have access to the parts of the register necessary for them to fulfil their duties to advise the DFVR Coordinator on particular matters. In practice, this will mean that committee members and independent advisers will not have a login to access the database which stores the register. Instead, they will be provided with a copy of the necessary and relevant information by the Coordinator or their delegate. Accordingly, as far as is practicable, committee members and independent advisers will have access to information only about matters on which their expert advice is needed, rather than on the full list of matters under review.

Additionally, there are appropriate safeguards in place to restrict the access and use of the information on the register. Committee members and independent advisers will be subject to the prohibition of unauthorised use and disclosure of information under Part 3A of the DVAA (section 16T), and will be further obliged to take all reasonable steps to avoid being placed in a position where a conflict of interest

arises when advising the DFVR Coordinator (section 16J). This is intended to avoid the circumstance where a committee member or adviser has access to information about a person they know personally, or professionally unless that professional knowledge forms the basis for their appointment. Committee members and advisers will also be subject to the TPPs.

Public servants delegated under section 16G will also be subject to the offence provisions in section 16U if they use or disclose information otherwise than as authorised, and will be subject to other laws and policies which apply to all ACT public servants.

Division 3A.5 – Information Gathering and Sharing

Nature of the limitation (section 28(2)(c) HRA)

The following provisions in Division 3A.5 engage and limit the right to privacy:

- Section 16O, which provides the DFVR Coordinator the power to request personal information from relevant entities about persons which the Coordinator considers is reasonably necessary to either determine whether an incident is a DFV incident, or to otherwise exercise their functions. The right is engaged and limited as the entity must provide the information sought by the request as far as is practicable and, in most circumstances, will not be required to obtain the consent of the person to whom the information relates. Relevant entities capture a broad range of government and non-government agencies, and further agencies may be prescribed by legislation.
- Section 16P, which grants the DFVR Coordinator the power to issue a notice requiring a person to give or produce information, a document or other thing the DFVR coordinator considers necessary to exercise their functions. There are offence provisions for non-compliance with the request without reasonable excuse. The right is engaged and limited as it compels a person to give or produce information, document, or other thing; and the information, document or other thing compelled to be given or produced is personal information related to a DFV incident.
- Section 16Q which allows the DFVR Coordinator to share information with corresponding interstate entities, which engages and limits the right to privacy of those to whom that information relates.
- Section 16S, which allows for a person or agency to share information which they consider may be relevant to the DFVR Coordinator's functions, with the DFVR Coordinator on their own initiative. This provision means that a person or agency does not need to wait for a request for information from the DFVR Coordinator before sharing information, and is critical to ensuring that as

many relevant matters as possible are referred to the DFVR Coordinator for consideration.

Legitimate purpose (section 28(2)(b) HRA)

The legitimate purpose of Division 3A.5 is to enable the DFVR Coordinator to exercise their functions, with the objectives of improving how the ACT service system responds to DFV, and to recommend measures aimed at reducing the perpetration of DFV in the ACT community. These objectives are together aimed at increasing public safety and wellbeing.

Rational connection between the limitation and the purpose (section 28(2)(d) HRA)

The limitations or interferences are rationally connected to the legitimate purpose as research shows that many different individuals and agencies hold information about DFV, and that it is not always or solely services which provide specialised services to victim survivors or perpetrators of family violence which hold this information. Often, these pieces of information viewed in isolation do not give an accurate or comprehensive picture of the circumstances of the people involved, nor of what level of risk there is of a fatal or life-threatening DFV incident occurring. In order to conduct system-wide reviews and identify matters such as where an agency could have acted earlier to help prevent such an incident, the DFVR Coordinator must have access to all of these small pieces of information from a broad range of agencies. The list of agencies is not confined to only those which provide specialised support to people subject to or perpetrating DFV, as research indicates that it is frequently the case that people affected by DFV disclose first to people or agencies outside of the DFV sector.

Proportionality and safeguards (section 28(2)(e) HRA)

The limitations or interferences on the right to privacy in Division 3A.5 are necessary, reasonable and proportionate to the legitimate purpose and there are no less restrictive means available which would allow the DFVR Coordinator to collect and share information to adequately conduct their functions.

The information gathering and sharing powers are essential to the DFVR Coordinator's functions, as an inability for the DFVR Coordinator to gather and share information about persons in DFV incidents would significantly hamper their work to prevent future DFV incidents. Entities which carry out functions akin to those of the DFVR Coordinator as described in Part 3A currently exist in every other Australian jurisdiction except for Tasmania. Each of these corresponding entities has information gathering and sharing powers which allow for the collection of personal information of people involved in DFV incidents (as defined in that jurisdiction's law or policy documents) without their consent. These powers are integral to the function and purpose of a DFVR Coordinator, and also correspond with powers given to the ACT's Children and Young People Death Review Committee, established by Chapter 19A of the *Children and Young People Act 2008*.

Without the DFVR Coordinator's powers in sections 16O, 16P and 16Q, agencies would be bound by their own policies and other privacy laws which may prohibit the sharing of information which is critical to the exercise of the DFVR Coordinator's functions. It is also extremely unlikely that a person who has perpetrated or is perpetrating DFV will consent to their personal information being collected and analysed by the DFVR Coordinator, or that they will consent to their children's information being shared, in circumstances where they have parental responsibility, or the other parent is deceased. Where consent for these persons would have to be obtained, and the consent is not provided, it would undermine the ability of the DFVR Coordinator to hold and analyse information about DFV incidents, which is fundamental to their functions and their work to prevent DFV deaths and near-fatal incidents in the ACT.

Further, the limitations or interferences on the right to privacy by the information gathering and sharing powers are reasonable and proportionate given the severity of the harm facing potential victims of DFV incidents. The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) Committee has stated that, in relation to perpetrators of violence, "Women's human rights to life and to physical and mental integrity cannot be superseded by other rights, including the [perpetrator's]... right to privacy". It is reasonable to suggest that this principle applies equally to people of other genders who are subject to DFV – the perpetration of which directly violates their rights to security, to protection from cruel, inhuman and degrading punishment and sometimes, devastatingly, their right to life.

There are also safeguards on the right to privacy applicable to Division 3A.5 ensure that the right is only limited as far as is necessary for the effective operation of the Division. In addition to the safeguards in the section above headed 'Section 16E DFVR Coordinator – functions and Division 3A.4 – Register of domestic and family violence incidents', supplementary safeguards on the right to privacy applicable to Division 3A.5 include that:

- a notice is to be provided to a person about how to comply with a requirement to give or produce information, a document or other thing (section 16P(4)), and there are reasonable excuse defences for non-compliance with either a section 16O request or a section 16P notice (sections 16O(4) and 16P(6)).
- no information will be sought from any person or agency under sections 16O and 16P in relation to a DFV incident resulting in serious harm to a person without the consent of the harmed person (sections 16O(2) and 16P(3)(b)), and under section 16P from a family member of a person who has died or is seriously harmed in a DFV incident (section 16P(3)(a)). This is in order to protect the privacy of the harmed person and family, and to respect their autonomy to choose whether or not they would like to participate in any review. Sections 16O(2) and 16P(3)(b) apply equally if consent is never given, as it does if consent is initially given but then withdrawn; and

- any information sharing guidelines for the purposes of Division 3A.5 may be prepared by an entity listed at section 16O(4) is a notifiable instrument (section 16T). This allows for public oversight and scrutiny of the information sharing processes of agencies which share information with the DFVR Coordinator.

Division 3A.6 – Reports about Family Violence Incidents

Nature of the limitation (sections 28(2)(c) HRA)

Sections 16V and 16W provide that the DFVR Coordinator must prepare biennial reports for the Minister about DFV incidents or on any matter arising in connection with the DFVR coordinator's functions, and may prepare additional reports on these matters at any other time. These reports must be presented in the Legislative Assembly. The right to privacy is accordingly engaged and limited as the reports will contain personal information (de-identified as far as possible) about people involved in DFV incidents, and will be on the public record when they are tabled in the Legislative Assembly.

Legitimate Purpose (section 28(2)(b) HRA)

The limitation or interferences seek to achieve the legitimate purpose of improving the safety, security and wellbeing of the public by enabling the ACT Government to be informed by the expert advice and recommendations contained in the DFVR Coordinator's reports in the Government's commitment to better responding to and preventing DFV.

Rational connection between the limitation and the purpose (section 28(2)(d) HRA)

The limitations or interferences are rationally connected to the legitimate purpose as the ACT Government can be informed of the findings of reviews conducted by the DFVR Coordinator via regular reports, and that the findings and recommendations contained within these reports can guide government policy, funding and legislative reform decisions to prevent future DFV incidents. Further, the tabling of the reports in the Legislative Assembly will allow for oversight and scrutiny of the work of the DFVR Coordinator and function as an accountability mechanism to track the implementation of recommendations by both government and non-government agencies.

Proportionality and safeguards (section 28(2)(e) HRA)

The limitations or interferences on the right to privacy in Division 3A.6 are necessary, reasonable, and proportionate to the legitimate purpose and there are no other less restrictive options which would allow the DFVDR Coordinator to undertake a comprehensive review of the circumstances leading up to a DFV death or incident resulting in serious harm.

It is crucial that the ACT Government is guided by reports prepared by the DFVR Coordinator when making decisions aimed at decreasing and preventing DFV. These reports will reflect the analysis and advice of a range of subject matter experts, and will be the only reports based on a comprehensive review of local incidents which exist. Further, allowing the reports to be tabled in the Legislative Assembly is critical for independent oversight of the implementation of any recommendations contained in those reports. Without any reporting mechanism, there is little accountability on any agency which is the subject of recommendations to implement those recommendations.

It is recognised that in a small jurisdiction such as the ACT, it may be possible to infer from a report the identity of persons involved in a DFV incident by a person reading the report who has personal knowledge of the incident or if the incident has been reported widely. However, there are safeguards in place to reduce this possibility. Sections 16V(4) and 16W(2) state that in preparing reports for the Minister, the DFVR Coordinator must not include any information which, in the opinion of the Coordinator, would disclose the identity of people involved in a DFV incident, or allow the identity of a person involved in a DFV incident to be easily worked out. The focus of these reports will also be at the systematic level, with recommendations about possible preventative measures and policy and law reform made broadly, rather than directly linked to a particular incident. The reports will not contain detailed descriptions of the circumstances of the people involved in DFV incidents, nor of the incident itself and will be de-identified as far as is possible without losing the context or meaning of any recommendations made.

Section 18 Right to Liberty and Security of Person

Nature of the right and the limitation (sections 28(2)(a) and (c) HRA)

Section 18(2) provides that no one may be deprived of liberty, except on the grounds and in accordance with the procedures established by law.

Section 16U (use and disclosure of protected information) engages and limits this right by prescribing that an offence against this provision is liable for a maximum penalty of 50 penalty units, imprisonment for 6 months, or both (sections 16U(1) and 16U(2)). Imprisonment is an obvious limitation on a person's liberty.

An offence will be committed against sections 16U(1) and 16U(2) if an information holder uses or discloses protected information about someone else and is reckless about whether that information is protected information.

Section 16U(5) provides that an 'information holder' means a person who is or has been the DFVR Coordinator or a person exercising a function of the DFVR Coordinator, a member of an advisory committee, an independent adviser, and any other person who exercises or has exercised a function under the DVAA.

Section 16U(5) also provides that ‘protected information’ means information about a person that is disclosed to or obtained by an information holder because of the exercise of a function under the DVAA by the information holder or someone else.

Legitimate Purpose (section 28(2)(b) HRA)

The legitimate purpose of this provision is to prevent the unauthorised deliberate or reckless use or disclosure of protected information which a person has access to because of their position as an ‘information holder’, as defined in section 16U(5). This is to protect the privacy of the people about whom information is gathered and stored by the DFVR Coordinator and those exercising or assisting in the exercise of the Coordinator’s functions.

Rational Connection between the Limitation and the Purpose (section 28(2)(d) HRA)

The limitations or interferences are rationally connected to the legitimate purpose as prescribing these offences and applicable penalties aims to ensure that personal information which a person comes to possess because they are exercising a function or assisting in the exercise of a function under Part 3A of the DVAA is not misused. Creating offences to discourage the abuse of personal information is necessary to ensure trust in the ability of the DFVR Coordinator, other public servants and authorised individuals to responsibly manage information obtained or compelled by the operation of Part 3A.

Penalties for the unauthorised use or disclosure of information have precedence in other territory laws, including the *Information Privacy Act 2014*.

Proportionality and safeguards (section 28(2)(e) HRA)

The limitations or interferences on the right to liberty and security in Division 3A.6 are necessary, reasonable, and proportionate to the legitimate purpose.

The importance of protecting personal information is so critical that it is justifiable to impose civil and criminal penalties for these offences to provide appropriate deterrence. The offences prescribed by sections 16U(1) and (2) however do not apply if the information holder uses or discloses the protected information in accordance with this Act or another law applying in the ACT, to the chief police officer in connection with a possible offence, in relation to the exercise of a function, as an information holder, under the DVAA or another law applying in the ACT, in a court proceeding, or with the protected person’s consent (section 16U(3)). It is considered that these exceptions safeguard against the arbitrary prosecution of these offences, from the prosecution of a person who is exercising the functions prescribed by Part 3A of the DVAA honestly and in good faith, and from the prosecution of a person who is otherwise required or allowed by law to use or disclose the protected information.

A possible less restrictive alternative would be to impose no penalty for the offence, or to impose a civil penalty only. However, it is considered that this does not reflect the seriousness of the offences and the importance of public service officials and their delegates handling personal information with the greatest of care. The maximum penalty is proportionate to the offence which involves a breach of authority and trust. It is not considered that this less restrictive option would achieve the purpose which this limitation seeks to achieve, of deterring the unauthorised use and/or disclosure of information obtained by an information holder under Part 3A.

Domestic Violence Agencies Amendment Bill 2021

Human Rights Act 2004 - Compatibility Statement

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Domestic Violence Agencies Amendment Bill 2021**. In my opinion, having regard to the Bill and the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly **is** consistent with the *Human Rights Act 2004*.

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Shane Rattenbury MLA
Attorney-General

CLAUSE NOTES

Clause 1 Name of Act

This is a technical clause that sets out the name of the Act as the *Domestic Violence Agencies Act 2021*.

Clause 2 Commencement

This clause states that the Act commences on the day after its notification day.

Clause 3 Legislation amended

This clause states that the Act amends the *Domestic Violence Agencies Act 1986*.

Clause 4 New part 3A

This clause states that there will be a new Part 3A titled 'Domestic and family violence incident review' inserted into the *Domestic Violence Agencies Act 1986* on commencement of the *Domestic Violence Agencies Act 2021*.

Part 3A Domestic and Family Violence Death Review

Division 3A .1 Preliminary

This division sets out the purpose of the Act, and also defines some words which are used throughout the part. It is important to refer to this division when reading and interpreting the rest of part 3A of the Act.

Section 16A Purpose – pt 3A

This division sets out the purpose of the new Part, which will assist readers to interpret its provisions. The purpose is to establish a function within the ACT to conduct systematic reviews of deaths and life-threatening incidents which occur in the context of domestic and family violence. These reviews will be undertaken by the newly establish Domestic and Family Violence Review Coordinator, with the assistance of a team of public servant delegates and expert advisers. The reviews will focus on what contact the people involved in the death or near-fatal incident had with government and community-based agencies, in an attempt to identify issues for potential policy or law reform. The Coordinator will then make de-identified reports to the Minister on the general findings of the review/s, and any recommendations for reform, with the purpose of better identifying, responding to, and preventing further perpetration of family violence within the ACT community.

Section 16B Definitions – pt 3A

This section defines some of the words and phrases used in the Act. The definition of 'circumstances involving family violence' is deliberately broad, so as to enable the Coordinator to exercise discretion about which matters to request information about

and potentially review. The definition includes but is not limited to the following, when they occur in the context of domestic and family violence:

- Homicides
- Homicide/suicides
- Deaths by suicide of a victim
- Deaths by suicide of a perpetrator
- Accidents
- Deaths or injuries caused to third parties, for example witnesses, bystanders, first responders or other people who die or are injured in the course of their employment, people who attempt to intervene in a DFV incident, children, and friends or family members of victim survivors or perpetrators
- Incidents which are the subject of open or closed coronial investigation or proceedings
- Incidents which are the subject of open or closed criminal investigation or proceedings

To determine whether a person was in a 'relevant relationship' with another person, the Act refers the reader to section 9 of the *Family Violence Act 2016* (ACT). Similarly, it is necessary to look at the dictionary of the *Criminal Code 2002* (ACT) for the definition of 'serious harm'. This broad definition is to enable the Coordinator to exercise their discretion about which matters to review, and in recognition of the fact that harm caused by domestic and family violence can manifest in a multitude of ways which cannot always be predicted or narrowly defined.

Division 3A.2 Domestic and family violence review coordinator

This division sets out the new role of Domestic and Family Violence Review Coordinator (DFVR Coordinator). It is intended that after commencement of this Act, the Minister will appoint the Coordinator-General for Family Safety as DFVR Coordinator. The functions of the DFVR Coordinator are set out in detail at section 16E and will be exercised in accordance with the overarching purpose of this part. These functions are also referred to in other provisions of the Act, as they must be referred to in determining whether certain actions are allowable.

Section 16F provides that the, although the DFVR Coordinator is a public servant, they must act independently in the exercise of the functions set out above. This is to ensure that the DFVR Coordinator is able to make findings and recommendations about agencies for which the Director-General of their agency is responsible. For example, the Coordinator-General for Family Safety is currently located within the Community Services Directorate and is ordinarily subject to the direction of the Director-General of this Directorate. However, if appointed DFVR Coordinator, the Coordinator-General must have full independence when making findings and recommendations about agencies including Housing ACT and Child and Youth Protection Services when exercising the functions of DFVR Coordinator.

Section 16G allows the DFVR Coordinator to delegate their functions to another public servant, which will allow them to establish a small team to undertake reviews and otherwise assist in the exercise of these functions.

Division 3A.3 Advisory committees and independent advisors

These provisions allow for the DFVR Coordinator to be advised by subject matter experts when conducting reviews and otherwise exercising their functions under this part.

It is likely that a committee will have a broad membership of people with diverse expertise relating to DFV. A committee will likely be established under section 16H either to assist in the review of any incidents which the DFVR Coordinator decides to review in a given time period, or to assist in a cohort review. A cohort review is a review of a specific issue or category of incidents – for example, a review of DFV deaths caused by strangulation, or of DFV deaths or life-threatening incidents where the affected people have been members of the LGBTIQ+ community. A committee established for the purpose of assisting with a cohort review will be comprised of individuals with specific expertise relating to the subject matter of the cohort under review.

The functions of a committee established under this division are broad. In effect, the DFVR Coordinator can ask the committee to provide advice to the Coordinator which will assist in the exercise of any of the Coordinator's functions (provided at section 16E).

An individual independent adviser can also be appointed by the DFVR Coordinator under section 16I, either because the Coordinator themselves have recognised the need for specialist knowledge and advice on a particular issue, or because a committee has requested this assistance.

The provision at section 16I(2) for an appointment to be subject to conditions stated in the appointment is intended to allow the DFVR Coordinator to identify the scope of the role of an adviser, and to outline requirements in relation to matters including (but not limited to) confidentiality, information management and – if appropriate – remuneration.

The purpose of section 16J is to avoid as far as possible any conflicts of interest for committee members or independent advisers. For example, it would not be permissible for a person appointed under this division to have any access to information or any involvement in a matter concerning a family member or close friend. It would also not be appropriate for a person to view information or provide advice on a matter about which the person had prior or current professional interactions with, if the nature of that engagement presented any possible or perceived conflict of interest. A person appointed under this division who becomes aware of a potential conflict of interest should alert the DFVR Coordinator as soon as possible.

Division 3A.4 Register of domestic and family violence

This division enables the DFVR Coordinator to keep a register (which will in this case be an electronic database) about fatal and serious harm DFV incidents which occur in the ACT, or where the victim/affected person is ordinarily an ACT resident (domestic or family violence incident is defined at section 16C). It is intended that this register will contain all information which the DFVR Coordinator knows about an incident which is required by the Family and Domestic Violence National Minimum Data Set – a set of data which all members of the Australian Domestic and Family Violence Death Review Network has agreed that each jurisdiction will collect as part of its death review mechanism. The DFVR Coordinator also has broad discretion to record any other information on the register which they think is relevant to the exercise of the Coordinator's function. Information must only be recorded on the register if it is considered by the Coordinator to be reasonably relevant to the DFV incident under review. For example, if a perpetrator of DFV had a diagnosis of asthma which the DFVR Coordinator became aware of, this could not be recorded on the register unless the condition had some connection with the DFV.

The register may also contain information about historical incidents (incidents which occurred prior to the commencement of this part) due to section 16K(2)(b). This will allow the DFVR Coordinator to track trends and patterns over time.

Section 16M tightly limits access to the register. The only people who will have full access to the register will be the DFVR Coordinator and their delegates. Other people – including committee members and advisers – will only have access to the part of the register which the DFVR Coordinator authorises them to in writing. In practice, this will involve the DFVR Coordinator or their delegate providing the committee members or advisers a copy of information extracted from the register. Only information necessary for the committee member or adviser to exercise their functions will be provided to them. People with access to the register must only access the information held on it for specific purposes and in accordance with the other provisions of this Act (including section 16T – use and disclosure of protected information) .

Section 16N provides that information held on the register is not admissible as evidence in court which, among other things, protects the information from being subpoenaed by parties to family law or other proceedings. This provision further protects the privacy of the people whose information is held on the register, recognising that it will be a collation of a broad array of information about certain people and incidents which parties to certain court proceedings may seek to obtain.

Division 3A.5 Information gathering and sharing

This division empowers the DFVR Coordinator to request and collect information and sets out who is and is not required to provide the Coordinator with information, and how information is to be managed.

Section 16O Power to ask for information – relevant entities

Section 16O grants the DFVR Coordinator the power to ask for information from a defined set of agencies. This information can be requested whether or not the DFVR Coordinator has reasonable grounds to think that the agency holds relevant information and is therefore intended to allow the Coordinator to make a broad request for information when they are first notified of an incident. The information gathered during this process will be analysed by the DFVR Coordinator and used to decide whether or not the incident should be reviewed, and whether the DFVR Coordinator needs to request further information in order to conduct such a review.

Section 16O(2) means that the DFVR Coordinator must only request information in relation to a non-fatal incident if the person harmed in that incident consents. This reflects the policy position that no review should be undertaken of a non-fatal incident if the person harmed does not want that review to occur.

Section 16O(3) is to ensure the timely provision of information as a priority. It is intended that the DFVR Coordinator will work with agencies who are not reasonably able to provide relevant information within the specified timeframe to reach an agreement about an alternative timeframe. Section 16(4) provides that an entity must comply with a request under this section unless they have a reasonable excuse not to. Reasonable excuses include, but are not limited to, that giving the information:

- would be contrary to a court order
- would be a breach of legal professional privilege
- could compromise an investigation or matter before a court
- could compromise a person's safety

The list of entities listed at section 16O(5) is deliberately broad, and able to be added to by regulation, in recognition that people affected by DFV may disclose an incident to people or agencies in a wide variety of circumstances. In other words, disclosures are often made to people with no specialised DFV knowledge, or to organisations which the affected person is engaged with for reasons unrelated to DFV.

Section 16P Power to require information, document or thing

Unlike section 16O, the DFVR Coordinator must only issue a notice requiring the production of information under section 16P if the Coordinator believes that the person holds relevant information regarding a DFV incident.

Section 16P(3)(a) makes it clear that a family member of a person killed or harmed in a DFV incident cannot be compelled to provide information to the DFVR Coordinator. This provision intends to respect the autonomy of family members, some of whom may wish to be actively involved in a review of their loved one's death, for example, while some may not.

As with section 16O, the DFVR Coordinator must only issue a notice in relation to a non-fatal incident if the person harmed in that incident consents

Due to the fundamental importance of the DFVR Coordinator having access to as much information as possible about a DFV incident in order to exercise their functions, there is an offence provision in this section which will apply if a person does not comply with a section 16P notice without reasonable excuse.

It is intended that where notices are issued under section 16P in relation to information held by a government agency, business, or any other organisation – that the notice will be directed to the head of that organisation, rather than to an individual staff member.

Section 16Q Sharing information – corresponding state entities

Subsection 16Q(1) This provision is included in recognition of the ACT's participation in the National Family Violence Death Review Network – a network of representatives from each Australian State and Territory.

Subsection 16Q(2) enables the ACT to contribute to national research and review projects, for example reports such as the 'Australian Domestic and Family Violence Death Review Network national data update', a project lead by the National Family Violence Death Review Network and Australia's National Research Organisation for Women's Safety Limited (ANROWS).

It is intended that any information shared under this provision will be deidentified as far as possible (for example, names removed), though it is recognised that the information shared will necessarily include a broad range of personal and health information about people involved in DFV incidents.

Section 16R: Sharing information with Coroner's Court

This provision is in recognition of the fact that there will be some crossover in matters which are under review by both the DFVR Coordinator and the coroner. The DFVR Coordinator has discretion to share information with the Court under this section if they consider that the information would assist the Coroner's Court to exercise its functions in relation to a matter involving known or suspected DFV.

Section 16S: Providing information etc – other circumstances

This provision makes it clear that if a person or agency which has information they consider may be relevant to the DFVR Coordinator, that person or agency may provide that information on their own initiative to the DFVR Coordinator. In other words, it is not necessary for a person or agency to await a request from the DFVR Coordinator to share relevant information. Any information provided to the DFVR Coordinator under this provision is subject to the same privacy and other protections as information received in response to a request.

Section 16T: Information sharing guidelines

This provision ensures that any agency which prepares policy or procedural guidelines about how they will share information with the DFVR Coordinator must do so in collaboration with the Coordinator. This is to ensure accurate and consistent interpretation and application of the information sharing provisions of this part. Requiring these guidelines to be notifiable instruments provides public oversight and scrutiny.

Section 16U: Use and disclosure of protected information

This provision prescribes two new offences which are aimed towards preventing the unauthorised use or disclosure of personal information by a person who obtains that information by exercising, or assisting in the exercise of, the DFVR Coordinator's functions under this part. These offences apply equally to those currently exercising a function to those who no longer have any involvement with the DFV incident review process as established by this part.

Division 3A.6 Reports about domestic and family violence incidents

This division requires the DFVR Coordinator to report to the Minister biennially but provides the Coordinator with discretion to report more frequently if they consider it necessary or desirable.

The Coordinator is given broad discretion about what they may include in their reports to the Minister, so that the content of each report can be specifically adapted according to the incidents reviewed in the relevant period.

It is intended that reports will be de-identified as far as possible according to the circumstances of each incident. For example, the Coordinator may decide to report on the age of victims or people affected by DFV incidents using an age range, rather than listing the age of each person.

It is intended that any recommendations contained in these reports will inform government decisions about policy and law reform to the DFV service sector. It is also intended that these reports will act as an accountability mechanism for both the government and any other agency which is the subject of a recommendation, as the DFVR Coordinator is able to include in the report's information about the implementation of any previous recommendation they have made.

Division 3A.7 Miscellaneous

Section 16X: Protection of DFVR coordinator etc from liability

This provision protects the Coordinator and anyone acting under their direction from liability unless they are acting dishonestly and/or recklessly.

Section 16Y: Review of part

This provision requires the Minister to review the operation of this part after a specified period of operation, being three years after commencement. This will allow for the provision of one biennial report to be provided to the Minister (in accordance with section 16U), as well as some time for the recommendations contained within that report to be considered and responded to by government and relevant agencies before reviewing the Parts operation.

Clause 5 Dictionary, note 2

This clause directs the reader to the *Legislation Act 2001* for the definition of some terms used in this part.

Clause 6 Dictionary, new definitions

This provision directs its reader to the location within this part of the definitions of certain terms.