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By website submission
https://www.womenstaskforce.qld.gov.au/forms/make-a-submission

14 July 2021

RE: RESPONSE TO DISCUSSION PAPER 1 – OPTIONS FOR LEGISLATING AGAINST COERCIVE CONTROL AND THE CREATION OF A STANDALONE DOMESTIC VIOLENCE OFFENCE

We welcome and appreciate the opportunity to make a submission in relation to the discussion paper addressing issues arising out of the means of addressing coercive control in the domestic setting.

Preliminary Consideration: Our background to comment

The Aboriginal and Torres Strait Islander Legal Service (Qld) Limited (ATSILS), is a community- based public benevolent organisation, established to provide professional and culturally competent legal services for Aboriginal and Torres Strait Islander people across Queensland. The founding organisation was established in 1973. We now have 24 offices strategically located across the State. Our Vision is to be the leader of innovative and professional legal services. Our Mission is to deliver quality legal assistance services, community legal education, and early intervention and prevention initiatives which uphold and advance the legal and human rights of Aboriginal and Torres Strait Islander people.

ATSILS provides legal services to Aboriginal and Torres Strait Islander peoples throughout Queensland. Whilst our primary role is to provide criminal, civil and family law representation, we are also funded by the Commonwealth to perform a State-wide role in the key areas of Community Legal Education, and Early Intervention and Prevention initiatives

(which include related law reform activities and monitoring Indigenous Australian deaths in custody). Our submission is are informed by five decades of legal practise at the coalface of the justice arena and we therefore believe we are well placed to provide meaningful comment, not from a theoretical or purely academic perspective, but rather from a platform based upon actual experiences.

OVERVIEW

The causes and contributors of domestic and family violence are extremely complex as acknowledged in the The Queensland Government's *Domestic and Family Violence Prevention Strategy* 2016-2026 (the Strategy). These include cultural attitudes and behaviours, gender inequality, discrimination and personal behaviours and attitudes.

As demonstrated in the options paper and as acknowledged by the Taskforce, how the law, police, the legal system and the broader community should respond to Coercive control is a complex issue about which there are passionate and diverse views. Whether some of the proposed further measures in the criminal justice system would appropriately address these issues also attracts strong and diverse views. As noted by the Taskforce, all options will have risks and benefits. We welcome the approach of the Taskforce to acknowledge these views and to welcome feedback on all viewpoints.

We also welcome the acknowledgement by the taskforce that

> *We are acutely aware, however, that there are victims who are men and perpetrators who are women. We also know that same sex couples and people identifying as LGBTIQ+ are impacted by these issues and may under report. We warmly encourage submissions from everyone as we consider these critically important issues and their impact on our society*.

And we appreciate the openness of the taskforce to consider all options.

BACKGROUND

The existing Provisions

We note that Queensland already has fairly expansive laws which allow for the imposition of domestic violence orders and which penalise breaches of those orders and a variety of domestic violence offences.

Whether those laws should be augmented by changes to the criminal justice system such as the creation of further offences and to provide defences for those who kill or commit other offences relying on a defence of coercive control is a question to consider.

Improved community safety can be achieved through measures other than further changes to the criminal law system. For example, the Maranguka Justice Reinvestment Project in Bourke New South Wales achieved massive reductions in offences such as domestic violence offences through early intervention, wrap around community support and the use of "circuit breakers" to break re-enforcing cycles of incarceration and community violence.[1] There were many benefits from that project not least of which was substantially improved community safety.

As outlined below, we would support more innovative sentencing options than increases in head sentences (for the imposition of custodial sentences) to deal with domestic violence offences.

Prisons are designed in part for the containment of the otherwise uncontainable; it is a less than ideal place to lead the process for behavioural changes needed to address offending behaviour. The problems with the lack of programs for offenders on short prison sentences has been expressed particularly well in two passages in the Sofronoff Report, the first problem detailing the lack of access to rehabilitation programs for short sentences of imprisonment:

> *'There may be an assumption that a prisoner released on parole will have begun a process of rehabilitation while in prison, by attending appropriate training or therapy and by a growth in self-discipline. However, prisoners on sentences under 12 months and those assessed as low risk do not engage in rehabilitation programs in Queensland prisons. They are either ineligible or not referred for most rehabilitation programs inside prison. While a few prisoners may be able to access low intensity programs with self-referral, this does not typically occur due to long waiting lists. In addition, programs are not delivered in Queensland for … prisoners who are on remand and have not been convicted of the offences for which they have been charged. This means that offenders who serve short periods of imprisonment or time on remand prior to sentence are not given the opportunity to attempt to address their offending behaviour before their release from custody.'*[2]

[1] KPMG, Maranguka Justice Reinvestment Project Impact Assessment, available at https://www.justreinvest.org.au/wp-content/uploads/2018/11/Maranguka-Justice-Reinvestment-Project-KPMG-Impact-Assessment-FINAL-REPORT.pdf

[2] Sofronoff Report, Ibid, paras 429-431. And see as an example of a self-represented prisoner trying to escape from the no programs no parole conundrum: *R v Hood* [2005] QCA 159 at paras [24]-[25], https://www.sclqld.org.au/caselaw/QCA/2005/159

Addressing the root causes of domestic violence requires more than a one-size-fits-all approach. Underlying the complexity of domestic violence sit a number of factors including intergenerational trauma and entrenched disadvantage. More research into the dynamics of family violence and the experiences of Aboriginal and Torres Strait Islander people would lead to a deeper understanding of the varying dynamics of family violence for Aboriginal and Torres Strait Islanders. A holistic approach is required to address these issues including more culturally competent services and programs designed and delivered by Aboriginal & Torres Strait Islander people to their own communities. For example the Orange Door initiative in Victoria offers specialist family violence services, men's family violence services, and integrated family services. Importantly the provision of help is flexible, recognising that the experiences of family violence or child and family vulnerability are not linear and that risk is dynamic so people accessing the hubs will experience the service in different ways that might not represent a linear step-by-step process and that people will connect with or leave the hub at different points.

Option 1 – Utilising the existing legislation available in Queensland a more effectively

We note that Queensland already has fairly expansive laws which allow for the imposition of domestic violence orders and which penalises breaches of those orders and a number of types of domestic violence offences.

Coercive and controlling behaviour is already included in the definition of domestic violence in the DFVP Act. Domestic Violence (protection) Orders can be obtained on the basis of coercive and controlling behaviour, and once in place, coercive and controlling behaviour can be punished as a breach of that protection order.

We note the other views expressed in the options paper, but the suite of offences contained in Queensland's Criminal Law protect the human rights of aggrieved and perpetrators.

The very real question is whether the criminal law is the appropriate means of further response to address coercive control when the dividing line between lawful and unlawful behaviour is unclear and the overt evidence needed to trigger police powers to respond is largely absent.

e.g. *someone accuses their partner of excessive drinking*

The challenge posed by coercive control is that, unlike physical harm, property damage or overt threats, there is little to activate police intervention. It may be important to refer to a pattern of behaviour to identify whether something is coercive behaviour or not.

It may be that protection from civil remedies and orders, such as may be obtained under elder abuse law, may be more appropriate.

OPTIONS FOR CHANGE – CREATION OF A NEW DEFENCE OR MITIGATING FACTORS FOR VICTIMES OF COERCIVE CONDUCT

- Option 9 – Creating a specific defence of coercive control in the Criminal Code
- Option 10 – Evidentiary provisions to call evidence on the defence of coercive control
- 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

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

This option proposes that the defence could provide:

• a complete defence for the use of force that is *objectively* necessary for a victim to defend themselves from a perpetrator who was unlawfully coercively controlling that person; and

• a complete defence for more extreme force (extending to the infliction of 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

The problem with such a defence is that it is hard to distinguish from the situation where there are escalating acts of violence between partners. Justifying a violent act in response to a non-violent act could quite quickly turn into an abusive spouse relying on this defence to inflict violence on their partner or family member.

We might add that a year or two ago we were provided with statistical feedback from the Department of Justice and Attorney-General's which disclosed that **approximately one in three applications for protection orders in Queensland relating to Aboriginal and/or Torres Strait Islander people, were made on behalf of a male** (alleged victim of domestic violence). Extreme care needs to be taken in terms of what does or does not amount to a defence. Taking the law into one's own hands has long been viewed as being totally unacceptable – and so it should remain.

Even where there are explicit defences, there will be situations quite frequently when a defendant's circumstances fall short of being able to claim a defence. For situations which fall below providing a defence, we would say as a matter of principle that there should be no mandatory sentencing precisely for the reason that there are often complicated situations where the sentencing judge or magistrate

should be able to take into account mitigating circumstances. (See option 2 below)

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)

The new provisions state evidence about family violence may be relevant when determining—in circumstances where an accused has claimed they acted in self-defence— whether the person believed their actions to be necessary, whether the conduct was reasonable, and whether there were reasonable grounds for those beliefs. If a new defence was to be created, then as all defendants do, they would have to go into evidence as part of their case to raise the defence for the prosecution to disprove.

Option 2 An explicit mitigating factor whether an offender's criminal behaviour could in some way be attributed to the offender being a victim of coercive control

The situations that could be encompassed could range from failure to attend court due to the demands of a controlling partner to an excessive use of force not otherwise excused by self-defence, defence of another or provocation.

In our view it would be appropriate that a court may take that factor into account. Depending on the circumstances, argument may arise as to whether that is a factor appropriate for the exercise of the sentencing discretion in the particular factual circumstances being considered by the Court.

OPTIONS FOR CHANGE – CREATION OF NEW OFFENCES AND FACTORS IN AGGRAVATION

- Option 3 – Amending the definition of domestic violence under the Domestic and Family Violence Act 2012
- Option 4 – Creating a new offence of 'cruelty' in the Criminal Code
- Option 5 – Amending and renaming the existing offence of unlawful stalking in the Criminal Code
- Option 6 – Creating a new standalone 'coercive control' offence
- Option 7 – Creating a new offence of 'commit domestic violence' in the Domestic and Family Violence Act 2012
- Option 8 – Creating a 'floating' circumstance of aggravation in the Penalties and Sentences Act 1992 for domestic and family violence

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

There already has been a considerable broadening of the definitions of domestic violence, and we note that provisions recognising coercive control as a form of domestic violence are already contained within the legislation. we query whether a further broadening of the definition of domestic violence would achieve much.

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

Professor Heather Douglas proposal of the new offence of Cruelty, created by essentially replicating the existing offence of Torture contained in section 320A. The strengths in that proposal are that the new offence draws upon existing language and concepts in the Criminal Code and thus is consistent with the wider operation of the criminal law and its key principles which provide fairness, certainty and due regard for common law and human rights protections.

Professor Douglas proposes the removal of two key protections contained in section 320A, namely that the prosecution be required to prove that the pain and suffering inflicted be '*severe*', and that the defendant inflicted the pain and suffering on the other person *'intentionally'.* Those requirements remove unintentional acts such as domestic accidents. Eg a couple are arguing with each other, one makes a wild hand gesture accidentally poking the other in the eye.

In our view those protections, if they are to be removed, should be replaced with the sort of protections contained in s 359B of the Criminal Code for the offence of stalking, namely that the conduct should be:

> *320C What is [cruelty]*
>
> *[Cruelty] is conduct— (a) intentionally directed at a person; and (b) engaged in on any 1 occasion if the conduct is protracted or on more than 1 occasion; and (c) consisting of 1 or more acts of the following, or a similar, type— (i) the infliction of pain and suffering including physical, mental, psychological or emotional pain or suffering, whether temporary or permanent (etc) or (ii) a threat of the infliction of pain and suffering including physical, mental, psychological or emotional pain or suffering, whether temporary or permanent(etc); and (d) that— (i) would cause the person apprehension or fear, reasonably arising in all the circumstances, of pain and suffering including physical, mental, psychological or emotional pain or suffering, whether temporary or permanent(etc) or (ii) would cause the person pain and suffering including physical, mental, psychological or emotional pain or suffering, whether temporary or permanent(etc) or (iii) causes detriment, reasonably arising in all the circumstances, to the person.*

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

We do not support including provisions for coercive control within the existing provisions of 'unlawful stalking'. In our view there is no real logic to putting the provisions in with stalking and would create confusion and uncertainty. For the reasons outlined under option 4 for the offence of cruelty we can see how a standalone provision might benefit from the importing of some structural elements from the definition of stalking.

Option 6 – Creating a new standalone 'coercive control' offence

With respect to where such a standalone offence should be located, logically it belongs within the DFVP Act.

For the creation of a course of conduct offence, basic principles of criminal law should continue to apply; that is that multiple acts should be particularised, that the acts which are proved against the defendant are identified by the finder of fact. To do otherwise would be a disproportionate infringement on the rights to a fair trial and due process.

Were this option to be followed, we would strongly support following the model of the Scottish and Tasmanian provisions which include broad and non-exhaustive definitions of the behaviour in addition to providing that the behaviour must cause or be likely to cause an adverse impact on the victim. There is sense and logic in the Tasmanian provision which requires that a prosecution be commenced within 12 months of the last act in the course of conduct. This would prevent stale or historic offences being pursued a long time after the public interest in pursuing such charges is well and truly spent – or where such are pursued for an ulterior motive.

In our view section 13 of the DFVP Act encompasses the relevant relationships that would be covered by an offence of coercion, namely intimate personal relationships, family relationships and informal care relationships.

It may be appropriate that a restraining order similar to that imposed for stalking offences may be imposed or, similar to the situation for domestic violence orders, that a defendant may make an undertaking to the court to refrain from such behaviour (when properly particularised).

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

We share the concerns expressed by the Australian Law Reform Commission and NSW Law Reform Commission when considering such a proposal (outlining various difficulties conceptualising the exact parameters of an umbrella offence proposed by the *Family Violence - A National Legal Response* report).

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

This could be done in one of two ways:

- Creating a specific circumstance of aggravation for circumstances in which existing offences are committed against family members (the South Australian model); or

- Creating a specific circumstance of aggravation when the commission of an existing offence would also amount to an act of domestic violence within the meaning of section 8 of the DFVP Act.

Presently the definition of domestic violence already includes coercive and controlling behaviours and thus a sentencing magistrate or judge may already take this form of control into account as amounting to a serious form of domestic violence.

Any changes to the criminal law should be proportionate and necessary. While the diffuse activities of organised crime lend themselves to the need for the creation of a circumstances of aggravation couched in general terms applicable to multiple offences (section 161Q of the PS Act) this is not how the sentencing laws operate in general. The law needs to be clear and predictable, it is unnecessary to depart from principles which bring certainty and clarity to the criminal law.

Our second point is that adding another year or a percentage uplift to the head sentence for a DV crime then falls into the trap of thinking that we can arrest our way out of social problems. More imprisonment is not going to address the problem. The conditions inside prisons do not create kinder gentler persons, they contain people, and if temporary containment is not the answer then neither is lengthier terms of imprisonment.

Parties should be separated if necessary by order and if those orders are broken then imprisonment may properly be a response. However, it is the party being protected by the order, that in our experience, not infrequently initiates contact.

If on the other hand partners can be rehabilitated and the relationship can be rebuilt, then they are extremely unlikely to receive the necessary programs inside a prison. It would make more sense to require a perpetrator to undergo special forms of counselling, similar to drug diversion programs, or intensive corrective orders served in the community.

OPTIONS FOR CHANGE – CREATION OF NEW TYPES OF ORDERS

- Option 11 – Creating a legislative vehicle to establish a register of serious domestic violence offenders
- 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
- Option 13 – Amending the Penalties and Sentences Act 1992 to create 'Serial family violence offender declarations' upon conviction based on the Western Australian model

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

The register for serious offenders contains a number of assumptions. It is unclear how serious the serious domestic violence must be in order to place someone on a register. Again in Queensland this measure has been implemented with respect to the *Child Protection (Offender Reporting and Offender Prohibition Order) Act* 2004. Whether such a register would be a proportionate response to the commission of domestic violence offences would very much depend on the severity of the offence to justify placement on a register.

We have seen situations where upon re-partnering, partners in a previously abusive relationship have then settled into a healthier relationship. Also of course an abusive partner might go from relationship to relationship repeating the same patterns of abuse. Where that line could or should be drawn is a considerable question.

The purpose of such a register is to enable new partners to obtain the information or for police to make privileged disclosures of that information to the new partner. Penalties for unlawful disclosure of information have limited impact and are unlikely to provide much in the way of protection.

This scheme leaves itself wide open to abuse, vigilantism and to have significant adverse impacts on a registered offender's ability to rehabilitate and reintegrate into the community. We note that the proposed amendments in England and Wales did not proceed. In our view there should be more consideration of this measure, possibly a referral to the Queensland Sentencing Advisory Council to examine the evidence base for such a measure.

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

The advantages of employing a structure similar to that contained in the DPSOA is that reports should be drawn up and orders should be based upon assessments of risk by expert witnesses with the opportunity for a respondent to call their own experts and to advocate for conditions that are only justifiable based on the evidence of risk. Further, after time limits, applications can be made to review those orders when circumstances change leading to a change in risk. Any legislation should be separate to the DPSOA as presumably it would rely upon objectively less serious forms of offending. In our view such measures should not be introduced without a referral to the Queensland Sentencing Advisory Council.

We note that courts already have the power to impose restraining orders against a person charged with stalking even if the person is acquitted or charges were discontinued by the prosecution. This type of restraining order would be a more proportionate response than a DPSOA style order.

Option 13 – Amending the Penalties and Sentences Act 1992 to create 'Serial family violence offender declarations' upon conviction based on the Western Australian model

The protections contained in the WA legislation are that:
In Western Australia courts convicting a perpetrator of a prescribed family violence offence have a discretion to declare the perpetrator a 'serial family violence offender' if they have committed at least three prescribed offences, or at least two prescribed indictable-only offences. The offences must have been committed within a 10 year time period, unless the court considers that exceptional circumstances exist. The court's decision to make a declaration is informed by:

- the risk of the offender committing another family violence offence;
- the offender's criminal record;
- the nature of the offences for which the offender has been convicted; and
- any other matter the court considers relevant.

When assessing an offender's risk of re-offending, the court, at its discretion, is empowered to take into account an assessment of the offender by an approved expert.

The consequences of being declared a serial family violence offender in Western Australia are:

- if the court determines that the appropriate sentence for an offence committed by a declared offender is a non-custodial sentence the court must consider the application of an electronic monitoring requirement;
- if a declared offender is imprisoned for a family violence offence, the Prisoners Review Board is required to consider an order for electronic monitoring as part of any parole order, re-entry release order or post-sentence supervision order made in respect of a family violence offence;
- disqualification from holding a licence for firearms and explosives; and
- upon arrest for a future family violence offence, a declared offender will be subject to a presumption against bail and, if bail is granted, consideration must be given to imposing a home detention condition with electronic monitoring,

Any such measures should be proportionate and justified on evidence that these severe incursions into the freedoms of an individual do create greater community safety and that there are no other less severe measure to achieve the same result. The question should be referred to the Queensland Sentencing Advisory Council for consideration.

CONCLUSION

We note the efforts of the Taskforce to set out a number of options to improve legal responses to coercive behaviour in domestic relationships. We thank the Taskforce for the opportunity to comment on the range of options to consider. We would urge that any options which go forward are necessary and proportionate and evidence based as to the improvements in safety that they seek to secure. It is well appeared that the majority of victims of domestic violence are women – we owe it to then (indeed, to all victims) to ensure that proposed changes actually makes for safer communities – for less victims of domestic violence moving forward**. Ultimately, we are of the view that the breaking of the circle of violence, is best achieved by addressing the underlying causes of offending behaviour**. Prison is not the answer – of that we can be sure.

Yours faithfully,

Shane Duffy
Chief Executive Officer