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Confidential

Hon Margaret McMurdo AC
Taskforce Chair
Women's Safety and Justice Taskforce
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By email: [redacted]

Dear Taskforce Chair

Women's Safety and Justice Taskforce: Discussion Paper 1

Thank you for the opportunity to provide feedback on options for legislating against coercive control.

The Queensland Law Society (**QLS**) is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled by members of the QLS Domestic and Family Violence Committee, the Criminal Law Committee, the Family Law Committee, the Elder Law Committee, the Health and Disability Law Committee, the First Nations Legal Policy Committee and the Human Rights and Public Law Committee, whose members have substantial expertise in this area.

QLS acknowledges the diverse perspectives and views among QLS members on the issues raised in the Discussion Paper. This submission acknowledges those different perspectives.

Coercive control is a pattern of behaviour or a course of conduct aimed at dominating and controlling another person and can involve both physical and/or non-physical tactics.[1] It is a method of undermining a person's agency and creating an atmosphere of threat and confusion.

[1] ANROWS, *Defining and responding to coercive control: Policy brief*, https://www.anrows.org.au/publication/defining-and-responding-to-coercive-control/.

Research suggests that coercive control is a predictive factor for serious physical violence in intimate relationships, including homicide.[2] The effects on victims can be devastating.

Coercive control is a gendered phenomenon. The way in which coercive control manifests is highly situational and contextual, and can vary significantly across different relationships.

There are communities for whom coercive control and domestic and family violence experiences and risks are compounded through social factors, systems responses and greater vulnerabilities and isolation. These groups include culturally and linguistically diverse people, First Nations Peoples, people with disability, older women and LGBTIQ+ people. We expand on some of these experiences below.

We respond to the questions set out in the Discussion Paper as follows:

Community Attitudes

3. **What should be done to improve understanding in the community about what 'coercive control' is and the acute danger it presents to women and to improve how people seek help or intervene?**

There is significant scope to improve community understanding of coercive control and domestic and family violence. This is essential to shift entrenched community attitudes about gender inequality and to achieve lasting change.

Community attitudes act as a barrier for women escaping violent relationships and seeking help. The fear of not being believed, in particular, is a significant barrier for women in accessing justice. The most recent National Community Attitudes towards Violence against Women Survey found that around 40 per cent of people believe women lie about or exaggerate reports of violence as a means of revenge or to gain tactical advantage.[3] This survey also found that two in five Australians believe that gender inequality is exaggerated.[4] One in five Australians believe domestic violence is a normal reaction to stress, and that sometimes a woman can make a man so angry he hits her without meaning to.[5] These beliefs are harmful and perpetuate dangerous misconceptions about women and domestic and family violence.

Given this, QLS strongly recommends that the Taskforce consider measures aimed at driving change in the structures, norms and practices that lead to gender inequality and violence against women. This is consistent with the Fourth Action Plan under the National Plan to Reduce Violence Against Women,[6] which focuses on primary prevention as a long term measure in addressing violence against women.

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[2] Hayley Boxall and Anthony Morgan, *Statistical Bulletin 30: Experiences of coercive control among Australian women* (Australian Institute of Criminology, March 2021) 2.
[3] ANROWS (2017) *Australians' Attitudes Towards Violence Against Women & Gender Equality – 2017* NCAS Summary Report. Retrieved from https://20ian81kynqg38bl3l3eh8bf-wpengine.netdna-ssl.com/wp-content/uploads/2019/10/anr001-NCAS-report-WEB-1019.pdf.
[4] ANROWS, *Are we there yet? Australians' attitudes towards violence against women and gender equality.*
[5] ANROWS, *Are we there yet? Australians' attitudes towards violence against women and gender equality.*
[6] Department of Social Services, *Fourth Action Plan of the National Plan to Reduce Violence against Women and their Children 2010-2022,* https://www.dss.gov.au/women-publications-articles-reducing-violence/fourth-action-plan.

Coercive control is deeply rooted in a historical imbalance of power and entitlement. Cultural attitudes about gender develop early and become entrenched. We support school-based education about respectful relationships. Early education programs challenge misogyny and support the development of pro-social behaviours that lead to equitable and respectful relationships.

The NSW Joint Select Committee on Coercive Control recently recommended that the State Government include coercive and controlling behaviour as a topic in school programs about respectful relationships.[7] This was found to be important in ensuring that young people develop an understanding of healthy relationships, and can navigate online relationships. The Joint Select Committee also considered submissions to the Inquiry which highlighted the importance of these programs, including culturally-specific programs, in encouraging healthy and respectful relationships, helping young people to identify abusive behaviour and access support services, and in combating stereotypes and stigma around relationships and abuse.[8]

Education should focus on the various forms of abuse, including physical, emotional, sexual, financial, social, spiritual, verbal, chemical, psychological or technology-based abuse. QLS supports campaigns such as 'Stop it at the Start' which encourages adults to reflect on their attitudes and provides resources to adults to support conversations with children about respect.

In order to effectively respond to coercive control, the community needs the tools to understand and identify it. QLS recommends the government implement a well-funded, comprehensive public education campaign on coercive control, including how it manifests and how to seek safety, support and protection. It should also encourage perpetrators to seek support and engage in early intervention programs.

11. **What could be done to better ensure that perpetrators, have access to services and culturally appropriate programs with the capability to respond to coercive control whilst they are on remand or after sentencing in a correctional facility?**
13. **What are the gaps in the service system that could be addressed to achieve better outcomes for victims and perpetrators of coercive control?**

In the experience of our members, there are significant delays in accessing perpetrator and behavioural change programs.[9] There is also a lack of variety in available programs. For example, there are very few culturally appropriate programs for Aboriginal and Torres Strait Islander men. The range of people affected by domestic and family violence is diverse and so available services should be similarly diverse.

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[7] Recommendation 10; Parliament of New South Wales, Joint Select Committee on Coercive Control, *Coercive control in domestic relationships* (Report 1/57, June 2021), https://www.parliament.nsw.gov.au/ladocs/inquiries/2626/Report%20-%20coercive%20control%20in%20domestic%20relationships.pdf.

[8] Parliament of New South Wales, Joint Select Committee on Coercive Control, *Coercive control in domestic relationships* (Report 1/57, June 2021), 51 https://www.parliament.nsw.gov.au/ladocs/inquiries/2626/Report%20-%20coercive%20control%20in%20domestic%20relationships.pdf.

[9] Our members report that it can take at least 4-6 months for a respondent who is the subject of an Intervention Order made to access an Intervention Program. For those who want to access the program voluntarily, there are delays of up to 12 months.

Many programs also fail to align with other services aimed at addressing issues which intersect with domestic and family violence, such as mental health, drug and alcohol addiction, unemployment, poverty and housing insecurity.

We support the availability of restorative justice processes in appropriate circumstances, including in conjunction with concurrent criminal proceedings.[10] Restorative Justice Conferencing in New Zealand (which has statutory recognition) has received positive feedback from victims in family violence matters.[11]

We acknowledge that there is a range of opinions about the appropriateness of restorative justice processes in a domestic violence context. Notwithstanding this, restorative justice and trauma-informed processes are increasingly used informally in the private sector. A question of access to justice arises because private processes are often expensive and not available through Legal Aid. Our members have also experienced reluctance from police when seeking to engage in restorative justice conferences. We support additional police training about these processes.

Whilst many criminal matters may not be appropriate for restorative justice conferencing, the process can be beneficial for participants in the right circumstances. This reinforces a key theme of our submission: responding to domestic and family violence requires a coordinated and multifaceted range of responses.

Legislative Response

18. What is working in the civil protection order system under the DFVP Act to protect women and children from coercive control?

Civil Domestic Violence Orders (**DVO**) under the *Domestic and Family Violence Protection Act 1989* (Qld) are designed to offer accessible protection for victims. The civil system has a number of benefits. The standard of proof is lower and the strict rules of evidence do not apply.[12] The definition of "domestic violence" under the Act is broader than under criminal statutes, and so a wider range of behaviour is captured, including those which constitute coercive control. The civil protection order system enables flexibility; the Court may tailor the conditions of the protection order to suit the parties' individual circumstances.

A further benefit of the civil protection order system is that the proceedings are heard in private and no information may be published about the evidence provided, the identity of parties or orders made. The non-criminal nature of the proceedings also means that resolution may be reached by agreement. In the experience of some of our members, the overwhelming majority of protective orders are made by consent, and without admission of wrongdoing.

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[10] We refer to research on restorative justice conferencing processes in a domestic violence context. See, Kathleen Daly and Julie Stubbs, 'Feminist engagement with restorative justice' (2006) 10(1) *Theoretical Criminology*, 9-28; See also e.g., James Ptacek (ed) *Restorative justice and violence against women* (Oxford University Press, 2009). Lois Presser and Emily Gaarder, 'Can restorative justice reduce battering? Some preliminary considerations' (2000) 27(1) *Social Justice* 175-195.

[11] Ministry of Justice – Restorative Justice Survey, (Victim Satisfaction Survey 2018),11 https://www.justice.govt.nz/assets/Documents/Publications/Restorative-Justice-Victim-Satisfaction-Survey-Report-Final-TK-206840.pdf.

[12] *Domestic and Family Violence Protection Act 2012* (Qld) s145(3).

Contravention of a domestic violence order is a criminal offence which attracts a maximum penalty of imprisonment of up to 5 years (where the perpetrator has previously been convicted of a domestic violence offence) or 3 years (where the perpetrator has not been previously convicted of a domestic violence offence).[13]

Breaching a protection order is one of the most commonly utilised offence provisions in the domestic violence context.[14] Police may charge a person with this offence notwithstanding the complainant's wishes. This enables the police and the court to exercise some ongoing jurisdiction even if the complainant does not wish to engage with proceedings. However, police may prosecute an offence of breaching a protection order where a more substantive, serious offence may be applicable. The result is that low penalties, relatively speaking, are applied to what is otherwise serious criminal behaviour. [15]

19. What parts of the civil protection order system under the DFVP Act could be improved to better protect women and children from coercive control?

There is inconsistency in the jurisprudence, process and procedures across the different Magistrates courts and registries of Queensland.

Accordingly, the local jurisdiction may have a drastic impact on the outcome of a matter. The *Domestic and Family Violence Protection Act* 2012 Benchbook, published in December 2020, may go some way to streamline inconsistent processes.

In the experience of some QLS members, it can be difficult to obtain a DVO on the basis of coercive and controlling behaviour alone. Some improvements to the definition of domestic and family violence under the DFVP Act may assist in addressing this issue to some extent. This is outlined in more detail below.

We support consideration of ways in which systems abuse can be addressed within the civil protection order system. The court should be empowered, for instance, to strike out clearly vexatious matters on application without the need to proceed to a full hearing.

Finally, efforts should be made to ensure that DVOs are worded consistently across jurisdictions and in plain English. Culturally sensitive wording may be appropriate where the parties to the order involve First Nations Peoples or people from culturally and linguistically diverse backgrounds.

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[13] *Domestic and Family Violence Protection Act 2012* (Qld) s 177.
[14] Australia Bureau of Statistics, 'Experimental family and domestic violence statistics' https://www.abs.gov.au/statistics/people/crime-and-justice/criminal-courts-australia/latest-release#experimental-family-and-domestic-violence-statistics.
[15] Heather Douglas, 'Do We Need a Specific Domestic Violence Offence?' (2015) 39 *Melbourne University Law Review* 434, 438; Special Taskforce, 'Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland' (Report, 28 February 2015) 73, 90.

20. What are the advantages and/or risks of using the civil protection order system under the DFVP Act instead of using a direct criminal law response?

There are several advantages to using the civil protection order system. As noted above, the civil protection order system is flexible and has the capacity to capture behaviour which does not meet the criminal law threshold.

In addition, the civil law response may be preferred by complainants who are reluctant to engage in the criminal law process and do not wish for their partner or former partner to be the subject of criminal charges, but want the violence to stop. There may be a range of factors which influence this preference. For instance, the engagement of criminal law processes against a perpetrator may have significant financial and economic consequences for the family unit. Some victims may prefer the civil order system as it ensures that the family unit is not unduly interrupted or disadvantaged.

The objectives and outcomes of the civil and criminal responses are different. They are not mutually exclusive and can work together. The objective of the civil law system is protection, and the outcome of the civil order system is an order that is protective of the person subject to coercive control. The objective of the criminal law system is to sanction behaviour.

The civil law response allows a process that can be more flexible and less onerous for the person seeking protection. The criminal response requires more formal proceedings and a higher standard of proof as its objective is State sanction of behaviour. If a civil protection order is breached, or if a criminal offence has been committed, then a criminal law response can be engaged to provide sanctions. By itself, a direct criminal response does provide protection.

Some of our members have expressed concern that respondents may not treat a civil protection order as seriously as a criminal charge.

21. What could be done to help the civil protection system under the DFVP Act be more effective in protecting women and children from perpetrators who coercively control them?

QLS supports ongoing education and training on domestic and family violence for solicitors, judiciary, court staff and other relevant professionals, including police.

Training on domestic and family violence should address the lived experience of victims and the deeply held beliefs of perpetrators which lead to the perpetration of domestic and family violence, including entitlement, power and control, disrespect for women, manipulation, and the use of fear and degradation.

Any training should be nuanced and tailored to the specific audience. Relevant topics for training include vicarious trauma, survivor adaptability, the complex dynamics of domestic and family violence, the impacts and manifestations of trauma and professional skills.

As stated above, more consistent and streamlined processes would also assist.

Bail

23. What would be the benefits and risks in only allowing courts to make decisions on bail with respect to a person charged with a domestic violence offence?

A presumption in favour of bail is consistent with the human right enshrined in the *Human Rights Act 2019* (Qld)–the presumption of innocence until proved guilty according to law. If a person is denied bail and later acquitted, there may be significant consequences (loss of employment or housing) due to long periods of remand, particularly given court delays.

Section 16(3) of the *Bail Act 1980* (Qld) provides that an offender charged with a 'relevant offence' (including an offence against the *Domestic and Family Violence Protection Act* 2012 (DFVPA))[16] is placed in a 'show cause' position. This means that an offender has their presumption to bail reversed and bears the onus of persuading the court as to why their detention in custody is not justified.

As noted previously, domestic violence is defined broadly under the DFVPA and a breach of a DVO could include a broad range of behaviours. Similarly, any breach is listed as a 'domestic violence offence', appearing in offender criminal histories and triggering the bail presumptions under the *Bail Act,* noted above.

When a person is charged with a domestic violence offence, police can issue a notice to appear or take the person into custody. If the person has been taken into custody, either a watch house officer or a court can grant bail. Our members have reported that the number of people who are granted bail from watch house officers is reducing, apparently due to concerns about further offending. While it has occurred, serious domestic violence cases only rarely involve police officers making decisions on bail.

There are risks in only allowing courts to make decisions on bail with respect to a person charged with domestic violence. The ability for these decisions to be made outside of court must be maintained to facilitate for appropriate decision-making in circumstances where a person may be vulnerable in a custodial environment. For example, there may be mental health, drug or alcohol addiction issues which are exacerbated in a watch house environment. Practically, where an offence occurs on a weekend, offenders will also be held in custody until the matter can be listed.

By allowing only courts to make decisions on bail with respect to domestic violence charges, people may spend more time in custody and incur additional legal costs. There may be an increase in Supreme Court bail applications (where bail is refused by a Magistrate) which places further pressure on courts and increases cost.

QLS supports the continued development and review of guidelines and protocols for determining bail in domestic and family violence matters. This should act as an additional tool for police to make informed risk assessments.

QLS also supports improved processes for explaining bail conditions to respondents. Offenders should also be able to seek the support of these services for any further clarity of bail conditions after their release.

[16] *Bail Act* 1980 (Qld) s 16(7).

24. **What could be done to improve the capability of police, lawyers and judicial officers to better understand coercive control behaviours so that these factors are given appropriate weight in the assessment of unacceptable risk under section 16 of the Bail Act?**
25. **Should further training be offered to police, lawyers and judicial officers involved in bail applications about coercive control and if so, should it be mandatory where possible?**

We support the provision of appropriately targeted training to all relevant stakeholders.

We refer to Safe and Together training recently undertaken by Family Court judges, registrars and family consultants.[17] The Safe and Together model has also been adopted by Child Safety Queensland.[18] This training focusses on the contextual nature of violence, including coercive control. In our view, this training would be suitable for Magistrates.

We also recommend specialist training be developed specifically for police, given their critical role in identifying and responding to coercive control. Again, this training should focus on the importance of context in identifying offending and assessing risk.

26. **How could the Bail Act be amended to improve a court's ability to take into account coercive control when assessing unacceptable risk under section 16?**

QLS does not recommend amending the *Bail Act* to specifically refer to coercive control.

In assessing whether there is an unacceptable risk under section 16, a court will appropriately take into account all matters it considers relevant. In a bail application before the court, a police prosecutor objecting to bail would need to provide the court with an affidavit setting out the reasons why bail should not be granted. Where police are alleging coercive control, the allegations would need to be plainly articulated. The inherent nature of coercive control may mean that this will be difficult in many circumstances, and arguably impossible in the context of a bail hearing.

Our members consider that the current thresholds in the *Bail Act* which trigger the presumption against bail are appropriate.

QLS submits that if there are going to be presumptions against bail arising from coercive control, the police must be able to produce clear evidence of the particular allegations. This is to ensure that persons are not held in custody on the basis of allegations which are not supported by evidence.

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[17] Safe & Together Institute, *Australian Courts engage U.S.-based Safe & Together Institute to undertake family violence-focused training,* https://safeandtogetherinstitute.com/australian-courts-engage-u-s-based-safe-together-institute-to-undertake-family-violence-focused-training/.
[18] Queensland Government, Child Safety Practice Manual, *Safe and Together Model,* https://cspm.csyw.qld.gov.au/practice-kits/domestic-and-family-violence/overview-of-domestic-and-family-violence/safe-and-together-model.

27. What could be done better, for example mandatory perpetrator programs, to protect the safety of women whose coercively controlling partners are given a grant of bail?

In our view, perpetrator programs should be available to those who wish to voluntarily participate, both pre and post sentence. Mandatory perpetrator programs should not be imposed on a person who has not been convicted of an offence.

If program attendance were a condition of bail and a defendant fails to attend, they will breach bail and be liable to criminal sanction. This risks further disadvantaging vulnerable groups, especially First Nations Peoples. Adverse outcomes may be compounded by periods of remand, especially with court delays.

As already noted, the current availability and range of perpetrator programs is limited. Existing offerings do not adequately address other factors which may be relevant to domestic and family violence including mental illness and drug and alcohol addiction. It is important to note that while drug and alcohol issues and mental health issues frequently co-exist with domestic and family violence, these are not causative.[19] Mandatory programs may also not be appropriate for those with intellectual impairments or other disabilities which are not immediately apparent or are undiagnosed.

We support a wide range of sentencing options, including the imposition of a program as a condition of probation or parole. Judicial discretion is crucial in ensuring that the court is able to properly respond to domestic and family violence.

The Queensland Criminal Code

28. What types of coercive control behaviours aren't currently criminalised by existing offences in the Criminal Code?

There are various offences in Queensland which contemplate coercive and controlling behaviour. These include but are not limited to:

- Offences of violence and sexual assault in the *Criminal Code* and attempts;
- Using a carriage service to menace, harass or cause offence;
- Recordings in breach of privacy;
- Stalking;
- Torture;
- Deprivation of liberty;
- Threats;
- Wilful damage;
- "Revenge porn" offences;
- Offences of violence against animals;
- Breach of DVO; and
- Extortion.

The discussion paper recognises that there is no single definition of coercive control. This poses a challenge in terms of developing an appropriate legislative response.

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[19] Richelle Mayshak et al, Alcohol/Drug Involved Family Violence in Australia (ADIVA), Research Bulletin No. 7 June 2018. Australian Institute of Criminology.

It is well recognised that coercive control involves the pattern of behaviour and it is the cumulative impact of these behaviours which causes harm. A core issue, however, is the threshold for behaviour warranting criminal sanction. Some instances of coercive control, as noted above, are already covered under existing criminal provisions. Other recognised coercive controlling behaviours, such as the gradual isolation from friends and family and 'gaslighting' are not currently criminalised.

The definition of domestic violence in section 8 of the DFVPA encompasses coercive controlling behaviour. As a result, a broader scope of criminal and non-criminal acts may be the subject of a civil order. The order may be breached (a criminal offence) by behaviour that is not illegal in other contexts.

29. **In what ways do the existing offences in the Criminal Code at sections 359E (Unlawful stalking) and 320A (Torture) not adequately capture coercive control?**

The offence of stalking engages some of the conduct that constitutes coercive control. The offence has been underutilised in the domestic violence context; this is probably due to narrow preconceptions about when the offence applies.

Unlawful stalking is conduct (a) intentionally directed at a person; (b) engaged in once if protracted or on more than one occasion; (c) consisting of one or more acts of the type specified in subsection (c) or similar; and (d) that would cause the stalked person a reasonable apprehension or fear of violence or otherwise cause detriment. It is immaterial if the defendant did not intend to cause apprehension, fear or detriment, and acts may be carried out in relation to one person although intentionally directed towards another.

One issue that commonly arises in stalking cases is the requirement that the conduct in section 359B(d)(i) "*would cause the stalked person apprehension or fear, reasonably arising in the circumstances, of violence...*" The test is objective, and so the apprehension or fear of violence need not be actually caused.[20]

However, the offence of stalking can be proved without relying on section 359B(d)(i). It is enough to prove the conduct caused a detriment under section 359B(d)(ii). In contrast to the objective requirement "would cause...fear" in (i), the provision in (ii) appears to require actual evidence that "detriment" to the victim was in fact caused. The concept includes apprehension or fear of violence to the stalked person or others and "serious mental, psychological or emotional harm".

Relevantly to acts of coercive control, "detriment" includes:

- prevention or hindrance from doing an act a person is lawfully entitled to do, and;
- compulsion to do an act a person is lawfully entitled to abstain from doing.

Specific examples of detriment given in the *Criminal Code* are:

- A person no longer walks outside the person's place of residence or employment.
- A person significantly changes the route or form of transport the person would ordinarily use to travel to work or other places.

[20] *Criminal Code 1899* (QLD) s 359C(5). See also *R v Davies* [2004] QDC 279, p. 4, 30-40 where his Honour expressed concern over the statutory reconciliation s359B(d)(i) with s359C(5).

- A person sells a property the person would not otherwise sell.

Unlike in NSW, the Queensland stalking provision does not require an intention to cause detriment. It also contemplates that one act may constitute stalking, if prolonged. The NSW provision is therefore of limited comparative value.

Certain types of coercive controlling behaviour, such as gaslighting or isolation (although threats leading to isolation may be captured), are probably not captured under the stalking provisions.

Torture is also an offence that has been underutilised in the domestic and family violence context. This may be partly due to preconceptions about the applicability of the offence. Although the *Criminal Code* definition would seem to capture some aspects of coercive control, in practice it is rarely a standalone offence and is often prosecuted in conjunction with serious offences of violence (both within and outside of domestic relationships).

30. How could police and prosecutors in Queensland utilise the current offences in the Criminal Code more effectively to prosecute coercive control?

Many offences in the *Criminal Code* could be better utilised to more effectively prosecute conduct involving coercive control. Stalking, extortion, "revenge porn offences", use of a carriage service to menace, harass or cause offence and breach of a DVO are examples of offences which incorporate aspects of coercive control. Targeted training for police and prosecutors is the best way to facilitate better use existing criminal offence provisions.

31. How could defence lawyers and courts better apply the existing defences and excuses in the Criminal Code in circumstances where a person's criminal offending is attributable to being a victim of coercive control?

A defendant's domestic violence background is already taken into account in sentencing a person. As knowledge about coercive control improves, it is likely to increasingly feature as a mitigating circumstance in sentencing. The link between coercive control and psychological trauma is well recognised.[21] Applying conventional legal principles, its relevance to the sentencing discretion will depend, in individual cases, on any link between coercive control, the offending and/or any relevant psychiatric or psychological condition. It will be incumbent on defence lawyers to take comprehensive instructions and ensure that relevant supporting evidence is obtained.

Coercive control is not a legal defence or excuse in its own right. Coercive control may form the backdrop or context to certain defences (such as duress, provocation and self-defence), although it is not *the* defence. Again, it will be a matter for criminal defence lawyers to ensure that comprehensive instructions are obtained to properly present any defence or excuse which incorporates coercive control.

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[21] Vanessa Bettinson, 'Aligning Partial Defences to Murder with the Offence of Coercive or Controlling Behaviour (2019) 83(1) *The Journal of Criminal Law* 71, 73, https://journals.sagepub.com/doi/pdf/10.1177/0022018318814362

The nature of coercive control is both subjective and cumulative. It is anticipated that prosecutors will insist on proper particularisation and evidence of coercive control where it is to be relied upon in mitigation of sentence or in answer to a criminal charge.

One of the problems posed by defining coercive control is the necessity for the definition to not be unduly broad in the criminal law context. The corollary of this is that where coercive control is relied upon by a female defendant, a narrow definition has the potential to limit the matters that could be raised in her defence.

Admissibility of evidence about coercive control

35. How could prosecutors, defence lawyers and courts more effectively introduce evidence of coercive control under the current law?

As community understanding of coercive control grows, it is hoped that evidence gathering processes, client/police interviewing and the presentation of evidence in court will improve. Prosecutors, defence lawyers and courts may be assisted by expert evidence in relation to extent and nature of coercive control, if relevant.

Due to the nature of coercive control, care and time needs to be taken to specify the context of the relationship and the ways in which coercive and controlling behaviours impact on victims. It may assist if all professionals involved were given additional training to recognise and understand how coercive and controlling dynamics impact a victim's ability to give evidence.

36. What amendments or changes to the law would assist to facilitate greater admission of evidence of coercive control without unfairly prejudicing an accused person's right to a fair trial?

QLS considers that all evidence should be subject to the usual rules of admissibility. Differing rules of admissibility for different types of evidence is problematic. If the evidence is relevant, including evidence in relation to a history of domestic and family violence, it is already admissible.

We support appropriate modifications to the process of giving evidence for vulnerable witnesses.

Sentencing

39. What amendments could be made to the PS Act (other than those proposed in Part 3) that would help to ensure coercive control was appropriately considered during sentencing?

We consider that the *Penalties and Sentences Act 1992* already enables coercive control to be taken into account on sentencing. For example, the sentencing guidelines in section 9(10A) provides that in determining the appropriate sentence for an offender convicted of a domestic violence offence, the court must treat the fact that it is a domestic violence offence as an *aggravating factor*, unless the court considers it is not reasonable because of the exceptional circumstances of the case.

Section 12A further provides that convictions for offences relating to domestic violence require a sentencing court to order an offence be recorded as a domestic violence offence if the court is satisfied it comes within the meaning of section 1 of the *Criminal Code*.

The courts are empowered to take into account all matters relevant to sentence. Again, greater understanding about the complex dynamics of coercive control among lawyers, prosecutors and court staff may assist in ensuring it is properly taken into account in appropriate matters.

40. How could sentences given to perpetrators of coercive control be structured to better protect the safety of women and children?

QLS supports flexibility in sentencing. Judges and Magistrates should be supported to take into account all relevant circumstances so that the sentencing discretion can be exercised in a just and effective manner. This discretion generally serves to better protect the safety of women and children.

We note that QSAC has recommended the creation of a new sentencing option for Queensland, a 'Community Corrections Order' (**CCO**) as part of its 2019 report on *Community based sentencing orders, imprisonment and parole options* (**Community based sentencing orders report**). The Discussion Paper also indicates that this type of order is similar to the sentencing penalty most frequently ordered in Scotland upon conviction of its recently introduced domestic abuse offence.

If a CCO were introduced, we would support judicial discretion to combine these orders with a suspended sentence.

QLS has previously submitted that the following items would enhance and improve sentencing in Queensland:

- Conditional suspended sentences;
- Half-way houses and other re-integration programs;
- The implementation of pre and post-conviction restorative justice schemes – a restorative conference may also be taken into account in sentencing in appropriate circumstances;
- Amendment to allow a judge to be able to impose a combined probation/suspended sentence order for a single charge;
- Reform of section 160B of the *Penalties and Sentences Act 1992* (Qld) and its associated provisions to grant courts the discretion to order fixed parole release dates in all sentences of three years or less;
- The need for appropriate programs for Aboriginal and Torres Strait Islander offenders sentenced to imprisonment for breach of domestic violence orders.[22]

The Community based sentencing order report observed that, for breach of domestic violence orders, there were increasing numbers of short imprisonment sentences. This is a product of an increasing number of these offences being heard before the court and an increased use of

[22] Queensland Sentencing Advisory Council, *Community-based sentencing orders, imprisonment and parole options* (Final Report, July 2019) 189 https://www.sentencingcouncil.qld.gov.au/__data/assets/pdf_file/0004/623533/final-report-community-based-sentencing-and-parole.pdf

imprisonment.[23] QSAC also analysed the enablers and barriers to access to services and support for offenders on supervised orders.

They suggested further examination of the ways in which to 'improve the availability and accessibility of family violence perpetrator interventions, including programs aimed to support an offender to reach a readiness-for-change stage and increasing availability of programs that are shown to be effective'.[24] Whilst support and rehabilitation infrastructure requires significant government investment and commitment, interventions and appropriate supervision are a crucial aspect of reducing domestic violence recidivism and overall levels of violence.[25]

Finally, parole delays need to be addressed urgently. Certain kinds of offenders require extended periods of parole to ensure access to rehabilitation and programs, but also to supervision as offenders adjust to life in the community after a period of custody. The current delays mean that these extended periods of parole and supervision are being impacted significantly. Funding for parole services should also be increased to ensure that perpetrators have access to appropriate intervention programs.

49. What improvements could be made to police training to ensure better protections for women and girls who are victims of coercive control?

There is scope for current powers, laws and protections to be implemented in a more effective and appropriate way.

As the point of entry into the criminal justice system, police play a critical role in protecting individuals experiencing coercive control and domestic violence.[26] Police have significant discretionary powers and the operational decisions individual officers make in responding to domestic violence can have significant consequences. Improving first response systems, through education, training, specialised domestic violence sections within the police and embedding a culture of best practice is a critical aspect of protecting victims and keeping them safe.

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[23] Queensland Sentencing Advisory Council, *Community-based sentencing orders, imprisonment and parole options* (Final Report, July 2019) 445 https://www.sentencingcouncil.qld.gov.au/__data/assets/pdf_file/0004/623533/final-report-community-based-sentencing-and-parole.pdf

[24] Queensland Sentencing Advisory Council, *Community-based sentencing orders, imprisonment and parole options* (Final Report, July 2019) 481 https://www.sentencingcouncil.qld.gov.au/__data/assets/pdf_file/0004/623533/final-report-community-based-sentencing-and-parole.pdf

[25] Shann Hulme, Anthony Morgan and Hayley Boxall, 'Domestic violence offenders, prior offending and reoffending in Australia (Australian Institute of Criminology, Trends & issues in crime and criminal justice, No. 580, September 2019) 14, https://www.aic.gov.au/sites/default/files/2020-05/ti580_domestic_violence_offenders_prior_offending.pdf

[26] Victorian Office of Policy Integrity, *Talking Together – relations between police and Aboriginal and Torres Strait Islanders in Victoria* (Report, 2011).

Legislating against Coercive Control

54. Are there any other benefits in legislating against coercive control?

55. How will legislating against coercive control improve the safety of women and children?

There is significant debate about whether criminalising coercive control would reduce violence against women.[27]

Some of our members consider that a specific offence provision may allow the justice system to better identify and respond to the harmful impacts of coercive control.[28]

Other members hold concerns that there is insufficient evidence to establish that the creation of a specific offence would improve the safety of women and children. In the absence of such evidence, the risks of creating such an offence (as outlined below) may outweigh any benefit.

There is consensus that, whether or not a specific offence provision is legislated, it will not, of itself guarantee improved safety of women and children and a range of strategies is required.

A new offence could play an important educative function for police, perpetrators and the public and would highlight the seriousness of this behaviour. It could also provide a means to determine its prevalence within the community.

The police response to coercive control is also likely to improve where it is clear in criminal legislation that coercive control constitutes offending behaviour. As it stands, police are required to make a judgment call about whether or not intervention is warranted. We acknowledge the important role of discretion in policing. However, in the experience of our members, this has resulted in inconsistency in the police response to domestic and family violence. As noted above, there are communities for whom the experience of domestic and family violence is compounded through social factors, systems responses and greater vulnerabilities and isolation.

The experience of older persons

In the context of elder abuse, there may be scope for any legislative response to extend to any relationship where there is a pattern of behaviour which intends to control, establish power, or cause fear, by one person in an intimate, family or carer relationship against another. Circumstances of vulnerability and dependence can create particularly apt conditions under which coercive control may be perpetrated. Coercive control may capture circumstances where an older person is being abused by a family member. However, it can be difficult to distinguish coercive control from genuine care, particularly where behaviour is viewed in isolation.

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[27] Home Office (UK), Review of the Controlling or Coercive Behaviour Offence (Research Report 122, March 2021) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/982825/review-of-the-controlling-or-coercive-behaviour-offence.pdf

[28] Home Office (UK), Review of the Controlling or Coercive Behaviour Offence (Research Report 122, March 2021) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/982825/review-of-the-controlling-or-coercive-behaviour-offence.pdf

Victims of elder abuse are often vulnerable to coercive control due to cognitive impairments, care needs, or the 'digital divide', which may have initially created the need to rely on another person. While the offender may be a partner, they may also be an adult child, grandchild or carer, who has become the primary carer, often residing in the older person's home, and who, over time, has become indispensable. This form of abuse may be unnoticed for a long period due to the subtlety of the control being exerted. Often the carer presents as a useful resource and may be facilitating the older person's ability to remain in their own home or access services. The older person may be reluctant to report their concerns for a variety of reasons, such as the threat of being displaced, the belief that they are a burden, or out of obligation.[29]

Additionally, older persons may be victims of gaslighting, which may cause them to doubt their own ability to recover any autonomy. The abuse may never be physical or financial, and so may not trigger the usual alarms for community noticers such as social workers, banks or home care workers.

Some consideration will need to be given to the ways in which the particular experience of older persons could be addressed through legislative and non-legislative measures, given the context of abuse is different to that experienced in intimate partner relationships.

The experience of people with disability

People with disability, and women with disability in particular, experience disproportionately high rates of domestic and family violence. Almost sixteen per cent of women with a physical or cognitive disability or long-term health condition reported experiences of violence in the past year, compared to just over four per cent of women without a disability.[30]

Women with disability experience distinct and particular forms of family violence, including for example, threats and withdrawal of care, medication and other assistance. Increased social isolation, difficulties accessing appropriate services, communication barriers as well as difficulties associated with reporting violence can compound experiences of violence.[31] In the current environment, it is also important to note the particular impact crisis and emergency response situations can have on rates of violence, the ability of service systems to respond, and available supports for women with disability.

Women with disability who live in group homes or other shared accommodation, or who rely on carers and others for support, are at particular risk of violence in an intimate setting. However, like older persons, this type of violence is not always recognised or captured by legislative and policy frameworks as constituting family or domestic violence given it occurs beyond the typical intimate partner relationship. The capacity for systems to recognise and respond to this form of violence must be considered.

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[29] B Dow et al, 'Barriers to Disclosing Elder Abuse and Taking Action in Australia' (2020) 35 *Journal of Family Violence* 853; Marianne James, 'Abuse and Neglect of Older People' (1994) 37 *Family Matters* 94.

[30] Australian Bureau of Statistics, *Personal Safety Survey 2016*, https://www.abs.gov.au/statistics/people/crime-and-justice/personal-safety-australia/latest-release.

[31] See, eg, ANROWS, *Women, Disability and Violence: Barriers To Accessing Justice: Key Findings and Future Directions*, (February 2018) <https://www.anrows.org.au/publication/women-disability-and-violence-barriers-to-accessing-justice-key-findings-and-future-directions/>.

The issue of women not being believed is exacerbated for women with disability when reporting their experiences of violence. Problematic assumptions around the credibility of victims is particularly pronounced for women with disability.[32]

Finally, the impact of family violence is often compounded by the intersectional discrimination and disadvantage experienced by women with disability. This is particularly so for Aboriginal and Torres Strait Islander women with disability.

Culturally and Linguistically Diverse Women

Recent research suggests that one third of migrant and refugee women in Australia have experienced some form of domestic and family violence.[33] Of these women, 91 per cent experienced controlling behaviours.[34]

The impact of violence experienced by women from culturally and linguistically diverse (**CALD**) backgrounds can be exacerbated by a range of factors including language barriers and reliance on interpreters to seek help, lack of familiarity with Australian laws and processes, mistrust of police, isolation from family and wider societal supports and a concern that speaking out would betray or bring shame to their extended family and community.

Women from CALD backgrounds are particularly vulnerable to forms of coercive control, including dowry abuse and other financial abuse as well as abuse from extended family members. The inability of temporary visa holders to access social supports can exacerbate the impacts of this abuse. Temporary visa holders report higher patterns of migration-related abuse and threats.[35] The COVID-19 pandemic has exacerbated these challenges.

Women from CALD backgrounds may experience particular forms of coercive control, including threats of deportation and threats of harm to relatives not living in Australia.

LGBTIQ+ Communities

A separate offence designed to respond to coercive control may also capture the unique forms of domestic and family violence experienced by people who identify as lesbian, gay, bi-sexual, trans, intersex and/or queer. Tactics of control such as forced outing, where the perpetrator threatens or does disclose their victim's gender identity or sexual orientation to family, friends

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[32] ANROWS, *Women, Disability and Violence: Barriers To Accessing Justice: Key Findings and Future Directions,* (February 2018) <https://www.anrows.org.au/publication/women-disability-and-violence-barriers-to-accessing-justice-key-findings-and-future-directions/>.

[33] Marie Segrave, Chloe Keel, Rebecca Wickes, 'One third of migrant and refugee women experience domestic violence, major survey reveals' *The Conversation* (Web Article, 30 June 2021) https://theconversation.com/one-third-of-migrant-and-refugee-women-experience-domestic-violence-major-survey-reveals-163651.

[34] Marie Segrave, Chloe Keel, Rebecca Wickes, 'One third of migrant and refugee women experience domestic violence, major survey reveals' *The Conversation* (Web Article, 30 June 2021) https://theconversation.com/one-third-of-migrant-and-refugee-women-experience-domestic-violence-major-survey-reveals-163651.

[35] Marie Segrave, Chloe Keel, Rebecca Wickes, 'One third of migrant and refugee women experience domestic violence, major survey reveals' *The Conversation* (Web Article, 30 June 2021) https://theconversation.com/one-third-of-migrant-and-refugee-women-experience-domestic-violence-major-survey-reveals-163651.

or colleagues without consent and controlling gender expression can have profound detrimental impacts.[36] People who identify as LGBTIQ+ can also experience additional systemic and service barriers including fear of encountering homophobia, biphobia or transphobia.[37]

Complementary measures

Any legislative response to coercive control would need to be accompanied by compulsory, specialist training for police to ensure they are equipped to appropriately identify, investigate and gather evidence of coercive control. This is particularly important considering a coercive control offence would involve a course of acts or events that potentially only become criminal when viewed together as a whole. Training should be designed to equip police with the skills to recognise the complex dynamics of domestic and family violence and the particular impacts and experiences of violence for First Nations Peoples, women from culturally and linguistically diverse backgrounds, women with disability, older women and LGBTIQ+ people.

56. How will legislating against coercive control encourage greater reporting of domestic and family violence including non-physical abuse?

As noted above, the creation of a specific offence relating to coercive control is likely to play an important educative function. Coercive controlling behaviour can be subtle, particularly initially, and not immediately obvious to a victim. Recognising coercive control within the justice system reinforces the seriousness of this type of behaviour.

57. How will legislating against coercive control improve systemic responses to domestic and family violence?

58. How will legislating against coercive control improve community awareness of domestic violence?

Legislating against coercive control alone will do little to improve the systemic responses to domestic and family violence. QLS strongly recommends a multifaceted approach, including comprehensive and well-resourced training and education campaigns.

59. How will legislating against coercive control help stop perpetrators from using coercive control?

Legislating against coercive control may assist in holding perpetrators accountable, if implemented effectively. Police may also be more willing and able to respond to behaviour which constitutes coercive control.

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[36] Monica Campo and Sarah Tayton, (2015). *Intimate Partner Violence in Lesbian, Gay, Bisexual, Trans, Intersex and Queer Communities.* AIFS. https://aifs.gov.au/cfca/publications/intimate-partner-violence-lgbtiqcommunities.

[37] See Catalyst Foundation "Towards a Safe Place." http://catalystfoundation.com.au/ourservices/lgbti/toward-safe-place-raising-awareness-domestic-violence-lgbtiq-communities/%3E.

60. What other risks are there in implementing legislation to criminalise coercive control?

As coercive control is a pattern of behaviour, it can be difficult to define, identify and address, particularly when certain behaviours are viewed in isolation. One risk is difficulty in drafting a specific criminal provision that is sufficiently targeted without criminalising the enormous diversity and capacity for nuance with human relationships. A broadly worded offence provision has the potential to be difficult to prosecute and create miscarriages of justice. This underlies the need for an objective test in any criminal provision.

Given the complex and contextual nature of coercive control, consideration would need to be given to how a new offence could be drafted in a manner which targets coercive control, without incidentally capturing other behaviour. There is also the risk of criminalising people with alcohol, drug and mental health issues, and other vulnerable and disadvantaged persons.

There are already well documented difficulties for women as witnesses in the criminal justice system which the creation of a new offence is, in and of itself, not going to address.

The creation of a new offence must not take the focus away from the non-legal ways of addressing coercive control: police training, education, cultural change, social policy and meaningful acknowledgement of the socio-economic and medical/psychiatric factors that contribute to domestic and family violence.

Impact on First Nations Peoples

The potential consequences on First Nations Peoples of legislative amendments which aim to address coercive control should be explored through direct consultation with First Nations communities and organisations to ensure legislation and policies are designed and implemented in a culturally safe manner.

Currently, mainstream legal systems and services are not designed or delivered in a way that recognises the lived experiences of First Nations Peoples. Engagement with the legal system, including reluctance to engage and mistrust of police and other authorities,[38] must be viewed within the historical context of colonisation, dispossession and forced removal from country, intergenerational trauma and systemic disadvantage. This historical context means that First Nations women are less likely to report violence to police or seek support through social services.[39]

First Nations women experience violence at higher rates and greater severity than non-Indigenous women.[40] Violence against First Nations women is significantly more likely to result

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[38] Judicial Council on Cultural Diversity, *The Path to Justice: Aboriginal and Torres Strait Islander Women's Experience of the Courts* (Report, 2016) https://jccd.org.au/wp-content/uploads/2016/04/JCCD_Consultation_Report_-_Aboriginal_and_Torres_Strait_Islander_Women.pdf

[39] Mandy Wilson et al, 'Violence in the Lives o Incarcerated Aboriginal Mothers in Western Australia' (2017) *SAGE Open* 1, https://journals.sagepub.com/doi/pdf/10.1177/2158244016686814

[40] ANROWS, *Existing knowledge, practice and responses to violence against women in Australian Indigenous communities: Key findings and future directions* (Compass, Issue 1, January 2016) https://20ian81kynqg38bl3l3eh8bf-wpengine.netdna-ssl.com/wp-content/uploads/2019/02/C1_3.2-AIATSIS-Compass-1.pdf.

in death.[41] Aboriginal and Torres Strait Islander women who experience violence are more likely to engage in resistant behaviours and use retaliatory violence as a survival method.[42] Unfortunately, as a result, when police respond to a single incident of violence in these circumstances, there is a significant risk of police misidentifying the victim and the perpetrator. The creation of a new coercive control offence may present an opportunity to improve the identification of the primary aggressor if it allows police to consider particular behaviour in the context of a broader pattern of abuse.

However, it is important to recognise the role systemic racism and discrimination play a role in the poor response to First Nations women and children experiencing violence. In the experience of our members, Aboriginal and Torres Strait Islander women are routinely misidentified as the primary aggressor and may be charged with minor offences when police attend a domestic violence incident if they are not cooperative. It is not reasonable or realistic to expect Aboriginal and Torres Strait Islander women to trust police to protect them, and come forward with reports of coercive control, under the current system.

First Nations Peoples are already disproportionately represented in the criminal justice system.[43] The potential risk for a new offence to exacerbate the over-criminalisation of First Nations Peoples must be considered in developing a response to coercive control, particularly where the capacity for the criminal justice response to consider patterns of behaviour, rather than a single incident, is limited.

In Queensland the Community Justice Program and Murri Courts provide culturally appropriate supports and services to Aboriginal and Torres Strait Islander Peoples who come into contact with the criminal justice system. Our members have suggested that Community Justice Groups should be resourced to refer families to appropriate services and case manage these referrals. Any legislative response to coercive control must acknowledge the ongoing impact of trauma and historical and existing laws and policies which have disproportionately impacted Aboriginal and Torres Strait Islander Peoples.

Further, access to legal advice and representation through culturally competent legal services, such as the Aboriginal and Torres Strait Islander Legal Service (ATSILS) and Aboriginal and Torres Strait Islander Women's Legal Service (ATSIWLS) is essential to facilitate proper access to legal education, advice and representation from First Nations Peoples. Any move to reform the legal response to coercive control must therefore be supported by additional, appropriate funding to legal assistance service providers, including providers in remote communities.

Other culturally appropriate support services, including crisis accommodation, health care, social workers, and domestic and family violence support services must also be properly resourced to assist Aboriginal and Torres Strait Islander women in escaping violence and

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[41] ANROWS, *Existing knowledge, practice and responses to violence against women in Australian Indigenous communities: Key findings and future directions* (Compass, Issue 1, January 2016) https://20ian81kynqg38bl3l3eh8bf-wpengine.netdna-ssl.com/wp-content/uploads/2019/02/C1_3.2-AIATSIS-Compass-1.pdf.

[42] Boxall H, Dowling C & Morgan A 2020. Female perpetrated domestic violence: Prevalence of self-defensive and retaliatory violence. *Trends & issues in crime and criminal justice* no. 584. Canberra: Australian Institute of Criminology, https://www.aic.gov.au/publications/tandi/tandi584

[43] Judicial Council on Cultural Diversity, *The Path to Justice: Aboriginal and Torres Strait Islander Women's Experience of the Courts* (Report, 2016), https://jccd.org.au/wp-content/uploads/2016/04/JCCD_Consultation_Report_-_Aboriginal_and_Torres_Strait_Islander_Women.pdf

accessing safety. We also support the development of targeted education campaigns for Aboriginal and Torres Strait Islander communities. It is important that awareness campaigns are designed to be responsive to communities in culturally appropriate ways which reflect the differing ways coercive control affects these communities.

Misidentification of victims

Victims of family violence are sometimes misidentified as the primary aggressor.[44] Mutualisation of violence through the use of terminology such as 'high conflict relationship', 'relationship characterised by violence', and 'conflictual relationship' is commonly used in matters involving domestic and family violence. This has the effect of mutualising violence in relationships, meaning that both parties are considered at blame for their involvement in the 'conflict'.'[45]

QLS is concerned a coercive control offence may be used against women experiencing violence, rather than offering protection. It can be difficult for police to appropriately identify victims and perpetrators in domestic violence cases, and introducing a new offence increases the risks of arrest and criminalisation of women, who are overwhelmingly victims of domestic violence.[46]

61. Could the risks identified above be mitigated successfully by proper implementation or other means? If so, how?

Any offence designed to respond to coercive control would need to be very specifically defined, modelled on similar continuing offences such as stalking, have a high threshold for seriousness and contain an objective (not just a subjective) test that the behaviour would cause fear of serious harm.

In Scotland, the creation of a standalone offence was supported by a campaign designed to affect cultural reform and increase understanding of the scope of domestic abuse, enhanced training to 14,000 police officers and staff to support the implementation of the offence, and

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[44] ANROWS, *Accurately identifying the "personmost in need of protection" in domestic and family violence law* (Research Report, November 2020) https://apo.org.au/sites/default/files/resource-files/2020-11/apo-nid309729.pdf; ANROWS, *Accurately identifying the 'person most in need of protection' in domestic and family violence law* (Web page, November 2020), https://www.anrows.org.au/project/accurately-identifying-the-person-most-in-need-of-protection-in-domestic-and-family-violence-law/.

[45] Women's Legal Service Queensland, Submission to ALRC on Review of the family law system (Submission No 158) https://www.alrc.gov.au/wp-content/uploads/2019/08/family-law-158._womens_legal_service_queensland_submission.pdf

[46] QLS notes the practice of police to apply for protection orders on behalf of both parties. See e.g. Heather Douglas and Robin Fitzgerald, 'Legal Processes and Gendered Violence: Cross-Applications for Domestic Violence Protection Orders' (2013) 36 *University of New South Wales Law Journal* 56; UK found year ending December 2018 97% of offenders were male - The majority of defendants prosecuted for controlling or coercive behaviour were male (97%, where the sex was known), and the average custodial sentence given was 23.6 months, https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/domesticabuseandthecriminaljusticesystemenglandandwales/november2020#prosecution-and-conviction-outcomes.

increased funding to Scottish Women's Aid for dedicated training to frontline staff.[47] It was also co-designed with the women's sector.

Implementation of any legislative reform would need to be accompanied by police training and funding, and additional funding to support services including social supports for women, and perpetrator intervention programs.

Adequate social supports for women and children

Survivors of domestic and family violence need to be empowered to leave abusive relationships. QLS recognises the connection between domestic and family violence and women's economic security. Access to social supports, including affordable housing, is a significant factor in determining whether women feel able to escape a violent relationship.[48]

A response designed to address coercive control and domestic and family abuse must accommodate sufficient social supports including women's shelters, domestic violence services, counselling and access to legal and financial advice. Our members have reported a lack of targeted support for children impacted by domestic and family violence. We therefore recommend expansion of supports available to children who have experienced trauma as a result of their exposure to and experience of domestic and family violence. The historic piece-meal approach to funding these critical support services has proven inadequate in assisting the volume of women and children who continue to experience abuse and live in fear. Where the victim is an older woman or woman with disability, more specific supports and resources are required.

QLS recommends the government consult with specialist supports services, including community legal centres and other legal and non-legal assistance sector providers, to undertake a proper assessment of the resourcing necessary to support women escaping violent relationships and to maintain their safety after a relationship has ended.

Perpetrator Intervention Programs

Perpetrator intervention programs aim to challenge misogynistic views and change men's abusive and violent behaviours. However, discussion around perpetrator interventions is often simplistic. Engaging in perpetrator intervention programs does not guarantee self-awareness or behavioural change.

There are a range of complexities and challenges involved in the delivery of perpetrator intervention and men's behavioural change programs.[49] In the experience of experts who facilitate these interventions, perpetrator programs are likely to be more effective if they sit within

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[47] The Department of Communities and Justice (NSW), *Coercive control – Discussion paper,* (Discussion Paper, October 2020) 15, http://www.crimeprevention.nsw.gov.au/domesticviolence/Documents/domestic-violence/discussion-paper-coercive-control.pdf.

[48] Cortis, N. & Bullen, J (2016) *Domestic Violence and Women's Economic Security: building Australia's Capacity for Prevention and Redress: Final Report* (ANROWS Horizons, 05/2016).

[49] Australian Attorney-General's Department. AVERT Family Violence: Collaborative Responses in the Family Law System. Retrieved from https://www.avertfamilyviolence.com.au/wpcontent/uploads/sites/4/2013/06/Prevention Strategies.pdf.

an integrated and well-funded service response. They should also be closely connected to justice, including courts and police, as well as departmental and service delivery providers to ensure that they are safety-oriented and hold perpetrators accountable.[50]

Effective engagement in programs can be more difficult where there are other factors at play such as mental health issues, addiction and job or housing insecurity.[51] Perpetrators must be supported by other tailored supports, including drug and alcohol programs or mental health programs. Experts delivering these programs emphasise the importance of these services siting outside the primary perpetrator intervention.

QLS recommends the Taskforce consider the structures and resources that will be necessary to improve availability and timely access to perpetrator intervention programs. Consideration should be given to the capacity and capability of current systems to support effective models of perpetrator interventions.

Currently, perpetrator programs offered in Queensland are inadequate. We note that in other jurisdictions, programs can run for up to 52 weeks.[52] Our members have reported positive outcomes in relation to programs targeted toward First Nations men in other Australian jurisdictions, which involved working with affected families with a flexible delivery model and the ability to insert a cultural healing program suited to the participants.[53] QLS supports ongoing evaluations into the efficacy and safety of perpetrator intervention programs as necessary to ensure such programs achieve their aims without compromising the safety of women and children.

68. Would it be desirable to narrow the definition of domestic violence to include only the abuse that is perpetrated in the context of coercive control?

QLS does not support narrowing the definition of domestic violence to include only the abuse that is perpetrated in the context of coercive control.

We do acknowledge that the current definition is broad and captures a range of behaviours. A consequence of this is that, as proven by recent tragic cases, the system is currently not well attuned to identifying high risk cases of coercive control.

However, the answer is not to narrow the definition of domestic violence and thereby remove protection for people who are subject to less serious, but nevertheless harmful, behaviours.

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[50] This was a dominant theme in the 2015 *Not Now, Not Ever* Report with respect to achieving best practice.

[51] Tony Fletcher and Sarah Wendt, 'To stop domestic violence, we need to change perpetrators' behaviour' *The Conversation* (Web Article, 5 October 2016), https://theconversation.com/to-stop-domestic-violence-we-need-to-change-perpetrators-behaviour-44844.

[52] See programs including Emerge in Boston (40 group sessions) and other examples in Michigan (52 weeks); Stopping Family Violence; Rodney Vlais, Sophie Ridley, Damian Green and Donna Chung, *Family and domestic violence perpetrator* programs, Issues paper of current and emerging trends, developments and expectations at pp 24 & 84.

[53] Northern Territory. Office of Women's Policy. 2001, *Northern Territory prison referred and community based indigenous family violence offender program: program guide / Office of Women's Policy* Office of Women's Policy, Department of the Chief Minister Darwin.

There are risks attached to any prescriptive structure of a definition of family violence which requires coercion and control as a precondition.[54] A person who has experienced violence may be limited in their ability to seek and receive protection where they are unable to prove that they were coercively controlled as part of this abuse.

QLS supports consideration of providing examples of behaviour which may constitute coercive control within the definition under the DFVPA. Under the *Family Law Act 1975* (Cth), for example, the definition of family violence is accompanied by examples of behaviour which fall within this definition. This includes, unreasonably denying the family member the financial autonomy that he or she would otherwise have had; and preventing the family member from making or keeping connections with his or her family, friends or culture. [55]

Options for legislating against coercive control in Queensland

The Taskforce has identified 13 options as a starting point to discuss how to legislate against coercive control. The safety of women and children should be prioritised in the Taskforce's determination of which options to recommend.

Human Rights Considerations

A human rights analysis of any legislative response to coercive control involves identifying the human rights engaged by those laws. On the one hand, the laws may protect rights of victim survivors, including for example:

- Right to life;[56]
- Protection from torture and cruel, inhuman or degrading treatment;[57]
- Protection of families and children;[58]
- Right to liberty and security;[59]

However, the potential unintended consequences of any new laws may engage the human rights of some individuals and groups, particularly those who may be disproportionately impacted by a new offence, including rights in criminal proceedings,[60] for example:

- Right to be presumed innocent until proven guilty;[61]
- Right to a fair hearing;[62]
- Right to liberty and security of person.[63]

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[54] Zoe Rathus, 'Shifting language and Meanings between Social Science and the Law: Defining Family Violence' (2013) 36(2) *UNSW Law Journal* 359 http://www.austlii.edu.au/au/journals/UNSWLJ/2013/15.html.
[55] *Family Law Act* 1975 (Cth), s4AB (2)(g).
[56] *Human Rights Act* s 16.
[57] *Human Rights Act* s 17.
[58] *Human Rights Act* s 26.
[59] *Human Rights Act* s 29. This may also be relevant to accused persons, as noted below.
[60] *Human Rights Act* s 32.
[61] *Human Rights Act* s 32(1).
[62] *Human Rights Act* s 31.
[63] *Human Rights Act* s 29. This may also relevant to protecting victims, as noted above.

Option 1 – utilising the existing legislation available in Queensland more effectively.

Queensland currently has both a civil and criminal response to domestic and family violence. As noted above, some coercive controlling behaviours are already captured by existing legislation.

However, there are practical challenges in obtaining sufficient evidence associated with police practice and court processes which undermine the effective use of existing provisions in a domestic violence context.[64] Complainants may also be reluctant to engage in a criminal prosecution for a multitude of reasons, including a desire to maintain their relationship with the perpetrator, fear of retaliation, the possible loss of family income, or a desire not to engage in a potentially traumatic retelling of personal events in court.[65]

Option 2 – Creating an explicit mitigating factor in the *Penalties and Sentences Act 1992* (Qld) that will require a sentencing court to have regard to whether an offender's criminal behaviour could in some way be attributed to the offender being a victim of coercive control.

As noted previously, the court can already consider coercive control as a mitigating factor when it is relevant to the offending.

Option 3 – Amending the definition of domestic violence under the Domestic and Family Violence Act 2012.

As noted in response to question 70, QLS does not support narrowing the definition of domestic violence to include only the abuse that is perpetrated in the context of coercive control.

We also note the recent progress on developing a nationally consistent definition across jurisdictions and areas of practice.

Option 4 – Creating a new offence of 'cruelty' in the Criminal Code.

QLS has some reservations about creating a new offence of 'cruelty'. As currently drafted, there would be difficulty in identifying the threshold of harm required in order to invoke the offence. It is also unclear whether there would an objective or subjective test for pain and suffering. Any offence which is directed towards an act that causes another person harm has to be tethered to an objective test of a reasonable person in those circumstances.

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[64] Special Taskforce, 'Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland' (Report, 28 February 2015) 14.

[65] Special Taskforce, 'Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland' (Report, 28 February 2015) 301; Australian Law Reform Commission, 'Difficulties in giving evidence' in *Family Violence – A National Legal Response* (ALRC Report 114, 2010) https://www.alrc.gov.au/publication/family-violence-a-national-legal-response-alrc-report-114/18-evidence-of-family-violence-3/difficulties-in-giving-evidence/ .

Relevant relationship, as defined by the *Domestic and Family Violence Protection Act* 2012 is also very broad and would have much wider application than for example, the Scottish offence of coercive control which extends to current and former partners.

As currently drafted, the charge is not able to be dealt with summarily even where this may be appropriate in the circumstances of the particular case. Further, as it would encompass a broad range of behaviour and relationships, we have concerns that police, court and other resources would not have capacity to respond and that more serious matters may get missed or overlooked.

Option 5 – Amending and renaming the existing offence of unlawful stalking in the Criminal Code.

QLS does not support renaming the existing offence as this may dilute the use of the provision for stalking cases that do not have a domestic and family violence aspect.

However we support further consideration of proposed amendments to the existing offence including adding a circumstance of aggravation to section 359E if the unlawful conduct was committed against a person in an intimate partner relationship.

The benefit of this option is that section 359F enables a court, whether a person is found guilty or not, to consider whether a restraining order should be made against the person. Whilst the matter would need to be charged as unlawful stalking, this may be an alternative way for the offence to be resolved, in appropriate circumstances.

The availability of the restraining order offers flexibility and protection for a victim even where there is insufficient evidence to sustain the charge of stalking.

Option 7 – Creating a new offence of 'commit domestic violence' in the Domestic and Family Violence Act 2012.

The Explanatory Memorandum to the Domestic and Family Violence Protection Bill notes that whilst the DVO carries the threat of criminal sanction, it does not immediately subject the respondent to a criminal penalty. It was noted that this was an important process "as victims of domestic and family violence often want the violence to stop, but do not want the respondent punished."[66] The other risk with an immediate criminal sanction is that some victims of violence may not seek any protection.

Previously, we have noted that one feature of the DVO breach response is that a charge can be progressed by police regardless of whether the victim wishes to proceed. This would not be the case with an offence of commit domestic violence.

The other potential unintended consequence of a commit domestic violence offence is the social and economic impact for persons whose criminal histories show domestic violence charges even where there is no conviction. This may lead to an increase in Section 222 of the *Justices Act* 1886 appeals in the District Court due to the impact of these offences on a person's ability to progress through working screening (e.g. Blue card or Yellow card systems) or to otherwise

[66] Explanatory notes at page 9 https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-2011-1585.

obtain work. This will create access to justice issues where only persons who can afford legal representation will be able to file these appeals.

Option 8 – Creating a 'floating' circumstance of aggravation in the Penalties and Sentences Act 1992 for domestic and family violence.

The courts are already taking domestic violence into account in sentencing. QLS supports further consideration of this option.

Option 9 – Creating a specific defence of coercive control in the Criminal Code.

The current defences and excuses in the *Criminal Code* can be adequately applied to reflect any diminished culpability of a coerced offender. The impact of coercive control was accepted as relevant to the defences of provocation and diminished responsibility by the UK Court of Appeal in the case of *R v Challen* [2019] EWCA Crim 916 although the impact of the abuse was not explored in detail.

QLS does not support a specific excuse of coercive control in the *Criminal Code*. The definitional issues in the offence would similarly apply to any specific excuse.

As noted in the discussion paper, if the defence was introduced, amendments would also be required to the *Evidence Act 1977*, particularly with respect to relationship evidence which would have an impact on the courts in terms of capacity and the ability to progress matters in a timely way.

Option 10 – Amending the *Evidence Act 1977* (Qld) to introduce jury directions and facilitate admissibility of evidence of coercive control in similar terms to the amendments contained in the Family Violence Legislation Reform Act 2020 (WA).

QLS supports the introduction of jury directions in principle.

QLS notes that evidence around the nature of a relationship is already admissible under the *Evidence Act 1977*. QLS therefore does not consider amendments to facilitate admissibility of evidence of coercive control necessary.

Option 11 – Creating a legislative vehicle to establish a register of serious domestic violence offenders.

A register would have a significant impact upon the ability of convicted persons to reintegrate into society. Research consistently confirms that the most effective way to reduce re-offending is to ensure that convicted persons are able to access appropriate support services,

employment and housing.[67] A register would further marginalise the offender population with implications for recidivism.

This proposal is also likely to lead to increased disputes and litigation in the domestic violence jurisdiction to avoid any potential implication in such a register.

Finally, we note the QLRC's 2017 report on a proposed Domestic Violence Disclosure Scheme in which the QLRC recommended against introduction of such a scheme in Queensland.[68]

Option 12 – Amending the Dangerous Prisoners (Sexual Offenders) Act 2003 or creating a postconviction civil supervision and monitoring scheme in the Penalties and Sentences Act 1992 for serious domestic violence offenders.

QLS does not support extension of the *Dangerous Prisoners (Sexual Offenders) Act 2003* so that it applies to high risk violent offenders. We have concerns about the application of the current provisions which go beyond their original policy intent.

We support consideration of wider sentencing discretion and refer to our response to question 40 in this regard.

Other considerations

Court infrastructure

In relation to the physical design of courts hearing civil protection orders, QLS recommends sophisticated security strategies be employed wherever possible to mitigate safety risks. Currently, court infrastructure is, in some locations, not suited for hearing matters involving domestic and family violence. For example, the courts have not been designed in a manner which easily enables aggrieved people and respondents to be separated. We refer to and support the implementation of recommendations made by the Victorian Royal Commission into Family Violence, including:

- providing safe waiting areas and rooms for co-located service providers;
- provide proper security staffing and equipment; and
- provide separate entry and exit points for applicants and respondents.[69]

We also support the implementation of additional technology which may facilitate better separation of parties, for example, the use of a 'buzzer' system to attend court when a matter is due to be heard.

Specialised training should be provided to all court staff, including volunteers, who are involved in domestic and family violence matters. Our members have reported that the environment of

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[67] See for example recommendations 25 of the Queensland Productivity Commission's report, *Imprisonment and Recidivism,* August 2019, available at < https://www.qpc.qld.gov.au/inquiries/imprisonment/>.

[68] Queensland Law Reform Commission, *Domestic Violence Disclosure Scheme* (Report No 75, June 2017), https://www.qlrc.qld.gov.au/__data/assets/pdf_file/0010/541189/qlrc-report-no-75.pdf.

[69] Recommendation 70, Victorian Royal Commission into Family Violence. http://rcfv.archive.royalcommission.vic.gov.au/MediaLibraries/RCFamilyViolence/Reports/Final/RCFV-Summary.pdf

these specialist courts is tense and consideration should be given to ways in which the environment of the court/registry might be improved. We support triaging of matters to improve the experiences of parties accessing the civil protection order system and to ensure matters involving highest risk are prioritised.

We note the 2017 Evaluation of the Specialist Domestic and Family Violence Court Trial in Southport stated that:

> *The Domestic Violence Action Centre also reports that they take on a significant triage and administration role within the Ipswich Court, for both aggrieved and respondents, including supporting the men's workers and volunteers in their role, and assisting the court and police prosecutions with keeping the list 'going'. This work involves 'directing traffic', an element of which is triage and can involve monitoring the waiting room and identifying any escalation...*[70]

We support this approach.

Data and information sharing

Relevant information about victims and perpetrators is often held by agencies including Police, Child Safety and Queensland Health. This information may assist the courts significantly in determining issues about coercive control and risk. The Family Court have implemented an initiative whereby child safety authorities and police are co-located at family law court registries. The co-location model assists in promptly providing information which is critical to the courts' capacity to be informed about context and assess risk.[71]

A similar co-location initiative may be of some assistance in a state context.

Additional responses sought from the Queensland Law Society

Female criminal lawyers

According to QLS data, of the 34 criminal law Accredited Specialists in Queensland, 7 are female.

Anecdotal feedback indicates several factors may contribute to the relatively low numbers of women in criminal law practice. These include a challenging client base, lack of flexibility in workplaces, lower rates of pay compared to other areas of law, the need to be available to attend court in the mornings and the spectre of inappropriate judicial conduct which disproportionately affects women. Due to the nature of the practice area, criminal law solicitors may also experience specific work related mental health impacts including vicarious trauma,

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[70] Griffith Criminology Institute, *Evaluation of the Specialist Domestic and Family Violence Court Trial in Southport* (Summary and Final Reports) 158, https://www.courts.qld.gov.au/__data/assets/pdf_file/0007/515428/dfv-rpt-evaluation-dfv-court-southport-summary-and-final.pdf.

[71] Australian Government 'Co-location of State and Territory child protection and other officials in Family Law Court Registries ' *National Plan to Reduce Violence against Women and their Children,* https://plan4womenssafety.dss.gov.au/initiative/co-location-of-state-and-territory-child-protection-and-other-officials-in-family-law-court-registries/.

depression, anxiety, burnout and stress. Sexual harassment within law firms and by counsel has also been reported.

For women in private practice, criminal law is particularly difficult once they have children. Few law firms have the capacity to offer paid maternity leave. Truly flexible workplaces are difficult when lawyers are required to attend court in person most mornings, or when the time frames for trials and other hearings are uncertain.

There are also other cultural factors which prevent women from re-entering the workforce after having children, which exist across all professions.

QLS is conscious of this important issue and are working to consistently improve the support we provide to criminal law solicitors.

Professional Development in relation to domestic and family violence

QLS strongly supports ongoing education for legal professionals on domestic and family violence. Ongoing education is critical to developing practitioners' ability to identify risk and respond appropriately.

QLS encourages legal practitioners, particularly in practice areas most affected by domestic and family violence, to undertake ongoing education on domestic and family violence. QLS offers an extensive range of education opportunities for practitioners to enhance their skills in these areas.

In addition, QLS has recently collaborated with Legal Aid Queensland in producing the Domestic and Family Best Practice Framework which aims to guide and support both legal and non-legal practitioners when dealing with matters impacted by domestic and family violence. Practitioners are encouraged to use the framework when working with either persons experiencing or persons using violence, across all areas of law.

Specialist accreditation

The QLS Specialist Accreditation Scheme is a non-statutory scheme offering specialist accreditation programs in nine areas of the law, including criminal law and family law. The specialist accreditation program is a rigorous, peer reviewed, and practical based assessment process. The accreditation scheme is not an academic or training program, and is not designed to provide practitioners with formal practical training on domestic and family violence, or other legal issues.

The Family Law Specialist Accreditation program is run on a national basis in cooperation between QLS, the Law Society of New South Wales (LSNSW) and the Law Institute of Victoria (LIV). The respective Family Law Specialist Accreditation Advisory Committees of QLS, LSNSW and LIV all recognise the importance of demonstrated expertise and skill in domestic and family violence for practitioners seeking to gain specialist accreditation, and for this reason, it is officially included as an assessable topic in the national course syllabus. The assessment is advanced and stringent, and involves a take home mock file, a simulated client interview and a written exam, which cover a range of topics in family law. Candidates must pass all three assessment items in order to be accredited. This is to ensure that candidates demonstrate a

high degree of practical skill and knowledge across a range of family law issues, including domestic and family violence, in order to be successfully accredited as a family law specialist.

In recent years, including in 2021, the Committee has aimed to highlight the importance of domestic and family violence by making domestic violence a key area of assessment in relation to the simulated client interview. This will involve candidates interviewing a person playing the role of a client, in which the client has experienced domestic and family violence. Candidates will be assessed on both their technical legal and soft skills in undertaking the assessment. This is intended to ensure that the Advisory Committees are satisfied that successful candidates demonstrate considerable expertise, sensitivity and understanding of complex dynamics relating to family violence.

Domestic violence is also assessable topic within the Criminal Law Specialist Accreditation program. It was one of the key assessable areas in the 2018 program.

Alongside the initial assessment process, accredited specialists in Queensland are subject to robust ongoing requirements to maintain their accreditation. Accredited specialists must maintain substantial involvement in the area of practice in which the accreditation is held and they must complete an additional five CPD points annual per year (a total of 15 CPD points per year, with 10 being in their area of accreditation).

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully

[redacted]

Elizabeth Shearer
President