



Submission to

Women's Safety and Justice Taskforce

Options for legislating against coercive control
and the creation of a standalone domestic
violence offence

Discussion Paper 1

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Zoe Rathus, Griffith University Law School

Judy Rose, Faculty of Arts, Education & Law, Griffith University

Menka Tsantefski, School of Health Sciences & Social Work, Griffith University

Toni McCallum, Indigenous Futures, Arts & Education, Charles Darwin University

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Introduction

This taskforce submission has been written by an inter-disciplinary team of academics representing two Australian universities (QLD, NT)¹. Our collective experience spans areas of anthropology, sociology, social work and law. Viewing the complex issue of coercive control through a multi-disciplinary lens has allowed us to address different questions and options that are relevant to, and reflect, our expertise. We have decided to use the term Domestic and Family Violence (DFV) throughout this submission, and we will interchangeably use the terms victim and survivor.

We begin this submission with a vignette that represents a lived experience of coercive control experienced by Mary (not her real name). Next, we examine questions 1, 2, 3, 8, 9, 10, 11, 13, 14, 15, 16, 17, 32, 36, 37, 56 and 69. We then we move to considering considering options 1, 3, 4, 5, 6, 7, 9 and 10. Our submission concludes with a summary statement outlining our overall position on legislating against coercive control.

¹ **Zoe Rathus** AM is a senior lecturer at the Griffith University Law School. She has published and presented widely on women and the law, particularly the impact of family violence on women and children. Zoe worked in private practice and at the Women's Legal Service before entering academia in 2005 and has been an advocate for legal system reform for nearly 40 years. She is the Chairperson of the Immigrant Women's Support Service and a member of the Queensland Law Society Domestic Violence Committee. Email: z.rathus@griffith.edu.au

Dr Judy Rose is a sociologist with research interests in gender inequality, women's employment and familial health and wellbeing. Judy's current research explores the phenomenon of coercive control in the context of domestic and family violence and through a structural and gendered lens. Judy currently works as a lecturer and research methods advisor (mixed methods) in the Faculty of Arts, Education and Law at Griffith University. Email: j.rose@griffith.edu.au

Dr Menka Tsantefski is a senior lecturer in the School of Health Sciences and Social Work at Griffith University where she teaches child and family related subjects. She has conducted numerous research projects on the impact of problematic parental substance use on children and the service response to women with problematic substance use and their infants. Her most recent studies have examined the intersection of domestic violence, parental mental health, problematic parental substance use and child protection concerns. Email: m.tsantefski@griffith.edu.au

Dr Toni McCallum is a family sociologist researching in masculinities, stay-at-home fathers and gender. She is a lecturer in early childhood education in the School of Indigenous Futures, Arts and Education at Charles Darwin University. As a researcher at the National Collective of Independent Women's Refuges in Aotearoa/New Zealand she looked at the effects of family violence on children. As a survivor of a coercive controlling relationship she uses her lived experience to inform her research and writing on the subject. Email: T.McCallum@cdu.edu.au

Mary was so bowled over by him at the beginning. She couldn't believe he was interested in her.

Good-looking, charming, charismatic. And she was so unremarkable. An early and unexpected budding of their first child meant a shift far away from family and friends. Unanchored. Moving to a small remote mining town for his work. She was always so frayed with two under two, that at first it took her a while to realise that things might not be right. Small things at first – hassling her for sex when she was just back from hospital with their oldest. Demanding she stop breastfeeding early so she would be more sexually available. Telling her which friends she could see. Making the ones he didn't approve of so uncomfortable they just stopped coming. When she started to put on weight as the children grew, telling her how fat she looked.

Years later, Mary is dissolving. Unravelling. Her brain shrouded. Her skin crackly thin. It is hard to make a decision. Maybe that's why she is still with him. Even deciding what to wear in the morning feels difficult. Always trying to second guess him and not upset him is exhausting. He calls her stupid, big and useless – 'thank goodness you're got me to organize you'. But she has to keep it together for the kids ...

Vignette 1: Lived experience of coercive control

Discussion 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?

Our conceptual understanding is that coercive controlling behaviours involve repeated patterns of psychological, emotional, verbal, physical, financial and/or technology-enabled abuse. Such behaviours can be subtle (and gendered) with more women affected than men involving abusive behaviours that can be difficult to “see” by victims and supports including family, friends and police. We strongly believe there are many issues that need to be considered in this complex area of coercive control that can include specific behaviours such as:

- *Undermining personal and professional identity and relationships*

- Disregarding personal or professional achievements
- Manipulating or gaslighting mothering practices
- Breaking bonds with children and/or pets²
- Breaking bonds with family and friends
- *Controlling access to finances³, resources and health services*
 - Limiting access to finances (e.g., survivor has no separate bank account, and limited or no access to cash, credit and assets).
 - Limiting shopping for needs and/or discretionary spending
 - Limiting access to utilities e.g., length of showers, access to water/heating/cooling
 - Regulating personal grooming, daily activities and clothing choices, e.g., forcing the victim to maintain a certain body weight
 - Controlling access to health and support services
- *Using technology to monitor and surveil movement⁴*
 - Controlling social media accounts
 - Constant texting to monitor and deliver threats
 - Micro-managing daily actions
 - Installing camera in/outside the house or car
 - Using GPS tracking devices and apps such as 'Find my iphone', 'GeoZilla' and 'Life 360: Find Family and Friends'
 - Harnessing technology to control where she goes, what she does, who she visits
 - Secretly filming sex acts and posting them online (or threatening to do so)

² For example, see Newberry, M. (2017). Pets in danger: Exploring the link between domestic violence and animal abuse. *Aggression and Violent Behavior, 34*, 273-281 & Hardesty, J. L., Khaw, L., Ridgway, M. D., Weber, C., & Miles, T. (2013). Coercive control and abused women's decisions about their pets when seeking shelter. *Journal of Interpersonal Violence, 28*, 2617-2639.

³ Postmus, J.L., Plummer, S-B., McMahon, S., Murshid, N. M. Sung Kim, M. (2011), 'Understanding Economic Abuse in the Lives of Survivors' in *Journal of Interpersonal Violence*. Postmus writes extensively on this topic.

⁴ Dragiewicz, M., Burgess, J., Matamoros-Fernández, A., Salter, M., Suzor, N. P., Woodlock, D., & Harris, B. (2018). Technology facilitated coercive control: Domestic violence and the competing roles of digital media platforms. *Feminist Media Studies, 18*(4), 609–625.

While predominantly occurring in heterosexual relationships, with males as perpetrators, we acknowledge incidences of coercive control also happen in same sex relationships and/or with males as victims. However, the predominance of male perpetrators is linked to the way traditional masculinity is framed in Australia. In Australian society, perceptions of being a 'good' man and father are still largely linked to successful breadwinning⁵. This prime breadwinning position means that men are more likely than women to have control over household finances and other decisions in the household. This gender imbalance can set up the cycle of power and control for women in coercively controlling relationships. We argue, like other key academics in the field,⁶ that there has been a failure to recognise the impact of gender in the conceptual framing of coercive control. The risks factors associated with motherhood, periods of time out of the workforce for women, and dependence on male partner earnings while women are caring for young, pre-school-aged children need to be recognised in the context of coercive control. The intersections between home, the social and cultural gendered practices of marriage and motherhood, and family and domestic violence have been noted as evidenced in the following quote: "women's roles in the family, in the building, maintenance and performance of family are consistently entangled in their experiences of family violence"⁷.

2. What aspects of women's attempts to survive and resist abuse should be taken into account when examining coercive control?

We note from our research and experience in the field that women's attempts to survive and resist coercive control are often pragmatic and logical responses to what they have to cope with and what they must do just to survive. Therefore, they may act in the following ways depending on their circumstances:

⁵ Connell, R. (2000) *The Men and the Boys*. Sydney, Allen & Unwin; Cambridge, Polity Press; Berkeley, University of California Press.

Connell, R., & Messerschmidt, J. W. (2005) "Hegemonic Masculinity rethinking the concept". *Gender and Society*, Vol 19, No 6, 829-859.

⁶ Barlow, C. & Walkate, S. (2021) Gender, Risk Assessment and Coercive Control: Contradiction in terms?' *The British Journal of Criminology*. Doi: 10.1093/bjc/azaa104

⁷ Maher, J., Fitz-gibbon, K., Meyer, S., Roberts, S. & Pfitzner, N. (2020) 'Mothering through and in Violence: Discourses of the 'Good Mother'. *Sociology*, 0038038520967262, p. 13.

- Women may opt to stay in place, rather than leave a coercively controlling partner, particularly if she has dependent children and/or is financially insecure (e.g., due to no, insecure casual or part-time employment, insecure housing, visa restrictions, worried about the safety of her children).
- Insecure citizenship is a key consideration for women experiencing coercive control. If you are not an Australian citizen, you are not entitled to receive financial support from the government and if this is compounded by multiple children, no family support nearby – or in the country, no employment or insecure/casual jobs that offer no benefits or protection, then staying looks better than homelessness.
- Some women stay in coercive controlling relationships because they prefer to live with their children, rather than leaving their abuser and risk unsafe post-separation arrangement for the children. The focus of the *Family Law Act 1975* (Cth) is on the children having on-going contact with the parents, and research suggests that this is despite the existence of DFV in some cases⁸. Some women feel that the only way they can keep their children safe is by staying where they are able to monitor their abusive partner’s behaviours.
- Coercive control has significant flow on effects for children. Children may be directly affected or indirectly affected in instances where they witness scenes of abuse including seeing their mother diminished, frightened and lacking self-esteem. For children this can have a deleterious effect as they may be similarly frightened or learn this is the normal pattern for adult relationships. Some research has found when boys observe their father’s controlling behaviours, they may mimic this behaviour and demean their mother in how they speak to her and by not having respect for her.⁹
- Women may use ‘workaround’ strategies to survive coercive control, e.g., skimming money from the grocery shop and hiding it away, leaving their phone off or at home

⁸ House of Representatives Standing Committee on Social Policy and Legal Affairs. (2017). *A Better family law system to support and protect those affected by family violence*. Canberra: Parliament of Australia; Z Rathus, S Jeffries, H Menih and R Field, “‘It’s Like Standing on a Beach, Holding Your Children’s Hands and Having a Tsunami Just Coming Towards You’: Intimate Partner Violence and Expert Assessments in Australian Family Law’ (2019) *Victims and Offenders*

⁹ Howard, J., (2011). *Adolescent Violence in the Home: The missing link in family violence prevention and response*. Stakeholder Paper 11, Australian Domestic & Family Violence Clearinghouse. Australia.

so they can not be contacted, monitored or surveilled. They may also find safe spaces to access support or seek help, such as a walk with a friend or contacting a counsellor while at work.

- Women manage or avoid situations of coercive control by trying not to trigger such abuse: e.g., by sticking to routines such as putting dinner on the table at a set time, monitoring the behaviour of children and pets, being careful about spending, reducing time spent out of the home or visiting friends or relatives, answering texts about whereabouts. This requires a high level of vigilance and resultant stress including severe mental health issues for women living in coercive controlling relationships.
- Perpetrators can control victims' thinking to such a degree they may be unable to resist abuse. This psychological aspect of coercive control can deny victims of autonomy, liberty and dignity, making it difficult to resist the abuse or seek help. Survivors may not have the mental resources or stability to be able to resist or leave the coercively controlling setting as they believe the perpetrators' description of them as 'useless' or a 'bad mother'.
- Women may resist coercive control in a reactive way which may put them at risk of being misidentified as the perpetrator.

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

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

We firmly believe actions need to be taken to improve community awareness around what coercive control is and what the behaviours look like. We outline some issues that still need to be resolved:

- There is currently no commonly accepted and understood definition of coercive control and there needs to be an extensive community awareness campaign to make this happen.
- The taskforce will need to consult with a wide diversity of groups in Australian society including diverse cultures (some of whom are traditional and patriarchal and

domination of women is culturally tolerated), same sex couples and people with a disability, among others. Understandings of coercive control need to take account of the ongoing effects of systemic racism and colonization on Indigenous Australians that exacerbate and change how coercive control is understood, recognised and enacted.

- To further understand coercive control, we urge the Taskforce to listen to the many voices and stories of victim and survivors. This is partially because it is only when survivors tell their stories that they can start to feel in charge of their own lives ¹⁰. This story-telling approach to advocacy and education is a powerful first step forward in bringing about change.
- It is important to educate the public and practitioners on the difference between ‘situational violence’ that may be a one-off event and coercive control – which occurs as a systemic and deliberate pattern of abuse over time.
- A public awareness campaign around coercive control is needed to educate the public more broadly, as well as practitioners who work in health, education, welfare and justice systems. This education and training are needed to begin to shift thinking around coercive control and its impact on victims and survivors.

Domestic and Family Violence Service Systems Response

8. What is being done that works well?

Integrated responses bring together statutory and non-statutory services to identify and respond to risk for women and their children. To function well, they need a shared underpinning theoretical framework and to have formal organizational structures within an authorizing environment. Services operating from a feminist framework understand the gendered nature of domestic violence, including the use of coercive control, and are able to respond in an appropriate way. These services have a common approach to risk assessment

¹⁰ Ball, R. (2013) “When I tell my story I’m in charge: ethical and effective storytelling in advocacy”, *CLC Fellowship 2013*, Report Human Rights Law Centre, Victoria Law Foundation. Ball’s report shows how “the alternative [to listening to people’s stories] is a policy and law reform agenda that relies on dry statistics and legal analysis and omits the insights and perspectives of people affected by injustice” (p. 4).

and safety planning and are able to prioritise those most at risk. Regular communication enables swift action when high risk, or an escalation in risk, has been identified.

9. What could be done to improve the capacity and capability of the service system to respond to coercive control (this includes services to victims and perpetrators)?

Concerns about confidentiality continue to hamper responses to domestic and family violence. Professional reticence is more pronounced when there is uncertainty about legislative requirements for information sharing. If workers fail to recognise coercive control and the risk it poses for women and children, they are unlikely to communicate across services.

Many collaborative responses to domestic and family violence rely on informal networks among individual workers, which limits the extent and sustainability of shared actions. Research has shown that frontline workers are less supportive of integrated responses than management¹¹. Services therefore need to be more closely aligned, and to have a deeper understanding of each other's role and mandate.

Staff in child and adult services need to be trained to recognise coercive control and its impact on child and adult survivors, but training will be insufficient to effect practice change if it is not underpinned by intra and inter-organizational policies and procedures.

The development of practice guidelines on coercive control would strengthen the capability of the domestic/family violence, child protection and justice¹² workforces.

Working with men who use violence and control needs to be increased and improved. This requires services to recognize the complex issues men present with, such as mental health and substance use, and how they use power and control. As with working with women and

¹¹ O'Leary, P., Young, A., Wilde, T. & Tsantefski, M. (2018). Interagency working in child protection and domestic violence. *Australian Social Work*. Doi: 10.1080/0312407X.2017.142277

¹² Healey, L., Humphreys, C., Tsantefski, M., Heward-Belle, S., & Mandel, D. (2018). *Invisible Practices: intervention with fathers who use violence*. Research Report. Sydney, ANROWS.

children, the knowledge and skills for engaging with men who use violence and control need to be widespread across all relevant services.

10. What could be done to better ensure that women in regional and remote areas of Queensland have access to services with the capacity and capability to respond to coercive control?

COVID-19 restrictions have changed the landscape for human services. Many agencies now provide online visits to clients, with both benefits and risks. While more clients can be seen, it is unclear if, or how, online delivery improves safety for women and children. There are inequities in access to technology. Of concern is perpetrators using technology to invade women and children's privacy¹³.

11. What could be done to better ensure perpetrators in regional and remote areas of Queensland have access to services with the capacity and capability to respond to coercive control?

Online men's behaviour change programs have been trialled in Australia and are currently being evaluated in Queensland. Early findings indicate that the programs are safe and could be accredited. There is demand for these programs. While concerns have been raised about online collusion with perpetrators, this is also a possibility in face-to-face programs. Men report that being able to do the programs without travel makes it easier for them to attend regularly.

13. What are the gaps in the service system that could be addressed to achieve better outcomes for victims and perpetrators of coercive control?

¹³ Dragiewicz, M., Woodlock, D., Salter, M., & Harris, B. (2021) "What's Mum's Password?": Australian Mothers' Perceptions of Children's Involvement in Technology-Facilitated Coercive Control. *Journal of Family Violence*. doi.org/10.1007/s10896-021-00283-4

Differences in practice orientations need to be resolved for fuller integration between services. This is most evident in cases where children are involved. Child protection services are child focused whereas women’s DFV services prioritise the needs of women. The statutory authority of child protection services can further limit collaborative efforts if power differences are allowed to unduly influence discussion and decision-making.

To improve the safety of women and children, all services need a common understanding of coercive control and perpetrator behavioural patterns over time. Services also need access to information about perpetrators’ criminal histories – this information is often provided well after an incident of violence¹⁴.

Several Australian states, including Queensland, have trained workers in the “Safe & Together” model. This framework is extremely beneficial in the development of DFV proficient services, to use terminology from the model. However, to date, there has been limited exposure of services beyond child protection to the model, although this varies by state. Extending training in the Safe & Together approach to adult-focused services would increase the capacity of a range of services to understand and respond to coercive control. The current training to the Family Court will help to inform legal responses to coercive control through education about the impact of coercive control on the non-offending parents care of the children, harm to the children and the effects on the family’s functioning. While training is central to a shared approach, it is insufficient. Shifting practices depends on leadership.

14. What service system changes would be required to support the options to legislate against coercive control? (see ‘Part 3: Legislating against coercive control’ below)

Cultural change would be needed to support legislation against coercive control. All systems and services, including police and the various courts that victims and perpetrators come into contact with, need to understand the intention and gravity of coercive control, and the full spectrum of impacts on women and children. Services may fail to recognise that coercive

¹⁴ O’Leary, P., Young, A., Wilde, T., & Tsantefski, M. (2018). Interagency working in child protection and domestic violence. *Australian Social Work*. 71(2): 175-188.

control is a key risk factor in femicide, infanticide and familicide. Australian research has shown that police, for example, are less likely to take protective action if victims present without signs of physical violence¹⁵. Services need to not only recognize patterns of abuse, including coercive behaviours, but also to document them and to use this knowledge to devise safety plans and inform legal interventions that hold perpetrators to account. All service providers also need to know how to partner with and support the non-offending parent, usually the mother, and to recognise and document the protective actions taken by the non-offending parent.

Integrated service response and co-response models

15. What in the current integrated service response works well to enable effective responses to coercive control?

Integrated responses work well when there is monitoring of vulnerable women and children, information sharing, joint decision-making, and flexible, coordinated responses that address dynamic risk factors. These factors make it possible for coercive control to be identified and responded to appropriately. Responses to coercive control are effective when the patterns of destructive perpetrator behaviours are recognized, along with the impacts on child and adult victims.

16. What are the opportunities to improve integrated responses to victims and/or perpetrators of coercive control to achieve better outcomes?

Integrated responses to DFV have a core group of service providers: women's domestic violence services, police, and probation and parole – some include child protection – and a number of services on the periphery of the workings of the group. This latter group of services is broad in its membership and is called upon on an at-needs basis. These services often include generalist providers such as health, child focused services, for example family support programs and schools, and adult focused services including mental health and the alcohol and

¹⁵ Douglas, H. (2019). Policing domestic and family violence. *International Journal for Crime, Justice and Social Democracy*. 8(2): 31-49.

other drug treatment sector. To improve responses to victims and perpetrators, all services need a shared understanding of coercive control and its impact on women and children, and on family functioning. A shared understanding enables shared safety planning. Currently, numerous barriers inhibit collaborative actions. The most significant challenges include definitions of the 'identified client', philosophical approaches, funding arrangements and uncertainty about legislative requirements for information sharing, as mentioned above.

These issues can be clearly demonstrated in relation to problematic parental substance use and mental health. The use of coercive control in substance use behaviours is poorly understood, with consequences for treatment outcomes. Coercive control can lead to mental health problems in women. A mother's mental health problems can be used against her in seemingly benign ways e.g., by perpetrators stating she is incapable of looking after her children and separating her from them. It can also promote problematic substance use and be used to block access to treatment. When perpetrators of violence enter the alcohol and other drug sector, the focus on building a therapeutic alliance with the adult client can preclude exploring abusive behaviours. Lack of understanding of coercive control can result in service providers not linking problematic behaviours and mental health problems with women's experiences of abuse. This is not only a missed opportunity for intervention to support adult and child victims, it fails to hold perpetrators of coercive control and other abusive behaviours accountable.

It is important to point out that there are significant differences between alcohol and other drug services in relation to responsibility for women's and children's safety and wellbeing. Some providers, for example, Odyssey House in Victoria, have specialist child-focused programs and dedicated domestic/family violence workers. The influence of these programs and workers is likely to infiltrate the agency more widely, steering practice towards a whole-of-family approach.

Training on coercive control therefore needs to extend to the range of services supporting victims and perpetrators of violence and abuse. Funding arrangements could also be extended to enable adult-focused services to attend more fully to clients' children.

- 17. Have you had any experience with the existing integrated service responses or co-responder models operating in the Brisbane, Cairns, Cherbourg, Ipswich, Logan/Beenleigh, Mackay, Moreton and Mt Isa regions?**

Yes, I¹⁶ have conducted research at the intersection of domestic violence and child protection concerns with Queensland service providers. From this experience, I would argue that services need to move beyond collaboration to formal integration, as practiced on the Gold Coast through the Domestic Violence Prevention Centre.

Legislative Response

The Queensland Criminal Code

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

Some defence lawyers may be hesitant about using evidence of DFV because they are not confident about how it will be received. Some are concerned that raising it will present the court with a motive for the violence committed – rather than it being seen as an explanation and potential basis for a defence. Lawyers are influenced by a culture of practice as well as the law, and if raising DFV is thought to be dangerous to defendants, and using this type of defence is not role-modelled by senior barristers, there may be reluctance.

It is noted that when this is done well, with a barrister and judge who understand DFV, there can be a successful outcome as in the trials of Dagmar Stephenson¹⁷ and Susan Falls.¹⁸ In analysing the trial of Susan Falls, Heather Douglas makes these points:¹⁹

¹⁶ Dr Menka Tsantefski

¹⁷ Z Ratus, *Rougher Than Usual Handling: Women and the Criminal Justice System - A gender critique of the Criminal Code Bill 1994*, (1994), Women's Legal Service, p 119.

¹⁸ In 2010, barrister Jeff Hunter successfully led evidence of the history of DFV, and expert evidence, in the case of Susan Falls, who killed her abusive husband. See: Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, 'Securing Fair Outcomes for Battered Women Charged with Homicide: Analysing Defence Lawyering in *R V Falls*' 38 [2014] *Melbourne University Law Review* 666.

¹⁹ Heather Douglas 'A consideration of the merits of specialised homicide offences and defences for battered women' (2012) 45(3) *Australian & New Zealand Journal of Criminology* 367–382.

- That it is unfortunate that s 304B of the Criminal Code does not contain accompanying legislation regarding the admissibility of evidence of a history of DFV – what evidence could be given, and who could give it;
- The prosecution argued against evidence from two experts being allowed – demonstrating the problems with the current laws;
- The judge had to turn to the Explanatory Notes relating to s 304B to allow the evidence;
- Subsequently the experts gave evidence about ‘the long-term effects of abuse, the cycle of violence, why an abused person might find it impossible to leave their abuser and the sense of hyperarousal and heightened ability to assess the seriousness of threats, risk and imminence of harm’ – all relevant to coercive control;²⁰ and
- That the judge had to give careful jury directions about self-defence because the deceased was asleep at the time.

Lawyers acting for victims of DFV who have harmed their usual abuser would have to carefully consider who to call as witnesses, and what documents to subpoena. Which family members know about the violence? Often these potential witnesses have not seen the actual event that has led to the charge – but they may have seen, or been told about, earlier abuse. Are the best witnesses children? Or are there adult children, step-children, parents, siblings? There may or may not be existing police or hospital files. Will a legally aided defence lawyer have the time and resources to pursue these lines of enquiry. The accused herself is a potential witness – but the risks of a defendant giving evidence are well understood.

A lawyer needs to understand a great deal about the dynamics of DFV to understand why evidence of such abuse is relevant to a defence. Lawyers and judges require more education and training about DFV and how it is relevant to understanding behaviour which may look like an offence, but is actually defensive. Importantly this involves understanding coercive control because of the profound impact of this insidious, and often invisible, form of abuse.

²⁰ Ibid, p 376

The lack of understanding is compounded by the language of the defence-related sections and a lack of clarity about what evidence would be considered relevant at law. Self-defence and duress and the rules of evidence should be amended regarding this as discussed under Options 9 and 10.

Admissibility of evidence about coercive control

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

The answer to this is similar to the answer to Q 32.

Sentencing

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

We believe that the law needs to make clear that evidence of the history of the relationship and any DFV that has occurred is admissible. Judges and lawyers will need education and training to understand how and when to apply those laws. The evidence would still have to be relevant to the offence charged or the defence raised – but learning to understand what evidence might be relevant is critical. This would be facilitated by laws which articulate some of these circumstances.

Such evidence might be relevant to both the prosecution and the defence:

- Where a perpetrator of DFV is charged with an offence of violence and claims provocation or self-defence the prosecution should be able to lead evidence of any history of DFV that might cast doubt on the claims. It would not automatically invalidate such defences. It would be matter for the judge / jury; and
- Where the usual victim of violence is charged with an offence – a history of DFV maybe relevant to a number of defences and partial defences and to sentence.

Issues relevant to this evidence being led by the prosecution were discussed by the Taskforce on Women and the Criminal Code (TWCC) in 2000.²¹ The current Discussion Paper raises ‘similar fact’ and ‘propensity evidence’ and notes the vexed consultations that have preceded this current debate (pp. 26-27). However, it must be remembered that when the usual perpetrator of DFV, including coercive control, is being prosecuted for an offence of violence, there is usually no question of who the perpetrator is. In cases of alleged sexual violence there may be contested issues of consent – but often the contest in other crimes is whether or not the accused was acting in self-defence – or provoked, potentially providing a complete defence to some crimes or reducing manslaughter to murder. These defences can be challenged by relevant evidence of DFV, including coercive control – not to prove that the accused did the act, but to probe the credibility of the defence being claimed.

Our suggested reforms are outlined under Options 9 and 10.

Part 3 - Legislating against coercive control

What are the possible benefits of legislating against coercive control in Queensland?

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

We are not convinced that any specific legal action ever has, or ever will, measurably increase the safety of women and children given the on-going statistics regarding spousal and child homicide. However, the infrastructure, services and systems which have been developed for responding to DFV in Queensland and around Australia have contributed to thousands of women being enabled to leave abusive partners. Society in general, and the governments we elect, must continue to try to prevent DFV. Whatever decisions are made through this Taskforce, the process itself has further ignited discussion on this issue. It is important to remember, however, that Dobash and Dobash first starting talking about coercive control in 1979²² – the recent focus grows from a 40-year history.

²¹ Queensland Government Office for Women, *Report of the Taskforce on Women and the Criminal Code* (2000) at pp 128-145.

²² R Dobash and R Dobash, (1979). *Violence Against Wives: A Case Against the Patriarchy*. New York, NY: Free Press.

As usual – whatever legislative changes are made – resourcing and training for all of the services and institutions relevant to this issue are critical. It has been remarked that part of the reason for the ‘gold standard’ label on the Scottish model was the huge investment in collaborative consultation and training for the significant service industry that works in this space. If changes are made here, their success will depend on similar investment.

Legislation that would narrow the breadth of the civil law response to the DFVP Act

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

We do not believe that it would be desirable to narrow the definition of domestic violence in the DFVP Act. It has not come to the attention of any of the authors of this submission that the definition of domestic violence in the Act is problematic. Changing an unproblematic definition in this piece of legislation will not assist in responding to coercive control, which is, in fact, captured in the definition.

Bringing the whole definition under an umbrella requirement of coercive control risks bringing about issues similar to those which have arisen in the family courts because of the definition of ‘family violence’ in the *Family Law Act 1975 (Cth) (FLA)*. There is a significant structural difference between the definition in the Queensland DFVP Act and the FLA that leads to very different interpretational outcomes. The FLA definition is set out below:

s4AB (1) For the purposes of this Act, family violence means violent, 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.

(2) Examples of behaviour that may constitute family violence include (but are not limited to):

- a) an assault; or
- b) a sexual assault or other sexually abusive behaviour; or
- c) stalking; or

- d) repeated derogatory taunts; or
- e) intentionally damaging or destroying property; or
- f) intentionally causing death or injury to an animal; or
- g) unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or
- h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; or
- i) preventing the family member from making or keeping connections with his or her family, friends or culture; or
- j) unlawfully depriving the family member, or any member of the family member's family, of his or her liberty.

Further sub-sections detail information about 'exposure' to family violence.

As can be seen, following the rules of statutory interpretation, the whole of the definition is contained in sub-section (1), and sub-section (2) is only elucidation. Therefore, abuse is only 'family violence' *if it coerces or controls or causes fear*. One of the authors of this submission has researched the exclusionary consequences of this definition in family law, as have other scholars.²³ One problem is that these are difficult concepts to be proven in a court of law, even where the onus of proof is only on the balance of probabilities as in family law.

The difficulties are compounded by the connection of this terminology to the American domestic violence literature.²⁴ That literature has created various iterations of categories of family violence of which 'coercive control' is only one. Other categories include; 'situational

²³ Zoe Rathus, 'Shifting Language and Meanings between Social Science and the Law: Defining Family Violence', (2013) 36(2) *University of New South Wales Law Journal* 359; Jane Wangmann, 'Different Types of Intimate Partner Violence? A Comment on the Australian Institute of Family Studies Report Examining Allegations of Family Violence in Child Proceedings under the *Family Law Act*' (2008) 22 *Australian Journal of Family Law* 123; Jane Wangmann, 'Different Types of Intimate Partner Violence - What do Family Law Decisions Reveal?' (2016) 30 *Australian Journal of Family Law* 77; Joan Meier, 'Dangerous Liaisons: Social Science and Law in Domestic Violence Cases' (February 2, 2017). Available at SSRN: <https://ssrn.com/abstract=3004176> or <http://dx.doi.org/10.2139/ssrn.3004176>

²⁴ See, for example, J Kelly and M Johnson, 'Differentiation among Types of Intimate Partner Violence: Research Update and Implications for Interventions' (2008) 46 *Family Court Review* 476-99.

couple violence’, ‘separation instigated violence’ and ‘violent resistance’. Rathus and Wangmann have both identified family law cases where judges have determined that instances of abuse in the evidence before them did not amount to coercive control, and were more situational or triggered by the separation. Although in the typology literature these are other forms of family violence, under the FLA, these fall outside the definition. The Queensland definition, which lists both behaviour which is ‘coercive’ and behaviour which ‘controls or dominates’ as part of a list, is far preferable.

However, we argue that it may well be valuable to include a further section in the *DFVP Act* after section 12 which could be headed “meaning of coercive and/or controlling behaviour”. Here we believe it would be valuable to formulate a definition of ‘coercive control’ which could then be referred to in any other legislation developed in response to coercive control.

Options for legislating against coercive control

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

This should be done anyway whatever.

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

NO – see discussion above.

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

Professor Heather Douglas’ formulation of a new offence of ‘cruelty’ is worthy of consideration. It is a re-write of s 320A, Torture, taking up some of the recommendations of the TWCC and some ideas of her own. The offence is a course of conduct offence in the context of a relationship. She has usefully provided definitions for ‘cruelty’, ‘pain and suffering’ and ‘a relevant relationship’. Our view, however, is that introducing new language such as ‘cruelty’, or amending the offence of ‘torture’, may miss the intention of this discussion, which is to increase the understanding of coercive control and improve and enable strong legal and other responses. We are also concerned that our general points about over-criminalisation and risks as set out in Option 6 would likely apply here as much as any new offence called coercive control or similar.

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

NO – that would be confusing.

Option 6 – Creating a new standalone ‘coercive control’ offence

Our team has struggled with this option. While we strongly support the development of legal sanctions that will contribute to a community message that coercive control is pernicious and needs to be prevented, we are concerned that creating an offence may have more negative unintended consequences than benefits. Many of these issues are rehearsed in the Discussion Paper – overcriminalisation, risks for women who are victims of DFV (particularly Indigenous women) of being charged and concerns about difficulties of proving these offences.²⁵ We are also concerned about the possible impact on young people who may be drawn into the criminal justice system when engaging in help-seeking behaviour.

One significant legal and moral question is: what is the demarcation line between controlling behaviour that is inappropriate (although maybe not uncommon in relationships) but should not be classed as criminal, and coercive controlling behaviour that falls over that line into criminality? For example, if all forms of DFV defined under our civil DFVP Act could also be charged as criminal offences, it might create an unmanageable policing situation.²⁶

We also note that there are significant challenges in transposing laws across jurisdictions and legal cultures.²⁷ In England, Wales, Scotland and Ireland, the civil protection order system and the role of police is quite different to the situation in Australia; therefore, the ‘gap’ legislators may be seeking to fill there might be different to gaps identified here. Further, the USA has tended to rely on the criminal justice system to respond to DFV more than Australia – focusing attention on physical violence. We would argue that Australia’s reliance on protection orders – despite the problems with this - has meant that we have

²⁵ We note the high attrition rates in reported in England and Wales.

²⁶ We understand that when police were mandated to report the presence of children in DFV situations to the Department of Child Safety (or its equivalent then), it was overwhelmed by the numbers of reports and unable to respond effectively.

²⁷ 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)

had a broader legislative and community understanding of non-physical forms of DFV. When Queensland introduced our domestic violence protection order legislation in 1989, a protection order could be made in circumstances where there had been 'intimidation or serious harassment' or 'indecent behaviour'.²⁸ It is easy to forget how long Queensland has understood this.

Of great importance is acknowledging that there is no equivalent of our Indigenous or First Nations Peoples in the UK. The specific issues confronted here in addressing the overcriminalisation of these peoples and the well-documented misidentification of First Nations women as perpetrators rather than victims, are simply not part of the social or legal landscape there. It may also be that conduct which is coercive controlling in Indigenous communities may not 'look like' any Western legislative framing of the concept. There is a risk that some male coercive controllers in these communities may not be recognised as such by police and other front line service providers (particularly non-Indigenous) – thereby leaving women unprotected – while women's reactionary behaviour may be misidentified as it may seem to fall more within the definition.

There may also be similar issues in culturally and linguistically diverse (CALD) communities, where culturally dominant Australian perceptions (e.g.; Anglo-Celtic) may misunderstand the conduct and actions of people which are outside of their experiences.

It is possible that any new offence, if limited to coercive control, may often in practice be charged with other offences where the conduct is more obvious and easier to prove – e.g.; assault. The Review of the coercive control offence in England suggests that coercive control is often charged with other offences.²⁹ If that is so, a new offence of coercive control may not often lead to men who do not use physical violence being charged.

Persistent Family Violence

Although we are not advocating for any new offence, as discussed above, we also understand that the Taskforce might consider that appropriate. Therefore, we wish to draw attention to the offence of 'persistent family violence' as enacted in Tasmania³⁰ and

²⁸ *Domestic Violence (Family Protection) Act 1989 (Qld)* ss 4(e) and (f) as originally passed.

²⁹ Home Office (England), *Review of the Controlling or Coercive Behaviour Offence*, Research Report 122, March, 2021, p 6.

³⁰ *Criminal Code (Tas)* s 170A

Western Australia.³¹ This offence would appear to have some merit in that it uses the familiar language of ‘family violence’; it can occur only in the context of relationship, is a course of conduct offence, where the victim is not required to specify dates and places and would encompass coercive control, without having to rely on evidence of that alone. As the Explanatory Memorandum said of the Western Australian amendment Act that introduced the new section states:

Its purpose is to deliver a package of reforms to improve the safety of victims of family violence, ensure accountability of perpetrators of family violence, and increase responsiveness of the justice system by making it easier and less traumatic for victims to obtain protection from violence.³²

There is some discussion of the Tasmanian offence in a Review of sentencing of the offence of non-fatal strangulation – which particularly examined other offences that were charged. One of those offences was persistent family violence.³³ However, the discussion does not really assist the inquiry into whether or not persistent family violence would be useful.

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

We believe that this is likely to be too wide and too criminalising.

Options 9 and 10 – considered together

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

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 strongly believe that that law needs to respond to the fact that some victims of coercive control, will eventually respond with violence out of defence of self or another. However, we do not believe that the defence is one of ‘coercive control’, just as we do not believe

³¹ *Criminal Code (WA)* ss 299 and 300

³² Explanatory Memorandum, Family Violence Legislation Reform Bill 2019 (WA), p 1.

³³ Rebecca Bradfield, *Sentencing for Non-fatal Strangulation*, Sentencing Advisory Council (Tasmania), May 2021, p 33-35

that the current partial defence in s 304B of the Criminal Code was the most appropriate conceptualisation of dealing with women who kill abusive partners.

It is our position that the defence is **self-defence** and that a number of amendments and additional section should be developed to make it applicable in circumstances of coercive control. These changes include:

- Amending the law of self-defence
- Changing the rules of evidence to make it clear that a history of DV is relevant to self-defence
- Developing legislative guidelines for what might be evidence of family violence
- Developing guidelines on how and why family violence might be relevant – and who is qualified to give the evidence
- Developing directions to juries

These will be discussed in order.

Amending the law of self-defence

The current wording of the Queensland provision on self-defence (s 271 Criminal Code) is not conducive to a victim of violence being enabled to tell their whole story. The Western Australian provision on self-defence was developed out of Review of the Law of Homicide that specifically addressed the gender bias in this law. We have borrowed from s 248 of the WA Code.³⁴

Self-Defence

- 1) A harmful act³⁵ done by a person is lawful if the act is done in self-defence under subsection (2).
- 2) A person's harmful act is done in self-defence if:
 - a) the person believes the act is necessary to defend the person or another person from a harmful act, *including a harmful act that is not imminent*; and

³⁴ Law Reform Commission of Western Australia, *Review of the Law of Homicide: Final Report*, Government of Western Australia, 2007 at <https://www.wa.gov.au/government/publications/project-97-review-of-the-law-of-homicide>

³⁵ This would require definition

- b) the person's harmful act is a reasonable response by the person in the circumstances as the person believes them to be; and
- c) there are reasonable grounds for those beliefs.

There could be provisions that adapt this defence to a partial defence to reduce murder to manslaughter where the response was not found to be reasonable.

We have italicised the words '*including a harmful act that is not imminent*' because we suggest that perhaps this idea is dealt with better in an evidentiary provision as below.

Changing the rules of evidence to make it clear that a history of DV is relevant to self-defence

We believe that s 132B of the *Evidence Act 1977* (Qld) is not very useful. It merely states the obvious – that relevant evidence is admissible. This point was made by the Taskforce on Women and the Criminal Code 20 years ago.³⁶ What this section needs to do is to educate, or illuminate for, judges that evidence of family violence is admissible – and its relevance. At the very least it should be amended as follows:

132B Evidence of domestic violence

- (1) This section applies to a criminal proceeding against a person for an offence defined in the Criminal Code, chapters 28 to 30.
- (2) The history of the domestic relationship between the defendant and the person against whom the offence was committed, including any history of family violence, is admissible in evidence in the proceeding.
- (3) In this section—domestic relationship means a relevant relationship under the Domestic and Family Violence Protection Act 2012, section 13.
- (4) In this section—'family violence' means family violence as defined under the Domestic and Family Violence Protection Act 2012, section 8.

³⁶ Queensland Government Office for Women, *Report of the Taskforce on Women and the Criminal Code* (2000) at pp 128-145.

Note—Under the Domestic and Family Violence Protection Act 2012, section 13, a relevant relationship means an intimate personal relationship, a family relationship or an informal care relationship, as defined under that Act.

Note – Under the DV Act ‘FV’ is defined as [here insert the definition]. Sections 9, 10, 11, [and our new proposed section regarding coercive control] add detail to some aspects of the definition.

We note that s 39A of the Western Australian *Evidence Act* states:

In proceedings for an offence, evidence of family violence is admissible if family violence is relevant to a fact in issue.

That section should be given careful consideration.

Developing legislative guidelines as what might be evidence of family violence

This involves creating a non-exhaustive list of examples of family violence – that include examples of coercive, controlling behaviour. The WA list is a useful blueprint.

- (1) For the purposes of sections 39 to 39G, evidence of family violence, in relation to a person, includes (but is not limited to) evidence of any of the following —
 - (a) the history of the relationship between the person and a family member, including violence by the family member towards the person, or by the person towards the family member, or by the family member of the person in relation to any other family member;
 - (b) the cumulative effect of family violence, including the psychological effect, on the person or a family member affected by that violence;
 - (c) social, cultural or economic factors that impact on the person or a family member who has been affected by family violence;
 - (d) responses by family, community or agencies to family violence, including further violence that may be used by a family member to prevent, or in retaliation to, any help-seeking behaviour or use of safety options by the person;

- (e) ways in which social, cultural, economic or personal factors have affected any help-seeking behaviour undertaken by the person, or the safety options realistically available to the person, in response to family violence;
- (f) ways in which violence by the family member towards the person, or the lack of safety options, were exacerbated by inequities experienced by the person, including inequities associated with (but not limited to) race, poverty, gender, disability or age;
- (g) the general nature and dynamics of relationships affected by family violence, including the possible consequences of separation from a person who commits family violence;
- (h) the psychological effect of family violence on people who are or have been in a relationship affected by family violence;
- (i) social or economic factors that impact on people who are or have been in a relationship affected by family violence.

Developing guidelines as to how and why family violence might be relevant to self-defence – and who is qualified to give the evidence

Again, the WA is useful here – and we would suggest that this is the right place for the issue of imminence to be raised. We have also changed some wording slightly and added a phrase regarding armed violence against an unarmed person as suggested by the TWCC³⁷

Evidence of family violence – self-defence

Without limiting any other evidence that may be adduced, in criminal proceedings in which self-defence *is raised*, evidence of family violence may be relevant to determining whether —

- a) a person has a belief that an act was necessary to defend the person or another person from a harmful act, including a harmful act that was not imminent; or

³⁷ P 164

- b) a person's act was a reasonable response by the person in the circumstances as the person believed them to be, *including in circumstances where the person was armed with a weapon and the other person was not*; or
- c) there are reasonable grounds for a particular belief by a person.

In relation to the qualification of witnesses, WA s 39 should be adopted.

Developing directions to juries

We recommend adopting the WA provisions from sections 39B to 39G of the WA Evidence Act as set out in Appendix 9 to the DP.

Additional Points on Option 10

Prosecution Led Evidence of FV

We also believe that consideration should be given to enhancing the admissibility of evidence of a history of domestic violence for the prosecution, particularly in circumstances where it may be relevant to the credibility of a defence raised by a usual perpetrator of DV. It is well known that defences of self-defence and provocation have been used by perpetrators. This was canvassed to some extent by the Taskforce on Women and the Criminal Code at pp 129 – 144. We attach a full copy of the referenced Taskforce Report which is not easily publicly accessible at present.

Duress

The defence of duress could be amended in a similar way to self-defence to ensure that a history of FV is admissible.

Provocation

Although there are arguments about whether or not the defence of provocation should be retained, if it is, then it should also be amended to better account for DFV.

Conclusion

Society in general, and the governments we elect, must continue to try to prevent DFV and, whatever decisions are made through this Taskforce, the process itself has further ignited discussion on this issue. While we strongly support the development of legal sanctions that will contribute to a community message that coercive control is pernicious and needs to be prevented, we are concerned that creating an offence may have more negative unintended consequences than benefits.

We are available for further consultation or discussion.

Thank you for considering this submission.

Yours Sincerely,

Zoe Rathus, Judy Rose, Menka Tsantefski, and Toni McCallum