

Review of Part 4, Division 4 (Sacrilege and housebreaking) of the *Crimes Act 1900*.

Full Stop Australia Submission, March 2024



Full Stop Australia acknowledges the Traditional Custodians of Country throughout Australia, and their continuing connection to land, sea and community. We pay our respects to them, their cultures and their Elders past and present.

About Full Stop Australia

Full Stop Australia thanks the Department of Communities and Justice (the **Department**) for inviting us to provide input on the review of Part 4, Division 4 (Sacrilege and housebreaking) of the *Crimes Act 1900* (NSW) (the **Crimes Act**) (**Review**).

Full Stop Australia is a nationally focused not-for-profit organisation, which has been working in the field of sexual, domestic, and family violence since 1971. We perform the following functions:

- Provide expert and confidential telephone, online and face-to-face counselling to people of all genders who have experienced sexual, domestic, or family violence, and specialist help for their supporters and those experiencing vicarious trauma;
- Conduct best practice training and professional services to support frontline workers, government, the corporate and not-for-profit sector; and
- Advocate to governments and in the media for laws and systems that better respond to, and ultimately prevent, gender-based violence.

Our advocacy draws upon the expertise of our trauma-specialist counsellors, who support people impacted by sexual, domestic and family violence across the country. It also draws on the lived expertise of over 600 survivor-advocates in Full Stop Australia's [National Survivor Advocate Program \(NSAP\)](#). The NSAP gives survivor-advocates a platform to share their experiences to drive positive change—by accessing opportunities to tell their stories in the media, weigh in on Full Stop Australia's submissions to Government, and engage directly with Government. We are committed to centring the voices of victim-survivors in our work, and advocating for laws and systems that genuinely meet their needs.

About this submission

This submission was prepared by Emily Dale, Head of Advocacy and Taran Buckby, Legal Policy Officer. If you have any questions in relation to this submission, please do not hesitate to contact Emily Dale at emilyd@fullstop.org.au.

This submission largely focuses on Issue 2 in the Department's *Discussion Paper: Review of Part 4, Division 4 (Sacrilege and housebreaking) of the Crimes Act 1900 (Discussion Paper)*, which asks stakeholders to identify preferred approaches for addressing the issues raised by *BA v The King* [2023] HCA 14 (**BA v The King**)—given this is where our organisational expertise lies. However, we have commented on one of the questions under Issue 1, which deals with modernising legislative drafting, as it raises issues in relation to how the Crimes Act should be amended to deal with *BA v The King*.

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This submission is underpinned by the following principles:

- **Victim-survivor safety is paramount.** There should never be a situation where a perpetrator of domestic and family violence (DFV), who no longer lives at a premises, can lawfully return to the property without the victim's consent.
- **Recognition of various types of harm.** Not all harm experienced by victim-survivors of DFV is physical. Perpetrators of DFV often engage in coercive and controlling behaviours, such as financial abuse, isolation from support networks and surveillance. This dynamic of control underpins all DFV, and can be a precursor to physical harm. Noting that the standalone coercive control offence will commence in NSW in July 2024, this Review should aim to protect victim-survivors from coercive control as well as physical forms of DFV.
- **The need for sustained practical support and safe housing options.** Legislative change should be accompanied by practical support to victim-survivors of DFV. Programs such as Staying Home Leaving Violence (SHLV)—which support victim-survivors to leave violent and abusive relationships, while remaining connected to support networks, communities, friendships and family—should continue to be a funding priority.

Issue 1: Modernising the drafting

Question 2: Should sections 109, 110, 112 and 113 retain the requirement for there to be a physical 'break' as an element of the offence?

Full Stop Australia supports replacing the requirement for a physical 'break' with terminology like 'trespass', or being 'in the place of another person without consent.'

As noted in the Discussion Paper, most Australian jurisdictions do not refer to 'breaking' as an element of relevant offences:

"In the ACT, the Northern Territory, South Australia, Tasmania, Victoria and the Commonwealth, the concept of 'trespasser' has been adopted. The relevant offences in these jurisdictions apply where a person enters, or remains in, a building as a trespasser. A 'break' is not an element of the relevant offences in these jurisdictions. In Western Australia the offence of burglary requires proof that a person "enters or is in the place of another person, without that other person's consent, with intent to commit an offence in that place."

The advantages of replacing the element of 'break,' as outlined in paragraphs [3.12]-[3.14] of the Discussion Paper, are as follows:

- It attaches criminality to the act of being in someone's home without their consent, rather than the means of entry to the premises (which, as the Discussion Paper notes, involves a level of "arbitrariness").

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- It would capture both entry to, and remaining on, a premises without the consent of the occupier. This is important for maximising protection available to victim-survivors of DFV.
- It would increase alignment between NSW law and the law in most other Australian jurisdictions.

Issue 2: Proposed approaches to BA v The King

Question 10: Is reform required to address BA v The King?

Full Stop Australia supports reform to address BA v The King. This decision puts victim-survivors of DFV at ongoing risk of harm—by creating a loophole allowing a perpetrator of DFV with a lawful right to access a premises, but who no longer resides there, to regain access at any time. This applies to persons listed on residential tenancy agreements, as was the case in BA v The King—but it likely has broader reach, also capturing “residential premises that are privately owned and not subject to a lease (i.e. owner occupied), and... non-residential premises that are privately owned by an individual or individuals,” as noted in the Discussion Paper.

It is important that NSW law adequately protects victim-survivors of DFV—including making it safe for them to continue living at home following an experience of DFV. As Anne Summers notes in her report, *The Choice: Violence or Poverty*, without support to remain in or access safe housing following DFV, victim-survivors are at increased risk of staying in, or returning to, violent relationships:

“[Based on the findings of the 2016 Personal Safety Survey] an estimated 275,000 Australian women suffered physical and/or sexual violence from their current partner. Of these women, 81,700 (30 per cent) had temporarily left the violent partner on at least one occasion but later returned... For around 15% of these women (12,000), the reason for returning was that they had no money or nowhere else to go. Returning to their violent partner seemed a better choice than being homeless or trying to subsist in poverty. The vast majority of these 275,000 women – 193,400 or 70 per cent of them – chose to remain. Not all of them did so happily. Almost 90,000 of them wanted to separate but were unable to do so, with 22,600 saying that lack of money and financial support was the main reason they were unable to leave their violent partner.”¹

DFV is a leading cause of homelessness in Australia, which disproportionately affects women and children. Australian Institute of Health and Welfare statistics show that in 2021-22, 39% of clients who presented to Specialist Homelessness Services (around 108,000 people) reported they were escaping DFV.² In March 2021, the Parliamentary inquiry into family, domestic and sexual violence found that victim-survivors of DFV

¹ Anne Summers. (2022). *The Choice: Violence or Poverty—Domestic Violence and its Consequences Today*. University of Technology Sydney. <https://doi.org/10.26195/3s1r-4977>.

² Australian Institute of Health and Welfare. (2020). *Specialist homelessness services annual report 2019-20*. AIHW. <https://www.aihw.gov.au/reports/homelessness-services/shs-annual-report-2019-20>.

often bear the costs of leaving a violent relationship, the family home and their community.³ Recent analysis by Homelessness Australia found that women and children make up 74% of all people using homelessness services, and women make up 80% of those turned away from homelessness services because they lacked the resources to assist.⁴

Legislative change to address the fact pattern in *BA v The King* is a positive step towards ensuring victim-survivors of DFV are supported to remain safe at home. This, in turn, has the potential to deliver flow-on benefits for victim-survivors' overall economic wellbeing.

Question 11: Reform clarifying that a person with right of access, who no longer resides at the premises, can commit an offence that includes a 'break' (Option 1)

As set out below in response to Question 12, we prefer the option of creating a standalone offence. We have nonetheless provided feedback on this option.

As set out above in response to Question 2, Full Stop Australia supports replacing the element of 'break' with something else—like trespass, or presence without consent. We think this shift in focus—from the means of entry, to the fact of nonconsensual presence—more appropriately captures the harm offences at ss 109, 110, 112 and 113 are intended to address. This broadens protection to victim-survivors of DFV. Firstly, it closes a loophole that could allow perpetrators accessing property without consent, but not technically 'breaking' in, to avoid culpability simply based on the means of entry. Secondly, using 'trespass' rather than 'break' captures situations where a person *remains* on a premises without consent, not merely their initial entry.

If this change were progressed, this option should instead clarify that, "a person with a right to access residential premises under property law is capable of committing an offence where '*trespass*'⁵ is an element of the offence" (rather than 'break').

Paragraph [4.19] of the Discussion Paper suggests limiting the application of this option to "circumstances where the person who enters the premises intends to commit, or actually commits, an assault against the occupant, intimidates the occupant or damages their property." This is intended to mitigate the risk of an offence being applied to a victim-survivor of DFV returning to their former residence to retrieve an item, or discouraging people in dangerous situations from moving out, among other things.

³ House of Representatives Standing Committee on Social Policy and Legal Affairs. (2021). *Inquiry into Family, Domestic and Sexual Violence*. Parliament of the Commonwealth of Australia. https://parlinfo.aph.gov.au/parlInfo/download/committees/reportrep/024577/toc_pdf/Inquiryintofamily_domesticandsexualviolence.pdf;fileType=application%2Fpdf.

⁴ Homelessness Australia. (2023). *Housing crisis is driving surging demand for homelessness services*. Homelessness Australia. <https://homelessnessaustralia.org.au/housing-crisis-is-driving-surging-demand-for-homelessness-services/>.

⁵ We've used 'trespass' to reflect legislative drafting in the majority of other Australian jurisdictions. However, this could also be 'presence without consent' or something similar.

If this option is progressed, we suggest expanding the above clarification as follows (changes in italics):

"Circumstances where the person trespassing on the premises intends to commit, or actually commits, an assault against the occupant or another person or animal, or threatens or intimidates the occupant (including by threatening harm to another person or animal, or damaging the occupant's property)."

We have added reference to a broader range of non-physical forms of abuse, recognising that DFV is a pattern of coercive behaviour that doesn't always involve physical harm. This includes capturing harm or threats to third parties or pets present at the property—recognising that perpetrators of DFV commonly use or threaten to use harm on others, as a way of instilling fear or maintaining control. Finally, we have clarified that, to be criminal conduct, property damage must be linked to intimidation or threats—to address the risk of victim-survivors being criminalised for minor property damage, which isn't linked to coercive, intimidating, threatening or otherwise fear-inducing behaviour. This is connected to the risk of misidentification, outlined below.

It's important that legislative change be accompanied by community education and police training to address the risk of 'misidentification' of victim-survivors of DFV as perpetrators. 'Misidentification'—when a DFV victim is mistakenly named as the respondent on an apprehended violence order or charged with criminal offences—is already a significant issue in the policing of DFV across Australia, A 2018 review by Women's Legal Service Victoria found that 1 in 10 of their clients had been misidentified as the aggressor in police applications for apprehended violence orders.⁶ This issue disproportionately impacts women from culturally and linguistically diverse communities, Aboriginal women and LGBTQ+ communities.

Question 12: Standalone assault offence (Option 2)

We have a slight preference for the introduction of a standalone offence to address the fact pattern in *BA v The King*, over Option 1 above. Specifically criminalising perpetrators of DFV who improperly regain access to premises where they no longer live, combined with a community education campaign on the new offence, has greater potential than Option 1 to raise awareness about new protections available to victim-survivors.

However, if a standalone offence is introduced, it should not only apply when the person trespassing 'assaults' the occupant. Instead, it should apply in a broader range of circumstances, recognising that DFV can consist of a range of controlling, threatening and intimidating behaviours, that don't always involve physical violence.

⁶ Ulbrick, Madeleine and Jago, Marianne. (2018). *Officer she's psychotic and I need protection": Police Misidentification of the 'Primary Aggressor' in Family Violence Incidents in Victoria*. Women's Legal Service Victoria. <https://womenslegal.org.au/files/file/WLSV%20Policy%20Brief%201%20MisID%20July%202018.pdf>.

The standalone offence should also deal with a situation of AVO breach. This would allow the higher penalties associated with housebreaking offences⁷ to capture breaches of interim or final AVOs involving trespass to victim-survivors' residential premises.

To address these points, we recommend recasting the standalone offence as follows:

*"The standalone offence would apply when a person *trespasses on*⁸ residential premises without the consent of the person apparently in charge of the premises (the occupant) and assaults the occupant *or another person or animal*, or *threatens or intimidates the occupant (including by threatening harm to another person or animal, or damaging the occupant's property)*.*

The standalone offence would also apply when a person trespasses on residential premises without the consent of the occupant, and there is an AVO in place with a condition prohibiting the person from accessing the premises."

If this offence were introduced, police training and community education would need to address the risk of misidentification, outlined above.

⁷ Meanwhile, the maximum penalty for AVO breach alone is 2 years' imprisonment.

⁸ See our comments above regarding our preference for 'trespass' over 'enter' or 'break'—given the former more clearly captures all non-consensual presence at a premises, not merely entry.