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SUBMISSION TO WOMEN'S SAFETY AND JUSTICE TASKFORCE
OPTIONS FOR LEGISLATING AGAINST COERVICE CONTROL AND THE CREATION OF A STANDALONE DOMESTIC VIOLENCE OFFENCE: DISCUSSION PAPER 1.

21 July 2021

To: The Chair, The Honourable Margaret McMurdo AC, Women's Safety and Justice Taskforce

We thank you for the opportunity to make a submission to this enquiry. We are academics within the TC Beirne School of Law at the University of Queensland where we teach and research in the areas of criminal law, criminal justice, immigration, human rights, and the law of evidence. We have recently commenced a research project examining dousing threats in the context of domestic and family violence.[1] Although our specific focus has been on threats, these commonly manifest within the context of coercively controlling relationships. The contexts that underpin the manifestation of threats has important implications for the way that victim-survivors experience and respond to threats, and for legal and/or social system interventions as well. For these reasons, our submission incorporates some of the preliminary themes we have uncovered in this research which have bearing on the questions raised by the taskforce. In addition, we draw on our broader knowledge of the criminal law to respond to questions and options where appropriate.

General considerations:

Before we turn our attention to the specific questions and options posed by the Taskforce, we note that our comments in this submission are guided by the following views:

- The criminal law is a blunt tool. Any reform to the criminal law should bear in mind the general risks of overcriminalisation. In the context of domestic and family violence ('DFV'), there is evidence showing that a focus on criminalisation can create undesirable outcomes, including escalation of behaviours and dual arrest of both victims and perpetrators.[2] The adverse impacts of criminal justice responses on First Nations people are well-known.[3]
- Criminal offences are only as good as their use in practice. A key issue in the context of DFV remains the appropriateness of the decisions taken by law enforcement authorities when engaging with either civil and/or criminal actions.[4] Adding further offences without addressing

[1] We acknowledge the ongoing assistance of Lucy Noble-Dickinson and Gerard Moriarty on this project, the preliminary findings of which inform parts of this submission.
[2] See, eg, Jane Wangmann, 'Incidents v Context: How Does the NSW Protection Order System Understand Intimate Partner Violence?' (2012) 34 *Sydney Law Review* 695; 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.
[3] Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence — A National Legal Response*, Final Report No 114/128 (2010) vol 1, 562 [13.4].
[4] See, eg, Marie Segrave, Dean Wilson and Kate Fitz-Gibbon, 'Policing Intimate Partner Violence in Victoria (Australia): Examining Police Attitudes and the Potential of Specialisation' (2018) 51(1) *Journal of Criminology* 99, 102–10; Silke Meyer, 'Seeking Help for Intimate Partner Violence: Victims' Experiences When Approaching

these issues will substantially hamper any positive impacts. As others have observed, law reform should not focus simply on 'gap filling'—an assumption that effective solutions lie in '100% coverage' of harmful behaviours in the criminal law is misplaced.[5]

- Complex offence provisions are often difficult to utilise in practice due to the high standard of proof required in criminal matters and related issues of evidence. Although such provisions are often contemplated as a means to be more pro-active/pre-emptive in responding to domestic and family violence ('DFV'), the reactive nature of criminal law and procedure often frustrates this purpose.
- Coercively controlling behaviours intersect with and have implications for many areas of law including, inter alia, financial law, property/tenancy law, family law, and child protection legislation. The criminal law is only one component of this complex network and changes to the criminal law may have flow-on effects. For this reason, a systemic view is important that is sensitive to the needs and interests of individual victim-survivors.
- Safety should be a key priority when considering interventions or responses to DFV, and the criminal justice system is limited in its ability to deliver safety to victims. Again, a systemic view is required – ensuring safety requires significant investment in areas such as housing and service support. Criminal mechanisms are often ancillary to these more pressing issues.

In sum, although there has been some progress in some domains, the criminal justice system response to DFV is, historically, poor. There appears to be some hope that the creation of new criminal offences will help to drive change within the system, but this hope should be balanced against the risk that introducing new criminal law into a flawed system will instead serve only to perpetuate or intensify systemic problems. In particular, we stress again the serious concerns raised by advocates and in research about the mis-identification of DFV perpetrators and the impacts this has on the criminalisation of First Nations women in Queensland.

This is not to say that the introduction of new offences cannot be positive. The above concerns should not preclude offence creation where there is evident need. To echo the Australian and New South Wales Law Reform Commissions, new offences are necessary if the 'mischief sought to be addressed cannot be adequately dealt with under the existing legislative framework'.[6] New offences can also play a role in the fair labelling of offending (to 'represent fairly the nature and magnitude of the law breaking')[7] and may have important educative, symbolic, and denunciatory functions.[8] As noted below, there are aspects of DFV that are, arguably, not adequately addressed by the current law.

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the Criminal Justice System for IPV-Related Support and Protection in an Australian Jurisdiction' (2011) 6(4) *Feminist Criminology* 268.

[5] Julia Quilter, 'Evaluating Criminalisation as a Strategy in Relation to Non-Physical Family Violence' in Marilyn McMahon and Paul McGorrery (eds), *Criminalising Coercive Control: Family Violence and the Criminal Law* (Springer, 2020) 124–7.

[6] Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence — A National Legal Response*, Final Report No 114/128 (2010) vol 1, 587.

[7] Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press, 7th ed, 2013) 77.

[8] Marilyn McMahon, Paul McGorrery and Kelley Burton, 'Prosecuting Non-Physical Abuse between Current Intimate Partners: Are Stalking Laws an Under-Utilised Resource?' (2019) 42(2) *Melbourne University Law Review* 551, 583; Jennifer Youngs, 'Domestic Violence and the Criminal Law: Reconceptualising Reform' (2015) 79(1) *The Journal of Criminal Law* 55, 66.

Comments on specific questions and options:

We have addressed a range of questions and options posed by the WSJ Taskforce in Discussion Paper. These are listed below.

Context: What is coercive control?

1. What other types of coercive controlling behaviours or risk factors used by perpetrators in domestic relationships might help identify coercive control?

As noted above, we are currently undertaking a project looking at dousing threats in the context of DFV. The use of threats is widely recognised as a behaviour that may be used to coercively control another person, though there is little research on threats as a discrete form of criminal conduct and DFV.[9] Nonetheless, the preliminary findings of our research suggest that threats warrant greater focus as a risk factor for escalation and serious harm. It also appears that threat offences are not commonly used (such as ss 75 and 359 and 'common assault' under s 335 of the *Criminal Code* (Qld)).

While we are not in a position at this stage to make concrete recommendations, increased awareness and education around threats (particularly serious threats) appears warranted. It may be useful to identify particular types of threat (such as dousing threats) as high-risk indicators.

Part 1 – How is coercive control currently dealt with in Queensland:

With respect to Part 1, we only wish to address a handful of questions as follows:

4. Are there opportunities for the media to continue to improve its reporting of domestic and family violence and for popular entertainment to tell more topical stories to increase understanding of coercive control?

There are some indications in our research that media reporting may provide perpetrators with 'leverage' over victims. They may, for instance, reference horrific incidents to instil fear. This can include sending copies of news reports to make an implicit threat. In the context of dousing (as a form of DFV), there is evidence that perpetrators have used the killings of Hannah Clarke and Kelly Wilkinson to make threats against and control partners and ex-partners. Some anecdotal evidence in our research further suggests that media reporting may lead to 'copy-catting' by perpetrators.

While media organisations must continue to report on and bring attention to DFV, attendance to guidelines around how to report on specific incidents are important. The inclusion of specific detail may have detrimental consequences. Suicide reporting may provide an idea of best practice in this regard.

Legislative response: Domestic and Family Violence Protection Act 2012

[9] See Joseph Lelliott, Phylicia Lim, and Maeve Lu, 'Dousing Threats and the Criminal Law in Queensland: Do we Need a New Offence?' (2021) *Alternative Law Journal* <https://journals.sagepub.com/doi/full/10.1177/1037969X211029961>.

Q18, 19, 20, 21: A general response:

Unlike the criminal law, a PPN/DVO regime has a much more explicit and targeted focus on safety and risk management. Because it is a civil regime, it is also more easily engaged as it relies on a lower standard of proof. Again, this can drive differences in system practices especially with respect to issues of evidence. As a result, the civil regime can be more responsive and flexible, compared to a criminal law response. Similarly, a civil regime avoids some of the concerns associated with the criminal law, such as over-criminalisation, although we note that breaching a DVO is a criminal offence and therefore a civil framework heightens the risk of entry into the criminal justice system. For these reasons, it is important to consider how the civil regime is used, for what purpose, and how to ensure it connects appropriately with the criminal justice system.

As we note above, legal mechanisms are only one (sometimes small) component of safety planning for victim-survivors, but PPNs/DVOs can serve important instrumental functions when used appropriately. Our research study highlighted some concern from service providers that threats manifesting within a context of coercive control were not being appropriately recognised by frontline police as domestic violence warranting a PPN or police application for a DVO in many instances. This was sometimes improved where there was a specialist police response, and/or police officers had a more nuanced understanding of domestic violence, but many participants spoke about high levels of inconsistency between responses in this respect. This produced a range of flow-on effects for victim-survivors, many of which left them without the benefit of this form of protection. Themes arose around the difficulty of convincing a court to issue a DVO in the absence of a PPN (where women applied as an aggrieved person) and ongoing problems for police in recognising risk escalation where a PPN/DVO had not been issued in the first instance. At the same time, there appeared to be inconsistency about where and when to appropriately use a direct criminal law response. In many examples described by interviewees, it appeared that a criminal case was only contemplated when the civil regime had been exhausted or breached, instead of considering the appropriateness of engaging the two systems simultaneously. This suggested that both police and courts may benefit from better directions about the nature of coercive control, how/when to use the civil protection system appropriately as a risk management and safety response, and when to respond appropriately by recognising and charging certain behaviours as criminal offences. To assist with these considerations, it often appeared that better outcomes might also be achieved if there was scope to reconsider and review initial decisions, particularly to ensure mis-identification and/or failures to act were remedied.

Bail (Q22-27) and Evidence (Q33-36): general response

We note the useful guidance provided in the National Domestic and Family Violence Benchbook with respect to issues of bail and evidence (and more generally, regarding DFV considerations in criminal proceedings), and make no further submissions on these points.

The Queensland Criminal Code

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

The *Criminal Code* currently contains a plethora of offences that may be used to prosecute discrete conduct that falls within the scope of coercive and controlling behaviour. These include numerous assault-based offences and other offences against the person in Chapters 29 and 30 of the *Code* (including strangulation), sexual offences, stalking and other offences against liberty, property offences, and many others.

There are, in addition, several course of conduct offences. Unlike other offences in the *Code*, 'Torture' under s 320A can capture a number of seemingly quite innocuous acts taking place on several occasions that, taken together, inflict severe pain or suffering and may amount to a pattern of coercive control.[10] Stalking under s 359B is another such course of conduct offence.

The large range of potentially coercive and controlling behaviours mean that, inevitably, many are not covered by existing offences. These tend to be the more 'subtle' markers of control and coercion; behaviours not amenable to discrete criminalisation. For example, behaviours such as controlling what a partner wears or eats or when she sleeps, degrading comments, gaslighting, isolation from friends and family, and some aspects of financial control are unlikely to fall within the ambit of current offences in the *Code* (especially where there is no threat of, or accompanying, violence).

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?

Section 320A may capture a range of behaviours that fall within patterns of coercive control. The offence has often been used to prosecute cases of DFV.[11] It extends to mental, psychological or emotional pain or suffering, whether temporary or permanent and, as noted by the Court in *R v Burns*, there is no need for physical pain.[12] The Court of Appeal in *R v Spies* observed that proof of bodily harm is not required.[13] The range of conduct potentially captured by 320A is unlimited: it may include making a person eat insects or hot chillies, making someone eat vomit, twisting an arm, making someone sleep and urinate outside, forcing a person to clean late at night or search for objects fruitlessly in the garden, or hosing them down with water.[14] It may involve purely verbal acts intended to inflict mental or emotional suffering (such as threats or humiliating comments).

There are, nonetheless, numerous ways in which s 320A may not effectively capture coercive control. Severe pain or suffering must be inflicted on the victim and, while this should be assessed on a case-by-case basis according to the individual,[15] this is a high bar. The prosecution must also prove an 'actual, subjective intention on the part of the accused to bring about the [severe pain or] suffering'.[16] Such an intention is quite different to a purpose of controlling or coercing a person; it is likely that many cases of coercive control would not evince this intention (or, at least, proof of which would present a significant barrier to the prosecution). For example, a perpetrator who controls the movements of the victim, how they spend money, and engages in gaslighting behaviour, is unlikely to fall within s 320A (absent other acts). The requirement to prove specific intent and actual infliction of 'severe' pain or suffering is the primary justification for the introduction of a 'cruelty' offence (see Options section below).

Similar comments may be made, in a general sense, with respect to 'Stalking' under s 359E. The elements of the s 359E offence, including the types of conduct set out in s 359B(c) and need for (1)

[10] Schloenhardt, Lelliott et al, '20 Years of Torture: Reflections on s 320A of Queensland's Criminal Code' (2019) 43 *Criminal law Journal* 58, 61.
[11] See, eg, *R v HAC* [2006] QCA 291; *R v AAW* [2015] QCA 164; *R v B; Ex parte Attorney-General (Q)* (2000) 110 A Crim R 499; *R v Burns* [2000] QCA 201.
[12] *R v Burns* [2000] QCA 201, [3].
[13] *R v Spies* [2018] QCA 36.
[14] See generally *R v HAC* [2006] QCA 291.
[15] Supreme and District Court of Queensland, *Practice Direction No 182.1 of 2017 – Benchbook – Torture: s 320A*, March 2017.
[16] *R v Ping* [2006] 2 Qd R 69; (2005) 159 A Crim R 90; [2005] QCA 472.

apprehension or fear of violence to or against property or (2) detriment, limit its scope. Many coercive and controlling behaviours are not covered by s 359E.[17] There may be scope to better utilise existing law by amending both offence provisions in order to better capture missing dimensions of coercive control.

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

While there may be technical improvements to police and prosecutor practice that may improve prosecution of coercive and controlling behaviours (particularly with regard to the gathering of evidence), an underlying issue is that criminal offences are arguably underutilised in the context of DFV. Based on our ongoing research, as well as the findings of others, it appears that the wide range of potentially applicable criminal offences are not commonly employed in response to DFV.[18] Evidence suggests that police are more likely to issue DVOs, or charge DVO breaches, than utilise offences in the *Criminal Code*. As Fitzgerald and Douglas have noted, 'civil protection orders have to a significant degree replaced criminal responses' in Australia, rather than supplement them.[19] Others have commented on the problems of relying on civil orders and breaches in the DFV context (such as implicitly decriminalising DFV in the absence of a breach and potential under-criminalisation).[20]

While many police decisions to not charge perpetrators with criminal offences may be justified (and may be based on victim preferences),[21] failures to use the available criminal law mean that some serious offending is not properly punished. It also indicates that the issue is not necessarily a lack of applicable offences and knowledge of how to properly utilise them; rather, it is a reticence to charge offences at all. This speaks to broader structural problems with criminal justice responses to DFV. While these problems are well-known—and do not need to be restated here—they suggest that simply adding new offences without addressing systemic issues in policing of DFV will likely be ineffective.[22]

Sentencing (Q37-40): General response

[17] See further Marilyn McMahon, Paul McGorrery and Kelley Burton, 'Prosecuting Non-Physical Abuse between Current Intimate Partners: Are Stalking Laws an Under-Utilised Resource?' (2019) 42(2) *Melbourne University Law Review* 551.

[18] See, eg, Heather Douglas, 'The Criminal Law's Response to Domestic Violence: What's Going On?' (2008) 30 *Sydney Law Review* 439.

[19] Robin Fitzgerald and Heather Douglas, 'The Whole Story: The Dilemma of the Domestic Violence Protection Order Narrative' (2020) 60 *British Journal of Criminology* 180, 181; see also Heather Douglas and Heather Nancarrow, 'Perils of Using Law: A Critique of Protection Orders to Respond to Intimate Partner Violence' in H Johnson, BS Fisher, and V Jaquier (eds), *Critical Issues on Violence Against Women: International Perspectives and Promising Strategies* (Routledge, 2015).

[20] Andrew Ashworth and Lucia Zedner, 'Preventive Orders: A Problem of Undercriminalization?' in RA Duff et al (eds), *The Boundaries of the Criminal Law* (Oxford University Press, 2010) 59. It is, of course, worth noting that the rise of civil protection order schemes was provoked by the failures of the criminal justice system in dealing with DFV.

[21] Heather Douglas, 'Do We Need a Specific Domestic Violence Offence?' (2015) 39 *Melbourne University Law Review* 434, 438-439.

[22] See Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (Report, 28 February 2015) 301; see also Russell P Dobash and Rebecca Emerson Dobash, 'Abuser Programmes and Violence against Women' in Wilma Smeenk and Marijke Malsch (eds), Family Violence and Police Response: Learning from Research, Policy and Practice in European Countries (Ashgate, 2005) 191, 192, 195, 215.

There is scope already for coercive control to be taken into account (as either a mitigating or aggravating factors) under the long list of sentencing considerations in s9 of the *Penalties and Sentences Act 1992.* We also note that the National Domestic and Family Violence Benchbook provides useful guidance for how existing sentencing considerations may have bearing in DFV cases. Given the consistent evidence that implicates DFV as a driver for women's offending and criminalisation, however, it may be useful to more specifically name and weight this as a mitigating factor in appropriate cases.

Police Powers under the Police Powers and Responsibilities Act 2002 (Q41-53): General response

As noted previously, our research is concerned with understanding more about how dousing threats manifest in the context of DFV. It appears from our preliminary research that there is a need to better recognise, differentiate, and respond to serious threats (such as threats to kill) and the risk that these may pose. We have discussed this issues at various points already in this submission.

Part 2- How do other jurisdictions address coercive control?

We make no submissions with respect to Part 2.

Part 3 – Legislating against coercive control

We have several general comments in response to the questions in Part 3.

First of all, we stress again that creating a coercive control offence will not remedy ongoing issues in the policing of DFV. While many police officers do respond appropriately, a substantial number do not and existing civil and criminal mechanisms are not utilised effectively. This is borne out by our ongoing research and the wider literature. Substantial cultural and attitudinal changes are needed across the entire criminal justice system. Without such changes, new offences are likely to have a marginal positive impact (at best). We note Hanna's observation that:

> In the vast majority of cases before the courts currently, the problem is not that the defendant's conduct did not violate the law. The problem is that the criminal justice system is overwhelmed and underfunded and, depending on the jurisdiction, under enlightened about the concept that men do not have a legal prerogative to beat their intimate partners.[23]

Notwithstanding these caveats, criminalisation of coercive control may have possible benefits:

- As noted above, and noting that existing offences (and civil mechanism) could be better used, there is gap in the Queensland criminal law that is not adequately filled by existing discrete and course of conduct offences. It may be possible to fill this gap with amendments to existing threat, stalking, and/or torture provisions, but as the discussion paper notes, there is no offence that currently adequately considers a course of behaviour meant to coerce and control a victim as criminal. Such an offence may be important for victims who primarily experience psychological violence and control but not overt physical abuse, and may encourage them to provide fuller evidence of a relationship.[24]

[23] C Hanna, 'The Paradox of Progress: Translating Evan Stark's Coercive Control into Legal Doctrine for Abused Women (2009) 15(12) *Violence Against* Women 1458, 1468.
[24] Vanessa Bettinson, 'Criminalising Coercive Control in Domestic Violence Cases: Should Scotland Follow the Path of England and Wales?' (2016) 3 *Criminal Law Review* 165.

- If accompanied by appropriate education and public information campaigns, a coercive control offence may assist in improving community awareness of DFV and the forms it takes. It also communicates condemnation of such conduct.
- A coercive control offence may also have fair labelling benefits and indicate to an offender that their entire pattern of behaviour is wrongful, not simply one discrete act.[25]

Against these possible benefits, the potential risks and challenges of criminalising coercive control must be emphasised:

- Absent substantial improvements in current policing of DFV, there is a significant risk that an offence of coercive control will exacerbate misidentification of perpetrators and dual criminalisation. The breadth of conduct potentially covered by coercive control may make it easier for a perpetrator to make false reports against a victim. These risks are elevated for First Nations women. Victims may fear being labelled as coercive or controlling or may be led to believe they are coercive and controlling by abusive partners; this may, in turn, lead to reduced reporting of criminal behaviours and have negative impacts on victim safety. Further on this point: '[t]he risk that a victim's resistance to abuse will be read as abuse is arguably greater when the criminalization of IPV is uncoupled from the need to establish physical violence'.[26]
- Not all victims want perpetrators to be charged with criminal offences. The breadth of a coercive control offence may be seen by victims as increasing the risk that their partner is charged and, as such, may reduce their willingness to report domestic violence to police.
- An offence of coercive control will be inherently complex and thus time-consuming and difficult to investigate and prosecute successfully. There is a risk that, due to these difficulties, a coercive control offence is primarily prosecuted in cases where there is physical violence. In such cases, it may supplant other, more serious offences and may, in turn, normalise lower levels of abuse.[27]
- An offence of coercive control will likely place significant emphasis on the testimony of the victim. This can be undesirable and potentially dangerous. As Tolmie observes: 'coercive control is a (potentially subtle) web of behaviours over an extended period of time, the particular meaning of which may only be discernible to the perpetrator and victim […] [S]uccessful prosecution will necessarily depend on the victim providing a detailed narrative in court. However, recovery may be required before the victim has a realistic understanding about what happened to her. This may not be possible until she is in a position of safety and has had the benefit of skilled support over an extended period of time'.[28] Further to this point, a victim's testimony will likely lead to potentially damaging and re-traumatising cross-examination about the relationship.

Options for legislating against coercive control

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

[25] Judith Gowland, 'Protection from Harassment Act 1997: The 'New' Stalking Offences' (2013) 77 *Journal of Criminal Law*, 387, 389.
[26] Julie R Tolmie, 'Coercive Control: To Criminalize or not to Criminalize?' (2018) 18(1) *Criminology & Criminal Justice* 50, 62.
[27] Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, 2007) 144.
[28] Julie R Tolmie, 'Coercive Control: To Criminalize or not to Criminalize?' (2018) 18(1) *Criminology & Criminal Justice* 50, 55.

We refer to our previous comments and reiterate that a significant issue in the criminal justice response to DFV is the failure of decision-makers to take appropriate action within the existing legislative frameworks. There is scope for existing offences to be better used to prosecute identifiable, dangerous, and discrete acts in the context of DFV (such as dousing threats). We note that more effective use of existing offences is not inconsistent with new offence creation.

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

See our general comments on sentencing above. We support the creation of an explicit mitigating factor.

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

We make no submissions with respect to this option.

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

We support this option, in the terms suggested in Appendix 8 of the Discussion Paper and by Professor Douglas in her 2015 article. A general offence targeting infliction of pain or suffering merits criminal punishment and fits well within the existing structure of the *Criminal Code* as, in essence, a lesser 'torture' offence. We note and support the suggestion by Professor Douglas that the offence be heard summarily unless the defendant elects for a trial by jury (limiting the penalty to three years imprisonment). We also strongly recommend that the s 320A 'torture' offence be renamed 'serious cruelty'. Among other things, this would create consistency with the terminology of a new 'cruelty' offence and promotes fair labelling: the term 'torture' is ill-suited for some of the offending captured by s 320A and interferes with general understanding of the term.[29] The offences should sit in s 320A and 320B respectively.

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

Further amendment may better address some aspects of coercive control, but we note that unlawful stalking is already a complex offence provision that is difficult to operationalise in many cases.

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

We refer to our previous comments and reiterate that there are advantages and potential disadvantages and risks to a standalone 'coercive control' offence. Even if offences of 'cruelty' and 'serious cruelty' are implemented, as suggested, a coercive control offence may still fill a gap and, unlike those offences, will specifically address the DFV context. Nonetheless, and given the focus of the Discussion Paper on a coercive control offence, we stress again that criminal justice responses are only one (arguably small) part of a holistic and effective response to DFV. New offences alone are unlikely to substantially reduce rates of DFV, increase women's safety, or address systemic problems in the policing and prosecution of such behaviours. We echo Tolmie's concern broadly that:

[29] See Schloenhardt, Lelliott et al, '20 Years of Torture: Reflections on s 320A of Queensland's Criminal Code' (2019) 43 *Criminal law Journal* 58, 61.

> [a]pplying the concept of coercive control to particular sets of facts may require a breadth of evidence and complexity of analysis that the criminal justice system is not currently well equipped to provide. Some of the risks involved in enacting an offence of coercive control are that it could be used in a manner that minimizes IPV, invalidates the victim's experiences or, worst of all, recasts their resistance to abuse as abuse.[30]

If a coercive control offence is introduced, we have two brief comments:

- In our view, seven years appears to be an justifiable maximum penalty for a coercive control offence (especially one that does not require proof of (or intention to cause) harm). This penalty would also sit in line with the suggested aggravated penalty for 'cruelty'.
- The Tasmanian time-limit approach should not be adopted.

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

We do not support the creation of this form of new offence for many of the reasons associated with its breadth and likely application, already highlighted as problems in the Discussion Paper.

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

As a general principle, we consider that courts should maintain a high level of discretion in relation to sentencing to ensure individualised justice.

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

In most cases, we feel that the issues arising here could be appropriately addressed by testing existing law, and as a mitigating factor of some weight at sentence. The exception is for a murder charge (where there is a mandatory life sentence), and consideration might be given to ensuring that s 304B appropriately captures the issues in this context.

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)

We support an amendment in these terms.

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

Our only comment on this Option is that use of a register, available to QPS, is justifiable. Significant caution should be exercised over any allowance for lawful disclosures outside of police, given the implications for human rights and offender rehabilitation.

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[30] Julie R Tolmie, 'Coercive Control: To Criminalize or not to Criminalize?' (2018) 18(1) *Criminology & Criminal Justice* 50, 62.

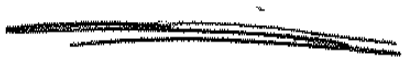
Option 12 and 13 – Amending the Dangerous Prisoners (Sexual Offenders) Act 2003 or creating a post-conviction civil supervision and monitoring scheme in the Penalties and Sentences Act 1992 for serious domestic violence offenders

While we do not have extensive comments on Options 12 and 13, we stress that continuing detention orders under the *Dangerous Prisoners (Sexual Offenders) Act 2003* are inconsistent with the human rights of offenders. We note that the United Nations Human Rights Committee found the Queensland Act inconsistent with the prohibition on arbitrary detention under article 9 of the *International Covenant on Civil and Political Rights*.[31]

Careful consideration should be given to the imposition of onerous obligations on offenders in the community and the use of monitoring systems. While such systems may ensure offender compliance and have positive effects on safety, they may entail significant adverse consequences for offenders. Existing sentencing options, such as probation, may achieve some of the goals related to offender rehabilitation outlined in the Discussion Paper.

We thank you for your consideration. Should you have any enquiries about this submission please feel free to contact us.

Yours sincerely,



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[31] Human Rights Committee, *Views: Communication No 1629/2007*, UN Doc CCPR/C/98/ (10 May 2010).