21 July 2021

The Honourable Margaret McMurdo AC
Chair
Women's Safety and Justice Taskforce
GPO Box 149
Brisbane QLD 4000

Dear Chair

Discussion Paper 1: Options for legislating against coercive control and the creation of a standalone domestic violence offence – submission

1. The Bar Association of Queensland (**the Association**) welcomes the opportunity to respond to the Women's Safety and Justice Taskforce's Discussion Paper 1 "*Options for legislating against coercive control and the creation of a stand-alone domestic violence offence*" (**the Discussion Paper**).

2. The Discussion Paper has been considered, and this response prepared, with the assistance of the Human Rights Committee and the Criminal Law Committee of the Association.

3. In summary, the Association supports many of the proposed options but, in particular, recommends option 6, being the creation of a new standalone "*coercive control*" offence. It is anticipated that the creation of a new offence would broaden the operation of the criminal law in a way that is proportionate to meeting the safety and wellbeing of women and children

4. The Association recognises, however, that there is a limit to the effectiveness of such a new offence to addressing the extreme hardship caused by controlling behaviour, and that there is a need for other reforms, such as education and rehabilitative tools.

5. These submissions are divided into two sections: Part A considers the threshold question of whether there should be legislation against coercive control at all and the relevant human rights obligations which are engaged. Part B addresses the 13 options identified in the Discussion Paper and, where relevant, makes observations in the context of the requirement in Queensland that legislation and executive decision-making be compatible with human rights.

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PART A: Threshold question whether to legislate against coercive control

The impact of coercive control

6. At the outset, the Association acknowledges that whilst coercive control is not restricted to any one gender, studies in both Australia[1] and the UK[2] indicate that, in the majority of cases, men will be perpetrators and women will be victims. The Association also acknowledges that coercive control has a devastating effect on children and young people, and on families generally. It is further acknowledged that this type of behaviour occurs outside the family setting, especially in work and care relationships. For the purposes of these submissions, however, the Association has largely concentrated on the effects of coercive control in family relationships.

7. Recent statistics reveal that domestic violence remains a significant problem in Queensland, with the effect that–many women suffer harm in personal relationships. That failure is particularly poignant in relation to coercive control, given the compelling evidence that such behaviour is a reliable predictor of physical violence for women and their families.[3]

8. Identifying, addressing and legislating against coercive control offers a significant opportunity to reduce violence against women and children.

International human rights law

9. In Australia's 2016 Human Rights Committee report, the authors emphasised that a "*holistic approach*" is required, to preventing domestic violence including:

> *"…Measures to prevent violence … such as education to change societal attitudes and improving health and economic outcomes for women and their children, ensuring that women who have experienced violence receive the support and assistance they need to recover and rebuild their lives, and that perpetrators are held to account."*[4]
>
> *The report also indicated that Australia "is committed to reducing the underlying disadvantage that leads to high rates of violence against Indigenous women, and Indigenous women's overrepresentation in the criminal justice system".*[5]

10. The Human Rights Committee issues "*General Comments*" on the interpretation and application of the *International Covenant on Civil and Political Rights* (***ICCPR***).[6] These instruments are not legally binding but are treated by States as authoritative interpretations of the *ICCPR*'s requirements to articulate "*the jurisprudence for national and international tribunals and*

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[1] New South Wales Government, Domestic Violence Death Review Team, Report 2017-2019, p. 154.
[2] Evan Stark and Marianne Hester, 'Coercive Control: Update and Review', (2018) 25(1) *Violence Against Women* 81.
[3] See, as a recent summation of a number of studies, the evidence given to the Commonwealth Parliament's House Standing Committee on Social Policy and Legal Affairs by Associate Professor Kate Fitz-Gibbon, Director of the Monash Gender and Family Violence Prevention Centre.
[4] Human Rights Committee, Consideration of reports submitted by States parties under article 40 of the Covenant, Sixth periodic reports of States parties due in 2013: Australia, 121st sess, UN Doc CCPR/C/AUS/6 (2 June 2016) 15 [75].
[5] Ibid 16 [80].
[6] *ICCPR* art 40(4).

administrative bodies in setting guidelines for normative standards."[7] They are relevant for considering the scope of human rights under the *Human Rights Act 2019* (Qld) (***HR Act)***: s 48(3) *HR Act.*

11. These emphasise the need for gender-based analysis of the operation of laws, to ensure equal protection and require positive steps to achieve the effective and equal empowerment of women[8] including by requiring States to report on protections given to particularly vulnerable people, which clearly includes domestic violence victims. [9]

12. The rights to life (with dignity), to freedom from torture, to security and liberty, to protection of children, and protection of families will not be interpreted narrowly. Accordingly, legislation and executive acts should recognise the rights held by victims of domestic violence. Each of the above rights supports the entitlement of an individual to protection by the State from coercive control, just as they support the rights of individuals generally to personal safety.[10]

13. Two other UN committees of relevance are the Committee on the Elimination of Discrimination Against Women under the Convention on the Elimination of all Forms of Discrimination Against Women ('*CEDAW*') [11] and the Committee on the Rights of the child established under the Convention on the Rights of the Child ('*CRC*'). Australia has ratified both treaties. The CRC mandates that State parties "*take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence"*[12] and reinforces a child's need for "*special safeguards*".[13]

14. The UN Commission on Human Rights appointed a Special Rapporteur on violence against women, including its causes and consequences, on 4 March 1994.[14] Since March 2006, the Special Rapporteur reports to the Human Rights Council.[15] The mandate was most recently renewed in 2019.[16] The Special

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[7]Triggs (n 11) 1014.

[8] Human Rights Committee, *CCPR General Comment No. 28: Article 3 (The equality of rights between men and women)*, 68th sess, UN Doc CCPR/C/21/Rev.1/Add.10 (29 March 2000) 1 [3].

[9] Human Rights Committee, CCPR General Comment No. 20: *Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment*), 44th sess (10 March 1992) 2 [11].

[10] Human Rights Committee, *CCPR General Comment No. 36: Article 6 (Right to Life)*, UN Doc CCPR/C/GC/36 (3 September 2019) 1 [3]; Human Rights Committee, CCPR General Comment No. 20: *Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 44th sess (10 March 1992) 1 [2] and [5]; Human Rights Committee, *CCPR General Comment No. 35: Article 9 (Liberty and security of person)*, UN Doc CCPR/C/GC/35 (16 December 2014) 1 [2], [3] and [9].

[11] *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13, (entered into force 3 September 1981).

[12] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 19.

[13] Ibid Preamble para 10.

[14] UN Commission on Human Rights, Question of integrating the rights of women into the human rights mechanisms of the United Nations and the elimination of violence against women, 50th sess, UN Doc E/CN.4/RES/1994/45 (4 March 1994).

[15] UN Human Rights Council, Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, 17th sess, UN Doc A/HRC/17/26 (2 May 2011) 4 [1].

[16] UN Human Rights Council, Accelerating efforts to eliminate all forms of violence against women and girls: preventing and responding to violence against women and girls in the world of work, 41st sess, UN Doc A/HRC/RES/41/17.

Rapporteur gathers and receives information, liaises with States parties (including State visits; Australia in 2017) and works with other UN human rights bodies. The Special Rapporteur has been requested to "*recommend measures, ways and means at the local, national, regional and international levels to eliminate all forms of violence against women and its causes, and to remedy its consequences*".[17]

15. The Special Rapporteur has published a series of reports, which relevantly provide that:

> "*…comprehensive and coordinated national framework to combat and prevent gender-based violence, including through provisions of shelters and protection orders … are essential tools in this framework.*[18]
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> *States' responsibility for acts of private persons includes the obligation to modify or adopt domestic legislation to protect women from gender-based violence committed by non-State actors and to provide services and measures to protect them from such violence. This due diligence obligation also includes adequate implementation of relevant laws and robust criminal justice responses involving cooperation of all State actors.*[19]
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> *…Criminal accountability of perpetrators for the breach of an order must be ensured along with all other initiatives, including the provision of domestic violence shelters and protection orders. Indeed, several cases at the international level show that perpetrators who continue to breach protection orders can eventually kill their victims.*[20]
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> *The Special Rapporteur notes the importance of capacity-building for legal professionals and law enforcement officials, including members of the police, the prosecution, the judiciary and social workers, to ensure that laws are applied in accordance with international norms and standards.*[21]
>
> *…Member States are urged to be guided by the overall principle that effective crime prevention and criminal justice responses to violence against women are human rights-based, manage risk and promote victim safety and empowerment whilst ensuring offender accountability.*[22]

16. The Special Rapporteur, in her Statement to the Commission on the Status of Women on 15 March 2021 commented upon the impact of the COVID-19 pandemic:

> "*[T]he COVID-19 pandemic … has led to an alarming increase in cases of violence against women, especially domestic violence and femicide. It has*

[17] UN Commission on Human Rights, Commission on Human Rights Resolution 2003/45: Elimination of Violence against Women, UN Doc E/CN.4/RES/2003/45 (23 April 2003).
[18] UN Human Rights Council, Report of the Special Rapporteur on violence against women, its causes and consequences, 35th sess, UN Doc A/HRC/35/30 (13 June 2017) 5 [19]-[20].
[19] Ibid 10 [53]-[54].
[20] Ibid 15 [85].
[21] UN Human Rights Council, Report of the Special Rapporteur on violence against women, its causes and consequences, 32nd sess, UN Doc A/HRC/32/42 (19 April 2016) 18 [68].
[22] UN Human Rights Council, Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, 23rd sess, UN Doc A/HRC/23/49 (14 May 2013) 10 [31].

also exposed pre-existing structural gender inequalities and the failure of Governments to combat violence against women." [23]

Is the existing criminal framework sufficient?

17. The Association apprehends that there is a concern in some quarters that the law is a blunt instrument for dealing with the oppressive, but often insidious, conduct that amounts to coercive control. It might be considered that laws in this area are difficult to police because the conduct is nuanced, because it is unlikely to be visible to third parties, or because the women who suffer from it may be reticent to have recourse to law enforcement agencies. It might also be said that such laws run the risk of intruding into healthy relationships or unnecessarily restricting people's autonomy.

18. The Association acknowledges that those challenges exist. It considers that legislation cannot be the sole tool because it is necessarily reactive: it is likely to be invoked only after significant damage has been sustained, either psychologically or physically. An effective response, in the Association's view, will necessarily involve an extensive, proactive and ongoing educational campaign promoting amongst Queenslanders, from an early age, the behaviours that they might emulate, and are entitled to expect, in a respectful relationship.

19. The Association apprehends that it might also be said that the law already deals adequately with violence and threats in coercive and controlling domestic relationships. The definition of "*domestic violence*", for instance, under the *Domestic and Family Violence Protection Act 2012* (Qld)[24] (**the *DFVP Act*)** currently includes behaviour which causes fear, emotional and psychological abuse and financial abuse, so that such conduct is sufficient to trigger a protection order. It might be noted, in that regard, that Magistrates hearing protection orders are usually well acquainted with the nature of domestic violence and tend to adopt a holistic approach.

20. Further, it would be said, there are prohibitions in the Act against contravening a protection order and there are other statutes which provide for offences of breaching the peace, stalking, assault, sexual assault, grievous bodily harm, wounding, choking, criminal neglect and endangering life by exposure or negligence (including failure to provide necessities), unlawful breaches of privacy, sexual offences including rape and indecent treatment, offences against liberty, offences relating to children, and homicide, for instance (with a full complement detailed in the Discussion Paper). [25] It would be contended that, in this context, there is no work to be done by an additional offence of coercive control.

21. The Association appreciates a consistent theme amongst opponents of coercive control legislation is that any laws are unlikely to be accessed by the people they are intended to protect, and that the real solution may lie in wider,

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[23] Dubravka Simonovic, 'United Nations Special Rapporteur on violence against women, its causes and consequences', Statement to the UN Commission on the Status of Women, 15 March 2021, 1.

[24] *Domestic and Family Violence Protection Act 2012* (Qld) (DFVP Act), s 8.

[25] 'Options for legislating against coercive control and the creation of a standalone domestic violence offence – Discussion Paper 1', *Women's Safety and Justice Taskforce*, Queensland Government, March 2021 page 20

systemic reform including better funding for front-line services, greater community education, more accommodation options, and streamlined access to financial assistance.

22. The Association's view, nevertheless, is that, subject to extensive consultation, legislative prohibition of coercive conduct *is* warranted, for at least the following reasons. ***First***, coercive control relates to behaviour that is quite distinct from the subject of existing offences, especially where it relates to a pattern of behaviour rather than a specific incident of violence or threats. ***Second,*** an offence of coercive control is likely to drastically increase public awareness and discussion about the issue. ***Third***, the creation of a criminal offence will more clearly signal the community's intolerance of the relevant behaviour so that police, prosecutors and juries approach their respective tasks with the strong sense of a mandate. ***Fourth***, the creation of such an offence may be useful in moving early against sinister behaviour, and preventing worse consequences. ***Fifth***, there are broader issues of deterrence. The community recognises that, in certain circumstances, it is important to provide protection where there has been a pattern of oppressive behaviour against a particular group. In that regard, there is ongoing public discussion about "*race-based crimes*", "*gay-bashing*" and "*elder-abuse*", as just some examples. The introduction of "*coercive control*" as an offence is a significant and positive step in the wider campaign to ensure that all women in Queensland are safe. ***Sixth,*** such an approach is in keeping with the protective obligations placed on Australia under international human rights law and could operate in a way that is compatible with human rights under the *HR Act.*

PART B: Options identified in the Discussion Paper

23. The Association has reviewed the 13 options in the Discussion Paper and provides comment below.

Option 1 – Utilising the existing legislation more effectively

24. Coercive control is referenced in the *DFVP Act* in:

    (a) Section 8 in the meaning of "*domestic violence*"; and

    (b) Section 12 in the definition of "*economic abuse*".

25. The Association considers that the *DFVP Act* definitions are broad enough to encompass domestic violence which is in the form of coercive control, including where this involves patterns of behaviour; see the underlying principles for that Act and the definition in s 8. The Association is not aware of any evidence or submissions to suggest that the legislative framework for making such orders, once matters are before the Magistrates Court, has not been effective.

26. The Association considers that the *DFVP Act,* in its current form, protects victims' human rights in a way that is compatible with human rights within the meaning of s 48(1) of the *HR Act.* Whilst the orders will limit an offender's freedoms (of association, movement etc.), the *DFVP Act* represents a proportionate limit upon offenders to such orders, with important safeguards in the form of natural justice and a judicial approach to their making. The confidential nature of *DFVP Act* proceedings carries protections for both

parties and at a public policy level, is likely to engender greater numbers of uncontested orders made on a no-admissions basis, which is a positive result for victims, and for some offenders.

Option 2 – An explicit mitigating factor in the *Penalties and Sentences Act 1992*

27. The amendment of the *Penalties and Sentences Act 1992* (Qld) ("**PSA**"), as suggested, is, in the Association's view, a desirable initiative. The Association notes that the authorities make it clear that such context ought properly be taken into account in mitigating sentence.[26] However, there appears to be no downside to making it explicit that such a factor must be taken into account in mitigation of sentence.

28. In particular, such amendment would address a situation where a woman commits violence or takes other extreme measures in response to being a victim of coercive control. The Association anticipates that any such mitigating factor would extend to coercive control.

29. Even though this would apply only to certain individuals, it operates as a measure recognised under the *HR Act*, s 15(5), taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination. It would not affect others' human rights.

Option 3 – Definition of domestic violence under the DFVP Act

30. It is the Association's view that the *DFVP Act* is not an appropriate vehicle for addressing coercive control as a criminal offence.

31. The Association does not support any proposal to narrow the definition of domestic violence under the DFVP Act so that the presence of coercive control is a necessary condition for an act or omission said to constitute domestic violence. Such a change does not seem to deliver noticeable benefits and presents the real risk of limiting the circumstances in which police and courts can act to prevent harm.

32. With respect to a proposal to broaden the definition of domestic violence to include behaviours more closely associated with coercive control, the Association is wary of the effectiveness of such an initiative. As indicated above, the current definition is broad enough to cover such conduct. If it were seen to be useful, further inexhaustive examples could be added to s 8(2).

33. Overall, however, the Association does not view amendments to the definition of domestic violence in the *DFVP Act* as an effective means of addressing coercive control in the community.

Option 4 – Creating a new offence of "*cruelty*" in the Criminal Code

34. The Association considers that the risk associated with adopting the model offence proposed by Professor Heather Douglas (a new offence of *"cruelty*" set out in Appendix 8 of the Discussion Paper) may give rise to ambiguity, misunderstanding and inconsistency because "*cruelty*" is an emotive word used in many different contexts. The potential outcomes of an offence provision not drafted in sufficiently clear and precise language is that it becomes too difficult to charge and prosecute or, conversely, may result in

[26] See *R v McLean* [2021] QCA 70 at [8]-[13] and [25]; *R v Wilson* [2021] QCA 115 at [57]; *R v UQD* [2021] QSC 50 at [38] and *R v Wallace* [2015] QCA 62 at [36] and [39].

convictions arising out of conduct which was not intended to amount to a criminal offence.

35. In international law, torture is a form of 'cruel, inhuman or degrading treatment or punishment' but treatment that does not meet the level of cruelty (being the intentional infliction of severe pain or suffering) may still fall within the meaning of cruel, inhuman or degrading treatment.

36. Acts of cruelty causing severe mental or psychological pain or suffering will overlap with the current offence of torture (s 320A of the *Criminal Code*).

37. If an offence of coercive control of the kind suggested herein is to be enacted, involving the causing of either/both harm or serious harm, there would be little room for an additional offence of cruelty to operate.

38. Further, the term seems ill-suited to dealing with coercive control. Cruelty, like torture, is usually understood to involve the unilateral infliction of suffering by a perpetrator upon a victim who has no prospect of resisting. Coercive control, by contrast, involves the perpetrator securing the victim's apparent "*co-operation*" through a climate of fear or threat. References to "*cruelty*" may obstruct, rather than assist, in the examination of the prohibited behaviour.

Option 5 – Adjustment to the offence of unlawful stalking in the Criminal Code

39. For similar reasons as option 4, the Association considers the creation of a new offence preferable to the option of simply amending the existing offence of unlawful stalking in the Criminal Code.

40. As the Discussion Paper notes, the risk with such an approach is that current community understandings of the notion of '*stalking*' may add an element of confusion to the application of the amended charge. Additionally, the Discussion Paper notes that there are advantages in adding to an existing offence, particularly because the authorities will have some familiarity with that offence. The Association is concerned that the distinct and dangerous nature of coercive control may not be fully appreciated unless it is afforded its own place in the criminal law.

41. If coercive control is to be legislated as a standalone offence, it would be preferable to carefully draft a new offence rather than amend existing offences in order to avoid such potential confusion.

42. In the Association's view, "*stalking*" does not provide a useful vehicle for addressing coercive control. Like "cruelty", the term describes unilateral conduct by a perpetrator, and does not capture a common element of coercive control, namely that the victim may acquiesce to certain conduct for fear of consequences from resistance.

Option 6 – Creating a new standalone "*coercive control*" offence

43. The Association recognises that such an offence may fill a gap in the current ability of the Courts to deal with domestic violence. Further, such an offence may allow a greater range of behaviours amounting to coercive control to be punished than the present suite of offences (such as stalking, torture and assault) permit. Further, the new offence may result in increased community awareness of the dangers of coercive control and an increased willingness on

behalf of victims of such behaviours to report it to police. All such outcomes would be beneficial.

44. If such an offence were to be introduced, the Association considers that the Scottish model described in the Discussion Paper appears to provide a sensible model for the framing of the offence.

45. However, while the Scottish model would be a useful starting point for the drafting of the offence, the Association urges that a great deal of caution would need to be taken in respect of the drafting of the offence to ensure the provision works appropriately in this jurisdiction. In order to avoid ambiguity and unintended consequences, particular care would need to be given to defining the meaning and scope of the coercive control behaviour intended to be criminalised.

46. The exercise of defining "*coercive control*" is problematic against the background set out in paragraphs 17 to 22 above. The term was developed by Professor Evan Stark, a sociologist and forensic social worker, who defined it as a "*pattern of domination that includes tactics to isolate, degrade, exploit and control' a person, 'as well as to frighten them or hurt them physically"*".[27]

47. The Federal Standing Committee's Inquiry considered a number of definitions including:[28]

    (a) "… *an umbrella term that refers to an ongoing pattern of controlling and coercive behaviours that are not exclusively physical but can pervade an individual's daily life with a devastating impact"* (the Australian Women Against Violence Alliance);

    (b) *"... the use by one person of controlling and manipulative behaviours such as isolation, emotional manipulation, surveillance, psychological abuse and financial restriction against another person over a period of time for the purpose of establishing and maintaining control. In relationships characterised by coercive control, abusers use tactics of fear and intimidation to exert power over their victim, undermining their independence and self-worth*" (Women's Safety NSW description of coercive control);

    (c) *"... a tactical pattern of behaviours that are designed by the perpetrator to control, intimidate, create dependency, and render the victim powerless. The perpetrator will use a range of tactics to leverage the emotional investment the victim has in the relationship to introduce rules and regulations that only apply to the victim, as well as penalties for non-compliance*". (Youth Affairs Council of South Australia).

48. Section 4AB of the *Family Law Act 1975* (Cth) defines family violence as "v*iolent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member), or causes the family member to be fearful*" and then goes on to provide a non-exhaustive list of examples of such behaviour. Similar legislative approaches are adopted in the

[27] Evan Stark, 'Coercive Control: How Men Entrap Women in Personal Life', (Oxford University Press, 2007).

[28] House Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into Family, Domestic and Sexual Violence* (2021), 104 – 105

DFVP Act, the Family Violence Protection Act 2008 (VIC),[29] the *Intervention Orders (Prevention of Abuse) Act 2009* (SA),[30] the Family Violence Act 2004 (TAS),[31] the *Domestic and Family Violence Act 2007 (NT)*[32], the *Family Violence Act 2016 (ACT)*[33], and the *Restraining Orders Act (WA)*[34].

49. The approach described in the preceding paragraph sits in the setting of preventative orders and does not require the same level of certainty as a criminal offence does.

50. The approach taken in NSW and some overseas jurisdiction is to have liability depend upon the intended effect of conduct – for example in New South Wales, a domestic violence offence is defined to include an offence (other than a personal violence offence) the commission of which is intended to coerce or control the person against whom it is committed or to cause that person to be intimidated or fearful (or both).[35]

51. The Association has not considered the merits of each of these various definitions and it merely brings the multitude of definitions which have been applied throughout Australia, and as developed by Professor Stark, to the attention of the Taskforce. The Association has not formed a view as to appropriateness, or otherwise, of these definitions in any intended legislation.

52. Further, while the Scottish offence is contained in a standalone piece of legislation, the Association considers that any new offence introduced in Queensland could properly be included in the Criminal Code where it would sit comfortably with other offences such as assault, torture and choking, suffocation or strangulation in a domestic setting. Such an approach would avoid the need to create entirely new legislation and would send the appropriate message that the offence is a serious one.

53. The Association considers such an offence ought to be an indictable offence, perhaps attracting a maximum sentence of seven years' imprisonment, which would bring it in line with the maximum sentence for the offence of "*choking, suffocation or strangulation in a domestic setting*" in section 315A of the *Criminal Code*.

54. The Association does not consider that it is necessary or desirable that the offence provision mandate that a prosecution can only be commenced within 12 months of the last act of the course of conduct underpinning the offence, given that such an approach would be inconsistent with the approach taken to the prosecution of other indictable offences in the Criminal Code.

55. The Association does not consider that proof of harm to the victim would be necessary; rather, the offence ought to only require that the purpose of the behaviour was to be harmful. Such an approach would have the consequence that the focus of the prosecution of such an offence would be on the alleged

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[29] Family Violence Protection Act 2008 (VIC), section 5.
[30] Intervention Orders (Prevention of Abuse) Act 2009 (SA), section 8.
[31] Family Violence Act 2004 (TAS), section 7.
[32] Domestic and Family Violence Act 2007 (NT), section 5.
[33] Domestic Violence Act 2007 (NT), section 8.
[34] Restraining Orders Act 1997 (WA), section 5A.
[35] *Crimes (Domestic and Personal Violence) Act 2007 (NSW),* section 11.

perpetrator's behaviour and state of mind rather than the victim's response to it.

56. In the Association's view, it would be appropriate that any new offence also incorporate a specific defence provision, the scope of which will be dependent on the terms of the offence provision, but which may provide a defence where otherwise abusive behaviour is reasonable in the circumstances, as provided for in the Scottish legislation.

57. Consideration might also be given to increasing the minimum number of occasions for the offending conduct to three and allowing for acts outside of Queensland to qualify, provided that at least one act occurs within Queensland.

58. From a human rights perspective, the Association considers that creating an offence of coercive control represents a proportionate restriction on putative defendants' rights to liberty which is necessary to meet putative victims' human rights to safety.

Option 7 – A new offence of 'commit domestic violence' in the DFVP Act

59. The Association considers the creation of an offence of coercive control is meritorious, in part, because it would fill the gap of domestic violence behaviour that is able to be dealt with criminally by the courts. With the creation of that new offence, the Association considers that the ability of the courts to deal with criminal conduct in a domestic setting will be adequate and appropriate.

60. The Association does not consider that there ought to be, in addition, a new offence of "*commit domestic violence*". It has already been noted that care would need to be taken in respect of the drafting of an offence to criminalise coercive control, in order to ensure the offence does not criminalise behaviour other than that which it intends to, and the Association considers that that difficulty would be compounded with respect to an offence intended to be an umbrella offence to criminalise all conduct amounting to domestic violence.

61. Further, the Association notes that one proposal is that the new offence might be structured in such a way as to simply provide that a person who commits domestic violence, as that term is defined in section 8 of the *DFVP Act*, commits an offence. Given that the behaviour described in that section is, for the large part, capable of constituting serious offences (of, for example, assault, sexual assault and torture), such acts are, in the Association's view, better dealt with pursuant to the existing offence provisions than an umbrella offence provision which would, necessarily, attract a lesser maximum penalty because of its catch-all nature.

Option 8 – Creating a circumstance of aggravation for domestic violence

62. In the Association's view, difficulties would be likely to arise in the application or interpretation of such a provision. There is a prospect that the circumstance of aggravation may be alleged for rather tenuous familial relationships, rather than the more limited relationships which truly aggravate an offence.

63. Given the experience of the Association's members is that sentencing Courts already treat violence against partners (or children) as an aggravating factor, the Association does not consider this proposed 'floating' circumstance of aggravation is necessary.

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

64. The Association understands that it is intended that the defence would be limited in application to the use of force against a person who was in an intimate personal relationship (within the meaning of section 14 of the *Domestic and Family Violence Protection Act 2012*) where the victim could demonstrate they were the victim of unlawful coercive control. The defence under consideration would operate:

    (a) as a defence for the use of force that is objectively necessary in self-defence against a person who was unlawfully coercively controlling the victim; and

    (b) as a defence for the use of force resulting in death or grievous bodily harm if the victim of unlawful coercive control subjectively believes on reasonable grounds that they could not otherwise save themselves from death or grievous bodily harm.

65. The Association notes that section 271 of the Criminal Code presently operates:

    (a) as a defence for the use of force that is objectively necessary to defend against an unprovoked attack (sub-section (1)); and

    (b) as a defence for the use of force resulting in death or grievous bodily harm if the person subjectively believes on reasonable grounds that they could not otherwise save themselves from death or grievous harm.

66. The Association has some concerns with respect to the proposed defence of coercive control. Firstly, the legislation does not presently define coercive control, or describe the limits of behaviour which might amount to coercive control, so it is somewhat difficult to assess how such a defence might operate in practice. Secondly, the Association considers that, in most cases where a defendant might seek to rely on the proposed new defence, it is likely that the conduct said to amount to coercive control would also be accompanied by an assault (or threat of an assault) sufficient to trigger the defence in section 271 in any event.

67. In the absence of good reason to consider that the new defence would add an avenue of defence not presently provided for, the Association considers that the defence of self-defence (and the partial defence relating to 'killing for preservation in an abusive domestic relationship' in section 304B of the Criminal Code) provide adequate safeguards to lessen or negate criminal responsibility for acts done in self-defence. For these reasons, the Association is not presently in favour of the introduction of a new defence of coercive control.

Option 10 – Amending the *Evidence Act 1977* (Qld)

68. The Association is not opposed to the introduction of jury directions to assist juries to understand the nature and effect of family violence (as may be relevant in particular trials, including in respect of the operation of self-defence in the context of family violence) if there is an evidentiary basis to consider that such directions are necessary or helpful because juries need that assistance.

69. The Association is not, however, aware of evidence which suggests there is a need for the introduction of such directions. In any event, there is presently nothing to prevent appropriate directions being given in particular cases, as required.

70. If there was any amendment made to 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) then these provisions would be facilitative and not directive and remain subject to a trial judge's overall discretion to ensure a fair trial.

Option 11 – Establish a register of serious domestic violence offenders

71. The Association is opposed to the creation of a legislative scheme to establish a register of serious domestic violence offenders to enable police to monitor the whereabouts and other personal details of domestic violence offenders when they are in the community. The Association is concerned that the proposed register of serious domestic violence offenders would result in unduly harsh consequences.

72. The Association considers that resources would be more effectively deployed to training police officers in responding to domestic violence, domestic violence shelters and services and programs aimed at facilitating the rehabilitation of those convicted of domestic violence offences than to the establishment of the proposed scheme.

73. The Association also does not support the creation of such a scheme which would, in addition to allowing police to monitor offenders' whereabouts, allow people to request their partner's criminal history be disclosed to them if they are concerned that they are at risk of domestic violence. There is a potential for such a scheme to be misused, or otherwise operate unfairly. The Association considers that resources would be better directed at other measures to combat domestic violence in the community.

74. The Association has not seen evidence to show that a register will act as a serious deterrent, and one that warrants the stigma that will attach to nominated people.

75. The Association considers that care needs to be taken in ensuring that offending is not so stigmatised and publicised that families affected by low levels of offending are dissuaded from seeking out help, including counselling.

76. Further, the Association notes that, as recently as 2017, the Queensland Law Reform Commission recommended against a scheme in which a person could seek access from the police about their partner's criminal history (which would include any history of that person breaching a domestic violence, but not an order having been made against the person) on the basis that it was unjustifiably costly, that prevention measures would yield better results and there was a lack of evidence to suggest their effectiveness. The Association considers these are sound reasons not to implement such a regime.

Option 12 – Create a post-conviction civil supervision and monitoring scheme

77. The Association does not support an amendment to the *Dangerous Prisoners (Sexual Offenders) Act 2003* or the creation of a post-conviction civil supervision and monitoring scheme in the *Penalties and Sentences Act 1992* for serious domestic violence offenders.

78. The Association notes that the proposed scheme would provide intensive monitoring of people convicted of domestic violence offences including requirements that such offenders have ongoing contact with corrections and case management personnel, and engage in intensive behavioural programs, with sanctions for non-compliance including a return to custody.

79. The Association is concerned that the risk that such a scheme could operate harshly with respect to sentenced offenders outweighs the potential benefits to be derived from its operation. The Association considers that the resources required to implement such a scheme would be better used for other measures aimed at preventing domestic violence, such as police training, increased services for victims and community-based rehabilitation programs for offenders.

80. Whilst the Association supports any measure to reduce the incidence of coercive control crimes, the relative novelty of such legislation in those overseas jurisdictions which have specifically legislated against coercive control means that there is unlikely to yet be a developed database of repeat offending. Given the potential human rights considerations associated with a post-conviction civil supervision and monitoring scheme, the Association does not, at this stage, support such an initiative. The option is relevant for the future depending on the frequency of recidivism in relation to coercive control crimes.

Option 13 – Create "*Serial family violence offender declarations*" upon conviction

81. The Association does not support amending the *Penalties and Sentences Act 1992* to create a 'serial family violence offender declarations' provision, which would enable court-ordered electronic monitoring requirement for an offender, for similar reasons, namely, the potential for the measures to operate unfairly and because the resources required to support the scheme would be more effectively deployed elsewhere.

82. The Association does not perceive that the creation of "*serial family violence offender declarations*" will necessarily address the frequency of coercive control offences as there appears, at this stage, perhaps because of the relevant novelty of such legislation, to be little overseas evidence of repeat offending, after prosecution, in coercive control crimes.

83. Each of options 11, 12 and 13, in the Association's view, do not appear to have support from the international law community in a human rights context. It is noted that the UK Government has rejected the idea of a register. The right to privacy and reputation for the offender is limited for the long-term by these options and the risks of inappropriate disclosure by those handling the sensitive information is high. Moreover, there is a real possibility for unintended consequences. As an example, an electronic monitoring system may work to alert a perpetrator to the location of the victim.

Conclusion

84. The Association commends the Discussion Paper for its extensive analysis and for canvassing so many possibilities for addressing coercive control in the community.

85. As set out above, the Association supports many of the proposed options but, in particular, recommends option 6, alongside broader structural and 'soft law' reform measures.

Yours faithfully

Tom Sullivan QC
President