

28 January 2021

Committee Secretary  
Joint Select Committee on Coercive Control  
Parliament House  
Sydney NSW 2000

Via email: [coercivecontrol@parliament.nsw.gov.au](mailto:coercivecontrol@parliament.nsw.gov.au)

Dear Committee Secretary

## Joint Select Committee on Coercive Control

### Introduction

1. Rape & Domestic Violence Services Australia (“**RDVSA**”) welcomes the opportunity to contribute to the inquiry of the Joint Select Committee on Coercive Control. We note that the inquiry includes a consideration of the Government’s Discussion Paper on Coercive Control, published in October 2020 (“the **Discussion Paper**” or “**DP**”).
2. RDVSA is a non-government organisation that provides a range of trauma specialised counselling services for those who have experienced sexual, domestic or family violence and their supporters.<sup>1</sup> Our services include the NSW Rape Crisis counselling service for people in NSW whose lives have been impacted by sexual violence; Sexual Assault Counselling Australia for people accessing the Redress Scheme resulting from the Royal Commission into Institutional Responses to Child Sexual Abuse; the counselling service and support for people experiencing domestic and family violence across Australia; and the LGBTIQ+ violence counselling service. In the 2019/20 financial year, RDVSA provided 27,793 occasions of service to 10,218 clients nationally. 88% of callers identified as female, and 90% identified as someone who had experienced sexual, domestic and/or family violence.

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<sup>1</sup> Generally, RDVSA prefers the term *people who have experienced sexual assault and/or domestic and family violence* to describe individuals who have experienced this type of violence, rather than the terms survivors or victims. This is in acknowledgement that, although experiences of sexual assault and/or domestic and family violence are very significant in a person’s life, they nevertheless do not define that person. However, in this submission, RDVSA will utilise the terms “complainant” or “victim-survivor” in the context of criminal proceedings.

#### Counselling Services

24/7 NSW Rape Crisis:	1800 424 017
Domestic Violence Services:	1800 943 539
Sexual Assault Counselling Australia:	1800 211 028
LGBTIQ+ Violence Service:	1800 497 212
<a href="http://rape-dvservices.org.au">rape-dvservices.org.au</a>	

3. In making this submission, RDVSA does not propose to address all aspects of the Discussion Paper in the order in which they appear. Instead, we address the Discussion Paper along the following themes:
  - A. Defining coercive control (questions 1 and 2)
  - B. The current legislative framework (questions 3, 4 and 10)
  - C. The use of evidence of coercive control in civil and criminal proceedings (questions 5, 11 and 12)
  - D. Coercive control in sentencing proceedings (questions 6 and 13)
  - E. Criminalising coercive control (questions 7, 8 and 9)
  - F. Other avenues of reform and non-legislative measures (questions 14 and 15).
  
4. RDVSA welcomes the discussion about coercive control and believes it should be recognised and reflected in NSW law. In particular, RDVSA supports legislative amendments to unambiguously recognise coercive control as a basis for obtaining an Apprehended Domestic Violence Order under the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). We are, however, concerned at the pace of the inquiry and the time within which the Committee is due to finalise its report. We urge the Committee to dedicate further time to comprehensive consultation, including consultation with specialist organisations, government agencies and representatives of marginalised communities. This is particularly imperative in relation to the issue of criminalisation. Any steps to introduce a criminal offence of coercive control must be accompanied by a fundamental shift in how police, prosecutors and other criminal justice personnel approach domestic and family violence, as well as a public awareness campaign, tailored training and careful monitoring of how the reforms are implemented.

#### **A. Defining coercive control (DP questions 1 and 2)**

***Q1: What would be an appropriate definition of coercive control?***

***Q2: How should it distinguish between behaviours that may be present in ordinary relationships with those that taken together form a pattern of abuse?***

5. Before attempting to define coercive control, it should first be acknowledged that there is no statutory definition of domestic and/or family violence in NSW legislation other than the definition of a “domestic violence offence” in s.11 of the *Crimes (Domestic and Personal Violence) Act 2007*, which in turns requires reference to the definition of a “personal violence offence” in s.4, which lists multiple offences by section number, most of which are contained in another Act, the *Crimes Act 1900*. While experienced lawyers may be skilled at navigating legislation and cross-referencing definitions, these definitions have limited value from a community and public awareness perspective. Apart from lacking transparency and being inaccessible to members of the general public, the definition in s.11 is fundamentally limited by virtue of its dependence on conduct that would amount to a recognised criminal offence.

6. The NSW Domestic Violence Death Review Team commented on the absence of a legislative definition of domestic and family violence in the context of considering non-physical forms of domestic and family violence in its most recent report:<sup>2</sup>

A further legislative issue the Team considered in discussing the public policy profile of non-physical violence for this report was the lack of definition of domestic and family violence in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (the *Crimes (DPV) Act*). It was noted that in other jurisdictions, such as Victoria and Tasmania, definitions of domestic and family violence are provided in legislation, and those definitions include non-physical manifestations of violence.

7. The Team noted that the introduction of a legislative definition had been considered and rejected in the 2015 statutory review of the *Crimes (Domestic and Personal Violence) Act 2007*.<sup>3</sup>
8. In their joint review of family violence, the Australian and NSW Law Reform Commissions described NSW legislation, in comparison to other jurisdictions, as “notable in its omission to define ‘domestic violence’.” They recommended a statutory definition of family violence as “violent or threatening behaviour, or any other form of behaviour, that coerces or controls a family member of causes that family member to be fearful.”<sup>4</sup>
9. The absence of a legislative definition stands in contradiction to the NSW Government’s non-statutory definitions of domestic and family violence. These definitions generally incorporate physical violence, sexual abuse, intimidation, stalking, threats and coercive control.<sup>5</sup> It is also generally stated in NSW Government policy documents that “domestic and family violence is a crime”.<sup>6</sup> The messages “domestic violence is a crime” and “domestic violence includes coercive control” do not align because in many cases (discussed below, in response to question 3), coercive control would not currently amount to a criminal offence in NSW.

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<sup>2</sup> NSW Domestic Violence Death Review Team (2020), *Report: 2017-2019*, 71.

<sup>3</sup> Ibid, referencing Justice Strategy and Policy, *Statutory Review of the Crimes (Domestic and Personal Violence) Act 2007 (NSW)* (2015), NSW Department of Justice.

<sup>4</sup> Australian Law Reform Commission and NSW Law Reform Commission, Report 114 / 128, *Family Violence – A National Legal Response: Final Report*, Volume 1, October 2010, [5.175]; recommendation 5-1.

<sup>5</sup> For example, Department of Communities and Justice website: <https://www.facs.nsw.gov.au/domestic-violence/about/types-of-abuse-in-dv>; NSW Domestic and Family Violence Blueprint for Reform 2016-2021: *Safer Lives for Women, Men and Children*, p1:

[http://domesticviolence.nsw.gov.au/\\_data/assets/pdf\\_file/0004/379849/dfv-blueprint-for-reform.pdf](http://domesticviolence.nsw.gov.au/_data/assets/pdf_file/0004/379849/dfv-blueprint-for-reform.pdf)  
Women NSW, *It Stops Here*:

[https://www.women.nsw.gov.au/\\_data/assets/file/0003/289461/it\\_stops\\_here\\_final\\_Feb2014.pdf](https://www.women.nsw.gov.au/_data/assets/file/0003/289461/it_stops_here_final_Feb2014.pdf)

<sup>6</sup> For example, Department of Communities and Justice website: <https://www.facs.nsw.gov.au/domestic-violence/police-law-help/the-law>; The Department of Communities and Justice’s website adds, “It’s a crime that often goes unreported to police and can be too complex for the police to provide an effective response to”: <https://www.facs.nsw.gov.au/domestic-violence/police-law-help/the-law> NSW Domestic and Family Violence Blueprint for Reform 2016-2021: *Safer Lives for Women, Men and Children*, p1:

[http://domesticviolence.nsw.gov.au/\\_data/assets/pdf\\_file/0004/379849/dfv-blueprint-for-reform.pdf](http://domesticviolence.nsw.gov.au/_data/assets/pdf_file/0004/379849/dfv-blueprint-for-reform.pdf)

10. Defining coercive control should be part of a broader task of defining domestic and family violence. There are several examples of how that task has been undertaken in Australia, and how it has been possible to distinguish coercive control from “behaviours that may be present in ordinary relationships.”<sup>7</sup> An appropriate definition of coercive control would necessarily exclude behaviour that is part of an “ordinary relationship” because behaviour that is designed to coerce, control or dominate another person is, by definition, distinguishable from acceptable behaviour within a relationship. The issue of defining coercive control and distinguishing it from behaviours arising in “ordinary relationships” should be considered separately from the question of whether criminalisation of coercive control carries risks in terms of defining its scope and its implementation.
11. Under the *Family Law Act 1975* (Cth), family violence is defined as “violent, threatening or other behaviour by a person that coerces or controls a member of the person’s family ... or causes the family member to be fearful.”<sup>8</sup> Examples of family violence are provided, ranging from physical and sexual assault to repeated derogatory taunts, unreasonably denying financial autonomy to a family member, unreasonably withholding financial support, and preventing the family member from making or keeping connections with his or her family, friends or culture.<sup>9</sup>
12. Other States and Territories take similar approaches by defining domestic and/or family violence as certain behaviour incorporating physical, sexual and non-physical abuse, including conduct amounting to coercive control. The definition of family violence in the Australian Capital Territory (“ACT”) includes emotional or psychological abuse, economic abuse and “coercion or any other behaviour that (A) controls or dominates the family member; and (B) causes the family member to feel fear for the safety or wellbeing of the family member or another person.”<sup>10</sup> Economic abuse and emotional or psychological abuse are further defined and examples are provided.<sup>11</sup> Victoria’s legislation takes a similar approach to the ACT.<sup>12</sup> The Northern Territory legislation defines domestic violence to include intimidation and economic abuse.<sup>13</sup> Intimidation is defined to include “any conduct that has the effect of unreasonably controlling the person or causes the person mental harm”<sup>14</sup> and, in deciding whether conduct amounts to intimidation, consideration may be given to “a pattern of conduct (especially domestic violence) in the person’s behaviour.”<sup>15</sup> Queensland’s legislation defines domestic violence to include behaviour that is emotionally or psychologically abusive,<sup>16</sup> economically abusive,<sup>17</sup> threatening, coercive or behaviour that otherwise controls or

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<sup>7</sup> Discussion Paper, question 2.

<sup>8</sup> *Family Law Act 1975* (Cth), s.4AB(1).

<sup>9</sup> *Family Law Act 1975* (Cth), s.4AB(2)(d), (g), (h), (i).

<sup>10</sup> *Family Violence Act 2016* (ACT), s.8(1).

<sup>11</sup> *Family Violence Act 2016* (ACT), s.8(3).

<sup>12</sup> *Family Violence Protection Act 2008* (VIC), ss.5-7.

<sup>13</sup> *Domestic and Family Violence Act 2007* (NT), s.5.

<sup>14</sup> *Domestic and Family Violence Act 2007* (NT), s.6(1)(c).

<sup>15</sup> *Domestic and Family Violence Act 2007* (NT), s.6(2).

<sup>16</sup> This is further defined in the *Domestic and Family Violence Protection Act 2012*, s.11.

<sup>17</sup> This is further defined in the *Domestic and Family Violence Protection Act 2012*, s.12.

dominates the other person or causes the other person to fear for their safety or wellbeing or that of someone else.<sup>18</sup> South Australian legislation provides, "Abuse may take many forms, including physical, sexual, emotional, psychological or economic abuse" and an "act of abuse" is defined as an act that results or is intended to result in physical injury, emotional or psychological harm, an unreasonable and non-consensual denial of financial, social or personal autonomy, or damage to property.<sup>19</sup> Tasmania's definition of family violence includes threats, coercion, intimidation or verbal abuse, economic abuse and emotional abuse or intimidation.<sup>20</sup> Western Australian legislation defines family violence as violence, a threat of violence or any other behaviour that coerces a family member or causes the family member to be fearful.<sup>21</sup>

13. Most of these jurisdictions also provide legislative examples of conduct that constitutes non-physical forms of domestic or family violence, such as:

- "stopping the family member from visiting or having contact with family or friends"<sup>22</sup>
- "unreasonably preventing the person from taking part in decisions over household expenditure or the disposition of joint property"<sup>23</sup>
- "using a GPS device to track a person's movements"<sup>24</sup>
- "preventing the person from seeking or keeping employment"<sup>25</sup>
- "threatening to withhold a person's medication"<sup>26</sup>
- "distributing an intimate image of the family member without the family member's consent, or threatening to distribute the image"<sup>27</sup>.

14. In addition, unlike NSW, almost all other jurisdictions across Australia recognise and clearly define exposure of a child to domestic and family violence as a form of domestic and family violence in itself.<sup>28</sup>

15. Victorian legislation also has a specific provision stating:<sup>29</sup>

To remove doubt, it is declared that behaviour may constitute family violence even if the behaviour would not constitute a criminal offence.

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<sup>18</sup> *Domestic and Family Violence Protection Act 2012* (QLD), s.8(1).

<sup>19</sup> *Intervention Orders (Prevention of Abuse) Act 2009* (SA), s.8(1) and (2). Emotional and psychological harm are defined in s.8(3) and examples are provided in s.8(4). Examples of unreasonable and non-consensual denial of financial, social or personal autonomy are provided in s.8(5).

<sup>20</sup> *Family Violence Act 2004* (TAS), s.7.

<sup>21</sup> *Restraining Orders Act 1997* (WA), s.5A.

<sup>22</sup> *Family Violence Act 2016* (ACT), s.8(3).

<sup>23</sup> *Domestic and Family Violence Act 2007* (NT), s.8(c).

<sup>24</sup> *Domestic and Family Violence Act 2012* (QLD), s.8(5).

<sup>25</sup> *Intervention Orders (Prevention of Abuse) Act 2009* (SA), s.8(5)(d).

<sup>26</sup> *Family Violence Protection Act 2008* (VIC), s.7.

<sup>27</sup> *Restraining Orders Act 1997* (WA), s.5A(2)(k).

<sup>28</sup> *Family Law Act 1975* (Cth), s.4AB(3)-(4); *Family Violence Act 2016* (ACT), s.8(1)(b); *Domestic and Family Violence Protection Act 2012* (NT), s.10; *Intervention Orders (Prevention of Abuse) Act 2009* (SA), s.7(1)(b); *Family Violence Protection Act 2008* (VIC), s.5(1)(b); *Restraining Orders Act 1997* (WA), ss.5A(1)(l), 6A.

<sup>29</sup> *Family Violence Protection Act 2008* (VIC), s.5(3).

16. Like every other jurisdiction in Australia, NSW should have a clear, transparent and accessible statutory definition of domestic and family violence that includes the various manifestations of abuse, including conduct amounting to coercive control. Exposure of a child to domestic and family violence should itself be recognised in the legislation as a form of domestic and family violence. Examples of non-physical forms of abuse should be included within the legislation to provide some guidance without being exhaustive.

## **B. The current framework (DP questions 3, 4, 10)**

***Q3: Does existing criminal and civil law provide the police and courts with sufficient powers to address domestic violence, including non-physical and physical forms of abuse?***

***Q4: Could the current framework be improved to better address patterns of coercive and controlling behaviour? How?***

***Q10: Could the current legislative regime governing ADVOs better address coercive and controlling behaviour? How?***

17. Both the criminal and civil law in NSW fail to adequately respond to domestic and family violence in its various forms, including non-physical forms of abuse.

18. As stated above, there is no statutory definition of domestic and/or family violence in NSW legislation other than the definition of a “domestic violence offence” in s.11 of the *Crimes (Domestic and Personal Violence) Act 2007*. And there is a disconnect between this definition and other government-sanctioned definitions of domestic violence and messaging that suggest all domestic violence is a crime.

19. Depending on how it is manifested, in many - if not most – cases, coercive control on its own would not currently give rise to an application for an Apprehended Domestic Violence Order (“ADVO”) under the *Crimes (Domestic and Personal Violence) Act 2007*. The test for obtaining an ADVO is that the person in need of protection (“PINOP”) has reasonable grounds to fear and in fact fears either (a) the commission of a domestic violence offence, (b) intimidation, or (c) stalking.<sup>30</sup>

20. Under s.11(1)(a)-(b) a domestic violence offence is defined as a personal violence offence committed against a person in a domestic relationship or some other offence that arises from substantially the same circumstances. In 2016,<sup>31</sup> the definition of a domestic violence offence was extended to include in s.11(1)(c) “an offence (other than a personal violence offence) the commission of which is intended to coerce or control the person against whom it is committed or to cause that person to be intimidated or fearful (or

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<sup>30</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW), s.16(1). There are exceptions to the fear requirement in s.16(2).

<sup>31</sup> *Crimes (Domestic and Personal Violence) Amendment (Review) Act 2016* (NSW).

both)". However, apart from potentially capturing Commonwealth offences,<sup>32</sup> it is debatable whether s.11(1)(c) is capable of capturing coercive or controlling behaviour given there is no specific offence of coercive control in NSW and the definition still requires the commission of an offence.<sup>33</sup>

21. Conduct that is coercive and controlling *may* amount to intimidation or stalking for the purposes of seeking an ADVO. Intimidation is defined to mean harassment, an approach that causes a person to fear for their safety or any conduct that causes a reasonable apprehension of injury, violence or property damage<sup>34</sup>. Harassment is not defined in the legislation. For the purposes of obtaining an ADVO, conduct may amount to intimidation even though it does not involve actual or threatened violence to the person, or it consists only of actual or threatened damage to property.<sup>35</sup> Stalking is defined to include following a person about and watching or frequently their home or place of work.<sup>36</sup> Amongst the NSW Domestic Violence Death Review Team's recommendations was a qualitative review with police about what forms of behaviour are being targeted under the offence of stalking or intimidation,<sup>37</sup> highlighting the fact that there is insufficient data to determine whether coercive and controlling behaviours are effectively recognised in charging practices for stalking or intimidation offences.<sup>38</sup>

22. While a "domestic violence offence" is defined to include an offence "which is intended to coerce or control the person against whom it is committed or to cause that person to be intimidated or fearful or both" in s.11(1)(c) (emphasis added), it does not comprehensively capture conduct that would amount to coercive control as the conduct would still have to amount to an offence. Coercive control may take the form of an offence of "intimidation", as defined in s.7, or "stalking", as defined in s.8, or some other offence arising under s.11, but whether or not it does will depend on the particular conduct. The Discussion Paper itself recognises that the offence of stalking or intimidation "prohibits some (but not all) forms of coercive control."<sup>39</sup>

23. Therefore, as well as not amounting to a criminal offence, coercive control does not generally on its own give rise to access to an ADVO.

24. At the very least, the *Crimes (Domestic and Personal Violence) Act 2007* should be amended to ensure that coercive control not otherwise amounting to a domestic

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<sup>32</sup> By reference to *Crimes (Domestic and Personal Violence) Act 2007* (NSW), s.11(2). Relevant Commonwealth offences may include, for example, using a carriage service to menace, harass or cause offence under s.474.17 of the *Criminal Code Act 1995* (Cth).

<sup>33</sup> David Brown et al, *Criminal Laws* (2020) Federation Press, Sydney, [7.6.5.1].

<sup>34</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW), s.7(1).

<sup>35</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW), s.16(3).

<sup>36</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW), s.8(1).

<sup>37</sup> NSW Domestic Violence Death Review Team, above n 2, recommendation 9(1).

<sup>38</sup> *Ibid*, 70. Alarmingly, the Team states at footnote 109, "It was suggested to the Team, anecdotally, that reports of intimidation alone are not routinely progressed by police as they are unlikely to result in a successful prosecution and that these matters will generally only be considered if they can be linked to another offence or to stalking."

<sup>39</sup> Discussion Paper, [3.7] (emphasis added).

violence offence, intimidation or stalking is clearly recognised as a basis for obtaining an ADVO.

25. Legislation in other States and Territories already unambiguously provides that a range of conduct constituting coercive control can form the basis of an application for a protection order:

- **The Australian Capital Territory:** emotional, psychological, economic abuse, coercion; coercion is defined as behaviour that controls or dominates the family member or causes the family member to feel fear for the safety or wellbeing of the family member or another person.<sup>40</sup>
- **The Northern Territory:** economic abuse and conduct that has the effect of unreasonably controlling the person or causing the person mental harm.<sup>41</sup>
- **Queensland:** emotional, psychological and economic abuse, coercion, controlling or dominating the other person and causing them to fear for their safety or wellbeing, or that of another person.<sup>42</sup>
- **South Australia:** an “act of abuse” includes emotional, psychological harm, unreasonable and non-consensual denial of financial, social or personal autonomy.<sup>43</sup>
- **Tasmania:** economic and emotional abuse or intimidation.<sup>44</sup>
- **Victoria:** emotional, psychological, economic abuse, coercion, controlling or dominating family member and causing them to fear for safety or wellbeing or that of another person.<sup>45</sup>
- **Western Australia:** behaviour that coerces or controls family member or causes them to be fearful.<sup>46</sup>

26. There is no justification for NSW to continue to lag behind other jurisdictions in the recognition of coercive control as a basis for legal protection. As stated by the joint Law Reform Commissions:<sup>47</sup>

In furthering the improvement of safety through legal frameworks, it is unacceptable that victims suffering similar experiences of abuse in different jurisdictions may have varying chances of obtaining a protection order based on the legislative threshold for the granting of orders in their jurisdiction.

27. Extending the availability of ADVOs to coercive control would have additional benefits beyond the prohibition of unacceptable conduct. It may enable services to reach those people who might not otherwise seek assistance, thereby providing support, information

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<sup>40</sup> *Family Violence Act 2016* (ACT), s.8.

<sup>41</sup> *Domestic and Family Violence Act 2007* (NT), ss.5-8.

<sup>42</sup> *Domestic and Family Violence Act 2012* (QLD), ss. 8, 11-12.

<sup>43</sup> *Intervention Orders (Prevention of Abuse) Act 2009* (SA), s.8.

<sup>44</sup> *Family Violence Act 2004* (TAS), ss.8-9.

<sup>45</sup> *Family Violence Protection Act 2008* (VIC), ss.5-7.

<sup>46</sup> *Restraining Orders Act 1997* (WA), s.5A.

<sup>47</sup> Australian Law Reform Commission, NSW Law Reform Commission, above n 4, [7.116].



and referrals to victims who might otherwise remain trapped in abusive relationships. It would also have the flow-on benefit of extending protective measures available under other statutory provisions to people experiencing coercive control who might not otherwise be recognised as having experienced domestic or family violence. Examples include provisions in the *Residential Tenancies Act 2010* for the early termination of leases<sup>48</sup> and the disqualification of a defendant from holding a firearms licence under the *Firearms Act 1996* (NSW).<sup>49</sup>

28. Courts making ADVOs need to tailor the conditions to ensure that they incorporate the behaviour intended to be addressed by the order. In the context of coercive control, this may involve considering conditions beyond the traditional prohibitions or ancillary property orders contemplated by AVOs. These need not be specified in the legislation as s.35 already provides that a court “may impose such prohibitions or restrictions on the behaviour of the defendant as appear necessary or desirable to the court and, in particular to ensure the safety and protection of the person in need of protection and any children from domestic or personal violence.”
29. In some cases, standard orders<sup>50</sup> and conditions prohibiting contact may be sufficient to address the defendant’s behaviour. However, it must be acknowledged that some relationships continue after an ADVO is made and that for some people, greater attention needs to be given to the crafting of conditions. Sample orders should be developed and training undertaken by those involved in the AVO process, including judicial officers, police officers and prosecutors, to ensure that orders can be crafted that address coercive control in individual cases.

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<sup>48</sup> *Residential Tenancies Act 2010* (NSW), Part 5, Division 3A.

<sup>49</sup> *Firearms Act 1996* (NSW), s.11(5)(c),

<sup>50</sup> *Crimes (Domestic and Personal Violence) Act 2007*, s.36.

### C. Evidence of coercive control in civil and criminal proceedings and jury directions (DP questions 5, 11 and 12)

**Q5: Does the law currently provide adequate ways for courts to receive evidence of coercive and controlling behaviour in civil and criminal proceedings? How could the law be improved to ensure the evidence is admissible and is given adequate weight in civil and/or criminal proceedings?**

**Q11: Should the common law with respect to context and relationship evidence be codified within the CPA (or other relevant NSW legislation) to specifically govern its admissibility in criminal proceedings concerning domestic and family violence offence? If yes, how should this be framed?**

**Q12: Would jury directions specifically addressing domestic and family violence be of assistance in criminal proceedings? If so, what should a proposed jury direction seek to address?**

#### Evidence of coercive control in civil and criminal proceedings

30. RDVSA's position on amending the *Crimes (Domestic and Personal Violence) Act 2007* to enable coercive control to form the basis of an ADVO is set out in response to questions 3, 4 and 10, above. Once coercive control is recognised as a basis for obtaining an ADVO, courts will be more readily able to receive evidence of a pattern of behaviour. For further clarity, the legislation should specifically include a provision to the effect that, for the purposes of determining whether an ADVO should be made, a court may have regard to any pattern of coercive conduct. This would be akin to ss.7(2) and 8(2) of the *Crimes (Domestic and Personal Violence) Act 2007* with respect to determining whether a person's conduct amounts to intimidation or stalking. References to a course of conduct or pattern of behaviour are expressly included in legislation in some other jurisdictions governing protection orders. For example, the Northern Territory legislation provides that, when determining whether conduct amounts to intimidation (which is defined to include controlling behaviour), "consideration may be given to a pattern of conduct (especially domestic violence) in the person's behaviour."<sup>51</sup> The New Zealand legislation defines violence to include "a pattern of behaviour ... that is made up of a number of acts."<sup>52</sup> It also expressly provides, "A number of acts that form part of a pattern of behaviour (even if all or any of those acts, when viewed in isolation, may appear to be minor or trivial) may amount to abuse."<sup>53</sup>
31. In terms of criminal proceedings, RDVSA is unaware of the extent to which prosecutors utilise evidence of coercive control as tendency evidence or to rebut evidence of good character. This may be a product of the fact that most proceedings for (non-sexual)

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<sup>51</sup> *Domestic and Family Violence Act 2007* (NT), s.6(2).

<sup>52</sup> *Family Violence Act 2018* (NZ), s.9(3).

<sup>53</sup> *Family Violence Act 2018* (NZ), s.10(2).

domestic violence offences are dealt with in the Local Court. No examples are cited in the Discussion Paper.<sup>54</sup>

32. While the Discussion Paper refers to the availability of context or relationship evidence in proceedings for domestic violence offences,<sup>55</sup> RDVSA is not aware of context evidence being regularly used beyond prosecutions involving child sexual assault.<sup>56</sup> The judicial treatment of context evidence generally revolves around the admissibility of evidence of uncharged sexual acts to place the charged conduct into context, for example, to explain the complainant's apparent "compliance" or a delay in complaint.<sup>57</sup> There is certainly scope for this to be more readily adduced by the prosecution and admitted in cases beyond the category of child sexual assault. Context evidence may have particular relevance where a domestic violence complainant has been effectively groomed by otherwise seemingly innocent or attentive conduct, to explain apparent acquiescence or delay in complaint.
33. Evidence of coercive control may also be particularly relevant in sexual assault proceedings where the offence arises in the context of a domestic relationship. In our submissions to the NSW Law Reform Commission ("**NSW LRC**") on its review of consent, RDVSA advocated for changes to the law to recognise that consent is not freely and voluntarily given in circumstances amounting to coercive control.<sup>58</sup> This was also raised by a number of other stakeholders in the joint Law Reform Commissions' review of family violence.<sup>59</sup> The joint Commissions recommended legislative amendments to recognise that consent may be vitiated "where a person submits because of fear of harm of any type against the complainant or another person".<sup>60</sup>
34. Currently, s.61HE(5)(c) of the *Crimes Act 1900* provides that a person does not consent if they participate in sexual activity because of "threats of force or terror", while s.61HE(8)(b) provides that consent may be negated "if the person consents to the sexual activity because of intimidatory or coercive conduct, or other threat, that does not involve a threat of force." RDVSA submits that the circumstances in s.61HE(8)(b) should never amount to free and voluntary consent.

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<sup>54</sup> Discussion Paper, [5.6]-[5.7].

<sup>55</sup> Discussion Paper, [5.9]-[5.13].

<sup>56</sup> As acknowledged by the Judicial Commission of NSW in the *Criminal Trial Courts Bench Book* at [4-210]: [https://www.judcom.nsw.gov.au/publications/benchbks/criminal/tendency\\_and\\_coincidence\\_evidence.html#p4-210](https://www.judcom.nsw.gov.au/publications/benchbks/criminal/tendency_and_coincidence_evidence.html#p4-210).

<sup>57</sup> For example, *DJV v R* (2008) 200 A Crim R 206 at [28]; *KJS v R* (2014) 86 NSWLR 603 at [34].

<sup>58</sup> Preliminary submission to the NSW Law Reform Commission Review of consent in relation to sexual offences, July 2018 at [6.29] – [6.37]: <https://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Consent/Preliminary-submissions/PCO88.pdf>; submission to the NSW Law Reform Commission in response to *Consent in relation to sexual offences – Draft Proposals*, November 2019 at [10.3] – [10.7]: <https://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Consent/Submissions/CO65.pdf>

<sup>59</sup> Australian Law Reform Commission and NSW Law Reform Commission, Report 114 / Report 118: *Family Violence – A National Legal Response*, Final Report, Volume 2 (2010) at [25.111] – [25.118].

<sup>60</sup> *Ibid*, recommendation 25-5(c).

35. In October 2019 the NSW LRC published draft proposals for its review of consent, including a provision to the effect that a person does not consent to sexual activity if the person participates in sexual activity:<sup>61</sup>

- (i) because of force or fear of force or harm to the person, another person, an animal or property, regardless of when the force or the conduct giving rise to the fear occurs, or
- (ii) because of coercion, blackmail or intimidation occurring at any time, ...

36. The NSW LRC noted that this proposal “may cover long-term patterns of abuse” and was “based on the law in the NT and Victoria, for which we heard considerable support.”<sup>62</sup>

37. In its final report, released on 18 November 2020, the NSW LRC essentially maintained this recommendation, with the additional provision that the force, fear, coercion, blackmail or intimidation may be considered, “whether it occurs in a single instance or as part of an ongoing pattern.”<sup>63</sup> RDVSA supports this recommendation.

38. The admissibility of evidence of coercive control is not dependent upon legislative amendment to the *Criminal Procedure Act 1986* or the *Evidence Act 1995*; it is a matter of prosecutors and courts recognising its relevance and probative value in applying the current law to have the evidence adduced and admitted. One concern about codification is that it may produce a more restrictive regime than that recognised by the current combination of the *Evidence Act 1995* and the common law. Consultation should be undertaken on any proposed legislative amendments in this regard.

### Jury directions

39. In its draft proposals on the review of consent, the NSW LRC indicated its intention to recommend a jury direction about domestic and family violence to the following effect:<sup>64</sup>

- A person may participate in sexual activity because of fear of harm in circumstances of domestic and family violence —
- (a) including where there has been an ongoing pattern of coercive and controlling behaviour, and
  - (b) whether or not there was a threat of harm immediately before or during the sexual activity.

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<sup>61</sup> NSW Law Reform Commission, *Consent in relation to sexual offences: Draft proposals* (October 2019), proposal 8.3: draft s.292(11).

<sup>62</sup> *Ibid* [6.27]-[6.28].

<sup>63</sup> NSW Law Reform Commission, *Report 148: Consent in relation to sexual offences* (September 2020), recommendation 6.6.

<sup>64</sup> NSW Law Reform Commission, *Consent in relation to sexual offences: Draft proposals* (October 2019),

40. The NSW LRC excluded this recommendation from its final report.<sup>65</sup> The NSW LRC stated that, following the release of the draft proposals, the direction “received a mixed message among submissions, which indicated that the intention behind our proposed direction was unclear.”<sup>66</sup> RDVSA maintains its position that a direction would be of benefit in highlighting the fact that a person may participate in sexual activity due to fear arising in the context of an ongoing pattern of conduct, rather than from a single instance.

41. We also note that the NSW LRC incorporated the reference to an ongoing pattern of conduct into the terms of the proposed amendments regarding the negation of consent.<sup>67</sup> However, there are other contexts (beyond that of sexual assault) in which directions about the nature of domestic and family violence would assist jury fact-finding. While limited to circumstances involving self-defence and duress (where the person who has experienced domestic or family violence is the defendant), the jury directions in Victoria provide a model for consideration in the context of the complainant’s experiences, particularly the following:<sup>68</sup>

- (a) that family violence –
  - (i) is not limited to physical abuse and may include sexual abuse and psychological abuse;
  - (ii) may involve intimidation, harassment and threats of abuse;
  - (iii) may consist of a single act;
  - (iv) may consist of separate acts that form part of a pattern of behaviour which can amount to abuse even though some or all of those acts may, when viewed in isolation, appear to be minor or trivial;
- (b) if relevant, that experience shows that –
  - (i) people may react differently to family violence and there is no typical, proper or normal response to family violence;
  - (ii) it is not uncommon for a person who has been subjected to family violence –
    - (A) to stay with an abusive partner after the onset of family violence, or to leave and then return to the partner;
    - (B) not to report family violence to police or seek assistance to stop family violence;
  - (iii) decisions made by a person subjected to family violence about how to address, respond to or avoid family violence may be influenced by –
    - (A) family violence itself;
    - (B) cultural, social, economic and personal factors.

42. The need to consider specific domestic and family violence directions is highlighted by the persistence of community attitudes that fail to reflect the realities of this violence. In

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<sup>65</sup> NSW Law Reform Commission, *Report 148: Consent in relation to sexual offences* (September 2020), [6.117].

<sup>66</sup> *Ibid* [6.119].

<sup>67</sup> *Ibid* [6.119].

<sup>68</sup> *Jury Directions Act 2015* (VIC), s.60.

2017, Australia's National Research Organisation for Women's Safety ("ANROWS") published a report about the attitudes of Australians to violence against women and gender equality. The report was based on responses of more than 17,500 Australians aged 16 years or over who participated in a telephone survey. There were a number of findings of concern:<sup>69</sup>

- nearly one in three of respondents (32%) agree that women who do not leave a relationship in which violence is occurring hold some responsibility for the abuse continuing
- just over one in six (16%) "don't believe it's as hard as people say it is for women to leave a violent relationship"
- more than one in ten (12%) believe that "if a woman keeps on going back to an abusive partner then the violence cannot be very serious".

43. Specific directions may go some way towards addressing attitudes minimising the impacts and consequences of recurring domestic and family violence.

#### **D. Coercive control and sentencing (DP questions 6, 13)**

***Q6: Does the law currently allow evidence of coercive control to be adequately taken into account in sentence proceedings? How could the law be improved?***

***Q13: Should provisions with respect to sentencing regimes be amended? If so, how?***

44. There has been some progress in the recognition of the seriousness of domestic and family violence by sentencing courts in recent years. Traditional leniency in domestic and family violence cases has largely given way to judicial recognition that the commission of an offence in a domestic violence context should no longer be treated as a matter in mitigation. As stated in one case heard in the NSW Court of Criminal Appeal involving the victim-survivor's estranged husband and her brother:<sup>70</sup>

It was submitted on behalf of both [the applicants] Ali and Hussain that, all other things being equal, when an offender is a close relative of the victim that association in most cases and in the present case makes the act of criminality of a lesser nature. I do not agree with that submission. It overlooks the fact that a victim who is a relative, and particularly a wife, may be in a more, rather than a less, vulnerable position with regard to the wrongful acts of the offender. It contains the inference that it is less serious to commit a crime, whether a crime involving property or a crime of violence against a relative compared with a stranger.

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<sup>69</sup> K Webster et al, *Australians' attitudes to violence against women and gender equality: findings from the 2017 National Community Attitudes towards Violence against Women Survey (NCAS)*, Research Report 03/2018, Australia's National Research Organisation for Women's Safety ('ANROWS') (2017), 81-82.

<sup>70</sup> *Hussain v R; Ali v R* [2011] NSWCCA 184 at [80]-[82].

In the present case it wrongly provides support for the attitude Hussain expressed to the Police at the time of his arrest for the abduction of his wife that he was entitled to do it “because she is my wife”, and the attitude of Ali when he was arrested that “she is my sister and she has been cheating on her husband. This is shameful to my family.”

Those views and attitudes have no place in Australian society. A submission that offences committed against relatives are of a lesser criminality should be firmly rejected.

45. Despite the firm rejection of this argument, it is concerning that submissions are still being made on sentence to the effect that an offence committed by a stranger would be more traumatic than one committed by a former partner, and that such submissions are accepted by some judges, particularly in the context of sexual assault.<sup>71</sup> In one recent case, Harrison J responded to a ground of appeal that the sentencing judge failed to give any or sufficient weight to the prior intimate relationship between the offender and the victim-survivor:<sup>72</sup>

... there has in my view been a regrettable tendency in some cases to refer to the fact that the assault occurred within, or following the breakdown of, a relationship as something that might “mitigate” the seriousness of the particular offence. This type of language has the unfortunate potential erroneously to dilute the significance of the offence under consideration. Put simply, the objective seriousness of sexual intercourse without consent cannot be reduced because of factors such as a prior sexual history between an offender and his victim without making unjustified and impermissible assumptions about the effect upon the victim. It depreciates the notion that no means no, whatever other factors may be involved. To accept that a prior relationship can ever operate to mitigate the seriousness of the offending completely abandons that uncontroversial wisdom and reverts to the type of attitude that once saw domestic violence treated as less culpable than other assaults. It also proceeds upon the implicit and unsafe adoption of non-consensual sexual intercourse with a stranger as the default position.

I cannot accept that a statement such as “the violation of the person and the defilement that are inevitable features where a stranger rapes a woman are not always present to the same degree when the offender and the victim had previously had a longstanding sexual relationship” is now or could ever have been an acceptable, far less correct, summary of the law or that it should continue to

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<sup>71</sup> See, for example, *R v Eckermann* [2013] NSWCCA 188 at [35]-[36]; *Boney v R* (2008) 1287 A Crim R 167 at [106]; *NM v R* [2012] NSWCCA 215 at [59]; *R v Cortese* [2013] NSWCCA 148 at [38]-[55]; cf *ZZ v R* [2013] NSWCCA 83 at [103].

<sup>72</sup> *Bussey v R* [2020] NSWCCA 280 at [95]-[96], with Hoeben CJ at CL and Bellew J specifically endorsing these comments at [1] and [113].

influence this Court in the determination of cases such as the present. Violation and defilement of the victim are quintessential aspects of the offence and the victim's familiarity with an assailant can have no bearing upon that fundamental circumstance. Indeed, such an assault, committed by a person with whom the victim may have had a formerly close and respectful relationship, is potentially more likely to exacerbate the seriousness of the offence than otherwise. I cannot accept the proposition that there can be varying degrees of violation and defilement. Such a concept appears to derive from the offensive notion that a man should in certain circumstances be entitled to raise his prior relationship with the victim as some kind of limited excuse for disregarding the absence of consent to an act of intercourse with him to which activity the victim had historically consented.

46. Rather than providing any comfort to the victim-survivor, the relationship and prior history of violence may serve to heighten that person's terror; after all, women are more likely to be sexually assaulted and killed by a person with whom they are or were in a domestic relationship than by someone unknown to them.
47. Courts have increasingly highlighted the need for sentences imposed for domestic violence offence to reflect the principles of general and specific deterrence, community protection and denunciation, as well as recognition of the harm done to the victim and the community.<sup>73</sup> In some cases the courts have specifically recognised the controlling and coercive nature of the relationship as a matter relevant to the assessment of the objective seriousness of an offence.<sup>74</sup> This is a welcome development.
48. However, gaps remain. A review of sentencing in homicide cases by the NSW Sentencing Council reveals discrepancies in sentencing for domestic and non-domestic murders. In particular, the mean head sentences and non-parole periods imposed by the NSW Supreme Court between April 2015 and March 2018 for intimate partner murders are approximately two years shorter than corresponding sentences for non-domestic murders.<sup>75</sup> The NSW Domestic Violence Death Review Team continues to identify examples of problematic language concerning domestic violence used by sentencing judges in open court, including descriptions of homicidal violence as episodes where the perpetrator "lost control" or "snapped" and descriptions of abusive relationships as "volatile", "tempestuous" or "troubled". This language fails to reflect the context in which these homicides occur and minimises perpetrator accountability.<sup>76</sup>

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<sup>73</sup> See *Yaman v R* [2020] NSWCCA 239 at [131], [135]-[136]; *Diaz v R* [2018] NSWCCA 33 at [59]-[60]; *Munda v Western Australia* (2013) 249 CLR 600 at [54]; *R v Burton* [2008] NSWCCA 128 at [107], [119]; *R v Hamid* (2006) 164 A Crim R 179 at [86].

<sup>74</sup> For example, *R v Burton* [2008] NSWCCA 128 at [95].

<sup>75</sup> NSW Sentencing Council, *Consultation Paper: Homicide*, October 2019 at [4.19].

<sup>76</sup> NSW Domestic Violence Death Review Team, above n 2, 145-146.



49. The totality of offending is not always reflected in sentencing for domestic violence offences, with concurrent sentences often imposed for discrete acts of criminality.<sup>77</sup> Courts should reflect the totality of offending in domestic violence matters through the accumulation of sentences for discrete offences involving distinct criminality, even when committed against the same person, either expressly or notionally where an aggregate sentence is imposed. Judges are capable of accumulating or partly accumulating sentences in the exercise of their discretion, while avoiding the imposition of a “crushing” sentence.<sup>78</sup>

50. The NSW Sentencing Council identified a lack of clarity on the issue of taking prior incidents of domestic and family violence into account on sentence:<sup>79</sup>

Where past incidents of domestic violence by the offender are a part of the context for the killing of a family member, it is unclear whether a court can take this into account. The issue is complicated when the offender’s past conduct is unproved or uncharged.

51. Although this statement was made in the context of sentencing for homicide, it is similarly applicable to sentencing for non-fatal domestic violence offences. RDVSA recognises that there can be challenges to the reception of evidence regarding a history of physical and non-physical domestic violence in sentencing proceedings. A circumstance of aggravation can only be taken into account if it is established beyond reasonable doubt.<sup>80</sup> If not conceded by the offender, contextual evidence at sentencing proceedings may lead to a disputed facts hearing, thereby delaying the finalisation of the proceedings and potentially causing the victim-survivor further distress and trauma.

52. However, it is still possible for the prosecution to seek to present the charges in their proper context. A sentencing court may take into account uncharged acts for the purpose of placing the offences into context and to rebut an assertion that an offence is isolated or out of character.<sup>81</sup> Prosecutors should consult with victims to ensure that statements of agreed facts reflect the true criminality and context in which the offences arise.<sup>82</sup>

53. RDVSA does not advocate for the recognition of a domestic relationship in itself as constituting an aggravating factor on sentence under s.21A(2) of the *Crimes*

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<sup>77</sup> See for example, *R v Campbell* [2014] NSWCCA 102 per Simpson J at [33], [41]; cf Harrison J at [86]; *R v Hibberd* (2009) 194 A Crim 1 at [71]-[73].

<sup>78</sup> See for example, *ZA v R* (2017) 267 A Crim R 105 at [76]-[85]; *Stanton v R* [2017] NSWCCA 250.

<sup>79</sup> NSW Sentencing Council, above n 75, [4.40].

<sup>80</sup> *The Queen v Olbrich* (1999) 199 CLR 270 at [27].

<sup>81</sup> *R v JCW* (2000) 112 A Crim R 466 per Spigelman CJ at [68].

<sup>82</sup> The NSW Director of Public Prosecution’s Guidelines provide that victims should be consulted about the acceptance of a plea of guilty and the contents of a statement of agreed facts, although the views of the victim are not determinative: Office of the Director of Public Prosecutions, Prosecution Guidelines, 1 June 2007, Guideline 20: <https://www.odpp.nsw.gov.au/sites/default/files/prosecution-guidelines.pdf>

*(Sentencing Procedure) Act 1999*. Not all offences in which the offender and victim-survivor have a domestic relationship occur within the context of domestic or family violence. For example, dangerous driving occasioning grievous bodily harm may be committed in the absence of this background,<sup>83</sup> although there may well be cases where prior or simultaneous domestic violence will be relevant to an offence of this kind. In addition, there may be cases in which the offender being sentenced had experienced domestic violence but self-defence is not available in relation to a specific charge<sup>84</sup>; in such cases it would be inappropriate to treat the mere existence of a domestic relationship as a factor aggravating the offence.

54. However, RDVSA supports the recognition of a history of domestic violence perpetrated by the offender as an aggravating factor on sentence. Depending on the context in which an offence occurs, it may constitute an aggravating circumstance under s.21A(2)(k) of the *Crimes (Sentencing Procedure) Act 1999* (breach of trust). In *R v Burton*, Johnson J recognised that the repeated exercise of control over the victim by the offender “constituted a violation of trust by someone with whom the victim shared an intimate relationship.”<sup>85</sup> Such statements are not, however, common from a survey of published judgments dealing with domestic violence offences. Courts should consistently recognise the context in which domestic and family violence offences occur as a matter that is highly relevant to an assessment of the objective seriousness of the offence. It is generally the circumstance of trust and seclusion within an established relationship that gives rise to the opportunity for the offender to commit the offence.
55. The importance of judicial discourse in the context of sentencing for domestic violence offences was highlighted by the NSW Domestic Violence Death Review Team:<sup>86</sup>

The language of the court is often echoed through the media and in turn, the community, shaping attitudes about violence against women. Judicial officers are positioned to send clear messages, not only to domestic violence perpetrators, but to the wider community, that this type of behaviour will not be tolerated. Judicial officers can set the standards of what is acceptable and unacceptable behaviour, and guide social dialogue to ensure that perpetrators are held accountable, dispel misleading stereotypes, and guard against victim-blaming.

56. Sentencing remarks should be used by judicial officers to reinforce that domestic violence is unacceptable, recognise the centrality of power and control in domestic violence cases, hold perpetrators accountable, and reflect the cumulative harm caused to the victim by physical and non-physical violence.<sup>87</sup> The Judicial Commission’s Sentencing Bench Book should be supplemented by material regarding the impact of

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<sup>83</sup> NSW Sentencing Council, above n 75, [4.6].

<sup>84</sup> Where the prosecution is able to negative self-defence beyond a reasonable doubt under s.418, *Crimes Act 1900* (NSW).

<sup>85</sup> [2008] NSWCCA 128 at [116]. His Honour made a similar finding in *ZZ v R* [2013] NSWCCA 83 at [105].

<sup>86</sup> NSW Domestic Violence Death Review Team, above n 2, 145.

<sup>87</sup> Emma Buxton-Namisnyk and Anna Butler, “What’s language got to do with it? Learning from discourse, language and stereotyping in domestic violence homicide cases” (July 2017) 29 *Judicial Officers’ Bulletin* 6.

domestic and family violence on those who experience it, their families and the broader community.

## E. Criminalising coercive control (DP questions 7, 8, 9)

**Q7: What are the advantages and/or disadvantages of creating an offence of coercive control?**

**Q8: How might the challenges of creating an offence of coercive control be overcome?**

**Q9: If an offence of coercive control were introduced in NSW, how should the scope of the offence be defined, what behaviours should it include and what other factors should be taken into account?**

### Benefits of criminalisation

57. Creating a specific offence of coercive control has a number of potential advantages. It would reflect the reality of domestic and family violence: that it often involves a course of conduct or pattern of harmful behaviour that the current criminal law, with its focus on specific incidents, fails to adequately capture.<sup>88</sup> Failure to criminalise may mean that the abuse remains in the private realm.<sup>89</sup> Criminalisation of coercive control “provides the opportunity to promote a clear understanding of the lived experience of domestic violence and/or abuse that many victims suffer.”<sup>90</sup> Criminalising coercive control also has the symbolic and educative benefits of signalling to the community that such conduct is unacceptable, harmful, and not a normal part of relationships.<sup>91</sup>
58. Criminalisation can also be justified on the basis of the profound and significant harm coercive control inflicts on individuals, including elevated levels of substance abuse, depression, anxiety, post-traumatic stress disorder, suicide attempts, homelessness and a range of physical ailments.<sup>92</sup> Many victim-survivors describe it as more harmful and long-lasting than their experiences of physical abuse.<sup>93</sup> Those who experience coercive

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<sup>88</sup> Marilyn McMahon and Paul McGorrery, “Criminalising Coercive Control: An Introduction” in Marilyn McMahon and Paul McGorrery (eds) *Criminalising Coercive Control: Family Violence and the Criminal Law* (2020) Springer, Singapore, 13; Cassandra Weiner, “Seeing What is ‘Invisible in Plain Sight’: Policing Coercive Control” (2017) 56(4) *The Howard Journal of Crime and Justice* 500, 503-504, 511.

<sup>89</sup> McMahon and McGorrery, *Ibid* 26.

<sup>90</sup> Vanessa Bettinson and Charlotte Bishop, “Is the creation of a discrete offence of coercive control necessary to combat domestic violence?” (2015) 66(2) *Northern Ireland Legal Quarterly* 179, 180-181.

<sup>91</sup> Supriya Singh, “Economic Abuse and Family Violence Across Cultures: Gendering Money and Assets Through Coercive Control” in Marilyn McMahon and Paul McGorrery (eds) *Criminalising Coercive Control: Family Violence and the Criminal Law* (2020) Springer, Singapore, 69; 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* (2020) Springer, Singapore, 126-127.

<sup>92</sup> Charlotte Bishop and Vanessa Bettinson, “Evidencing domestic violence, including behaviour that falls under the new offence of controlling or coercive behaviour” (2017) *International Journal of Evidence and Proof* 1, 9-10.

<sup>93</sup> McMahon and McGorrery, *above* n 88, 14; Singh, *above* n 91, 51.

control, including technology-facilitated abuse, economic abuse, isolation and reproductive coercion, face risks to their physical and mental wellbeing. The nature of the abuse makes it all the more difficult for them to seek and obtain assistance.<sup>94</sup> A strong association has been established between coercive control and the frequency of victimisation, as well as the risk of future victimisation.<sup>95</sup> The NSW Domestic Violence Death Review Team has identified a number of homicides preceded by histories of coercive or controlling behaviour not amounting to physical abuse.<sup>96</sup> The introduction of an offence may assist police in responding to cases that are potentially lethal but where there is no overt physical or sexual abuse.

### Concerns about criminalisation

59. A number of commentators and scholars have raised concerns about the introduction of a coercive control offence in Australia.<sup>97</sup> These include:

- the scope of the new offence and how it would be interpreted by investigators, prosecutors and the courts
- whether the police, prosecution services and court services would be sufficiently resourced to respond to the increased demand on these services anticipated to occur with the creation of a new offence
- how the new offence would operate within the existing criminal law framework
- the ability and willingness of those who experience coercive control to report offences and engage with the criminal justice system
- the risk of unintended consequences, including the misidentification of victims as perpetrators
- the limited nature of the evidence about the impact of the introduction of offences in other jurisdictions.

60. Our view is that there is a need for caution about creating a new criminal offence. As stated in the report of the Victorian Royal Commission into Family Violence:

Changes to the law must be avoided which, while superficially or symbolically attractive, do not actually advance the safety of victims and the community, or the accountability of perpetrators.<sup>98</sup>

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<sup>94</sup> Weiner, above n 88, 510-511.

<sup>95</sup> Melissa Dichter, Kristie Thomas, Paul Crits-Christoph, Shannon Ogden and Karin Rhodes, "Coercive Control in Intimate Partner Violence: Relationship with Women's Experience of Violence, Use of Violence, and Danger" (2018) 8(5) *Psychological Violence* 596; NSW Domestic Violence Death Review Team, above n 2, 69; Danielle Tyson, "Coercive Control and Intimate Partner Homicide" in Marilyn McMahon and Paul McGorrery (eds) *Criminalising Coercive Control: Family Violence and the Criminal Law* (2020) Springer, Singapore, 80-81.

<sup>96</sup> NSW Domestic Violence Death Review Team, above n 2, 68-69.

<sup>97</sup> For example, The Hon Professor Marcia Neave AO, "Forward", in Marilyn McMahon and Paul McGorrery (eds) *Criminalising Coercive Control: Family Violence and the Criminal Law* (2020) Springer, Singapore, vi-vii; Kate Fitz-Gibbon, Sandra Walklate, Silke Meyer, "Australia is not ready to criminalise coercive control – here's why", *The Conversation*, 1 October 2020: <https://theconversation.com/australia-is-not-ready-to-criminalise-coercive-control-heres-why-146929>

<sup>98</sup> Royal Commission into Family Violence, Victoria, Report and recommendations: Volume 3, March 2016.

61. The experiences in other jurisdictions may be useful but it should not be assumed that legislation introduced elsewhere can readily be transposed to NSW.<sup>99</sup> Evan Stark, who developed the concept of coercive control, observed that “particular constituent elements like a specific law are rarely replicable from one national context to the next.”<sup>100</sup> Researchers have noted that “the mere introduction and ‘travelling’ nature of such policies should not be misinterpreted as evidence of their effectiveness in practice.”<sup>101</sup>

### The scope of the offence

62. A number of issues must be considered in relation to the scope of the offence, including:

- the behavioural element / *actus reus*: identifying what conduct is proscribed
- the mental element / *mens rea*: identifying the relevant intent
- the harm element / *malum reus*: whether the offence requires proof of harm (intended or inflicted)
- whether the offence should incorporate currently criminalised conduct, such as physical or sexual violence, stalking or intimidation, or be limited to the current “gap” in the criminal law
- whether and how the offence captures a course or pattern of conduct
- whether the offence should apply to all domestic relationships or a particular category of relationships
- whether there should be a statutory defence specific to the offence.

63. If it is determined that a criminal offence should be introduced, the drafting of the legislation must be the subject of broad and meaningful consultation.

### Elements of the offence

64. It will be a challenge for the criminal law to recognise “bespoke” forms of coercive control, designed to target an individual through ostensibly benign behaviour. As Tolmie points out, these behaviours “may be subtle and readily understood only by the victim and perpetrator as, for example, when they are designed to exploit fears that are personal to the individual victim or consist of ‘gestures, phrases and looks that have meaning only to those within the relationship.’”<sup>102</sup> It is also unclear whether police and

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<sup>99</sup> Quilter, above n 91, 121-123.

<sup>100</sup> Evan Stark, “The ‘Coercive Control Framework’: Making Law Work for Women”, in Marilyn McMahon and Paul McGorriery (eds) *Criminalising Coercive Control: Family Violence and the Criminal Law* (2020) Springer, Singapore, 34.

<sup>101</sup> Sandra Walklate and Kate Fitz-Gibbon, “The Criminalisation of Coercive Control: The Power of Law?” (2019) 8(4) *International Journal for Crime, Justice and Social Democracy* 94.

<sup>102</sup> Julia Tolmie, “Coercive control: To criminalize or not to criminalize?” (2018) 18(1) *Criminology and Criminal Justice* 50, 54; see also, Weiner, above n 88, 508-510; Charlotte Bishop, “Why it’s so hard to prosecute cases of

the courts will be able to adjust their focus from an incident-based approach to crime to an approach that takes into account context and patterns of behaviour.<sup>103</sup>

65. The mental element varies across the different jurisdictions where a criminal offence has been introduced:

- **England & Wales:** The defendant knows or ought to know that the behaviour will have a serious effect on the person. A serious effect is where the conduct causes fear on at least two occasions that violence will be used, or it causes the person serious alarm or distress which has a substantial adverse effect on the person's day-to-day activities.<sup>104</sup>
- **Scotland:** A reasonable person would consider the course of behaviour to be likely to cause the person to suffer physical or psychological harm, and the defendant either intends to cause physical or psychological harm or is reckless about causing such harm. Psychological harm includes fear, alarm and distress.<sup>105</sup>
- **Ireland:** A reasonable person would consider the conduct is likely to have a serious effect on the person. A serious effect is where the person fears violence will be used or serious alarm or distress that has a substantial adverse impact on the person's day-to-day activities.<sup>106</sup>
- **Tasmania:** The defendant knows or ought to know the conduct is likely to have the effect of unreasonably controlling or intimidating or causing mental harm, apprehension or fear.<sup>107</sup>

66. One model for consideration is the current offence of stalking or intimidation under s.13 of the *Crimes (Domestic and Personal Violence) Act 2007*. This requires an "intention of causing the other person to fear physical or mental harm": s.13(1). This is further defined to include "causing the person to fear physical or mental harm to another person with whom he or she has a domestic relationship": s.13(2). It is also stated that "a person intends to cause fear of physical or mental harm if he or she knows that the conduct is likely to cause fear in the other person."

67. It would be desirable for any offence to expressly state that it is not necessary for the prosecution to establish that the intent was in fact realised by the intended victim or by any other person. For example, for the purpose of establishing an offence of stalking or intimidation, the prosecution is "not required to prove that the person alleged to have been stalked or intimidated actually feared physical or mental harm."<sup>108</sup> This relieves the victim-survivor of having to satisfy the court that they have experienced the

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coercive or controlling behaviour, *The Conversation*, 31 October 2016: <https://theconversation.com/why-its-so-hard-to-prosecute-cases-of-coercive-or-controlling-behaviour-66108>.

<sup>103</sup> Weiner, above n 88, 503-504, 511-512; Sandra Walklate, Kate Fitz-Gibbon and Jude McCulloch, "Is more law the answer? Seeking justice for victims of intimate partner violence through the reform of legal categories" (2018) 18(1) *Criminology and Criminal Justice* 115, 121.

<sup>104</sup> *Serious Crime Act 2015* (E&W), s.76(4).

<sup>105</sup> *Domestic Abuse (Scotland) Act 2018* (Scot), s1(2)-(3).

<sup>106</sup> *Domestic Violence Act 2018* (Ire), s.39(2).

<sup>107</sup> *Family Violence Act 2004* (TAS), s.9(1) (emotional abuse or intimidation).

<sup>108</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW), s.13(4).

intended effect. Scotland has included a similar provision in the context of its coercive control offence.

### *The relevant relationships*

68. Jurisdictions that have enacted coercive control offences have largely confined the relationships to which the offences apply to current and former intimate relationships. Tasmania limits the offence to a spouse or partner.<sup>109</sup> The legislation in Scotland<sup>110</sup> and Ireland<sup>111</sup> apply to current or former spouses, de facto partners and intimate relationships, while legislation in England and Wales<sup>112</sup> applies the offence to persons in an intimate relationship or persons living together, provided they are members of the same family or have previously been in an intimate relationship. England and Wales also excludes children under the age of 16 years where the other person has parental responsibility for the child.<sup>113</sup>
69. A “domestic relationship” is defined broadly under the *Crimes (Domestic and Personal Violence) Act 2007*.<sup>114</sup> If a new offence were to apply to a domestic relationship as defined in this Act, it would extend not only to a broad range of relatives, house-mates and carers, but also to the relationship between a person’s current and former partners.<sup>115</sup> Careful consideration should be given to this aspect of the scope of any new offence.
70. While there is a growing body of research regarding coercive control in current and former intimate relationships (including spouses, de facto and dating relationships), there is little research in relation to the experiences of coercive control in other domestic contexts in terms of how that would be recognised under the criminal law.<sup>116</sup> It has been suggested that it would be “detrimental to draft the offence so widely that it could include, for example, an overbearing parent or a controlling sibling.”<sup>117</sup> RDVSA does not necessarily advocate that certain domestic relationships be excluded, but this issue requires further consideration and consultation with representatives from a broad range of community groups, including Indigenous representatives, people from culturally and linguistically diverse communities and people with disabilities.

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<sup>109</sup> *Family Violence Act 2004* (TAS), ss.8-9.

<sup>110</sup> *Domestic Abuse (Scotland) Act 2018* (UK), ss.1(1), 11.

<sup>111</sup> *Domestic Violence Act 2018* (Ire), s.39(4).

<sup>112</sup> *Serious Crime Act 2015* (E&W), s.76(2).

<sup>113</sup> *Serious Crime Act 2015* (E&W), s.76(3). There is a separate child cruelty / neglect offence relating to children under 16 years in s.1 of the *Children and Young Persons Act 1933* (UK).

<sup>114</sup> *Crimes (Domestic and Personal Violence) Act 2007*, ss.5-6.

<sup>115</sup> Section 5(2), *Crimes (Domestic and Personal Violence) Act 2007*, s.5(2).

<sup>116</sup> One example of children’s experiences of coercive control is referred to by Evan Stark and Marianne Hester, “Coercive Control: Update and Review” (2019) 25(1) *Violence Against Women* 81, 96-98.

<sup>117</sup> Cassandra Wiener, “From Social Construct to Legal Innovation: The Offence of Controlling or Coercive Behaviour in England and Wales” in Marilyn McMahon and Paul McGorrery (eds) *Criminalising Coercive Control: Family Violence and the Criminal Law* (2020) Springer, Singapore, 170, citing J. Youngs, “Domestic violence and the criminal law: Reconceptualising reform” (2015) 79(1) *Journal of Criminal Law* 55, and H. Reece, “The end of domestic violence” (2006) 69(5) *Modern Law Review* 770.

71. Any offence should at a minimum apply to current and former spouses, de facto partners and intimate partners, without the qualification that appears in the legislation in England and Wales whereby former relationships are only covered where there is current cohabitation.

#### *Maximum penalty*

72. The maximum penalties prescribed for offences in other jurisdictions range from imprisonment for 12 months on summary conviction in England and Wales, Scotland and Ireland,<sup>118</sup> to 2 years in Tasmania,<sup>119</sup> 5 years on indictment in England and Wales and Ireland,<sup>120</sup> and 14 years on indictment in Scotland.<sup>121</sup> If introduced in NSW, an offence of coercive control should be capable of being dealt with summarily with the option of an election to be dealt with on indictment, as per the offence of stalking or intimidation, which carries a maximum penalty of imprisonment for 5 years and is capable of being dealt with on indictment if the prosecutor makes an election.<sup>122</sup> If dealt with summarily, stalking / intimidation carries a maximum penalty of imprisonment for 2 years.<sup>123</sup>

#### *Implementation and effectiveness*

73. The difficulties faced by women experiencing domestic and family violence in dealing with the criminal justice system are well documented. The barriers facing women experiencing coercive control who would not otherwise come to the attention of police are likely to be compounded as a result of the nature of the abuse they are experiencing.<sup>124</sup> As stated by Walklate and Fitz-Gibbon:<sup>125</sup>

... introducing coercive control as a standalone offence presumes that women will have access to police, that police will have access to the required evidence, and the legal frameworks of the inherently masculine criminal court system will be open to their experiences of a pattern of abuse. When considered from that vantage, it is a lot to expect from a single piece of legislative law reform.

74. There are also likely to be difficulties in the gathering of evidence of coercive control to the requisite legal standard without sufficient investment in training and increased resourcing of criminal justice system services. The introduction of a new offence is likely

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<sup>118</sup> *Serious Crime Act 2015* (E&W), s.76(11)(b); *Domestic Abuse (Scotland) Act 2018* (Scot), s.9(a); *Domestic Violence Act 2018* (Ire), s.39(3)(a).

<sup>119</sup> *Family Violence Act 2004* (TAS), ss.8-9.

<sup>120</sup> *Serious Crime Act 2015* (E&W), s.76(11)(a); *Domestic Violence Act 2018* (Ire), s.39(3)(b).

<sup>121</sup> *Domestic Abuse (Scotland) Act 2018* (Scot), s.9(b).

<sup>122</sup> *Criminal Procedure Act 1986* (NSW), s.260(2), Schedule 1, Table 2.

<sup>123</sup> *Criminal Procedure Act 1986* (NSW), s.268(1A).

<sup>124</sup> Kate Fitz-Gibbon, Jude McCulloch and Sandra Walklate, "Australia should be cautious about introducing laws on coercive control to stem domestic violence", *The Conversation*, 27 November 2017.

<sup>125</sup> Walklate and Fitz-Gibbon, above n 101, 94.



to increase demands on a criminal justice system that is already inadequately resourced, exacerbating delays and stalling the recovery of individuals.<sup>126</sup>

#### *Criminalisation within the existing framework*

75. Criminalisation would also raise questions about how the new offence would fit within the existing criminal law framework. One danger is that a general offence of coercive control will have the effect of diluting conduct that could be charged as an offence carrying a higher maximum penalty, or that guilty pleas would be accepted to an offence of coercive control rather than a more serious charge.<sup>127</sup>
76. The principle in *The Queen v De Simoni* (1981) 147 CLR 383 provides that “a judge, in imposing sentence, is entitled to consider all the conduct of the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence.”<sup>128</sup> This principle may prevent a sentencing court from taking into account conduct amounting to coercive control if it is not separately charged, and would prevent a court from taking into account conduct amounting to a more serious offence if a plea is accepted to a coercive control offence in lieu of, for example, an offence involving personal violence that carries a higher maximum penalty.

#### *Unintended consequences: misidentification of perpetrators*

77. The misidentification of victims as perpetrators is already a growing concern in the context of existing criminal offences and protection order applications across a number of jurisdictions. The criminalisation of coercive control has the potential to draw more women into the system as perpetrators,<sup>129</sup> particularly given the nebulous nature of some forms of coercive control. There is a real risk that a new area of systems abuse will emerge. Burman and Brooks-Hay provide the following scenarios as examples:<sup>130</sup>

Claims of emotional abuse perpetrated by women may gain credence by drawing upon familiar and well-worn tropes about women’s capacity to be emotionally manipulative and deceitful. There is also a risk that misuse of the proposed offence could see victims of domestic abuse criminalized in instances where they have attempted to protect themselves or their children (e.g. where women who are in, or are escaping, an abusive relationship withholding parental visitation due to safety concerns and are then construed as psychologically abusive to their partner or ex-partner).

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<sup>126</sup> Michele Burman and Oona Brooks-Hay, “Aligning policy and law? The creation of a domestic abuse offence incorporating coercive control” (2018) 18(1) *Criminology and Criminal Justice* 67, 77.

<sup>127</sup> Fitz-Gibbon, Walklate and Meyer, above n 97; Tolmie, above n 102, 60.

<sup>128</sup> *The Queen v De Simoni* (1981) 147 CLR 383 at 389 per Gibbs CJ.

<sup>129</sup> See for example, Burman and Brooks-Hay, above n 126, 76; Tolmie, above n 102, 61-62; Walklate, Fitz-Gibbon and McCulloch, above n 103, 122-123.

<sup>130</sup> Burman and Brooks-Hay, above n 126, 76, footnotes omitted. The authors acknowledge that these risks may be mitigated by the incorporation of a “reasonable person” test and a focus on perpetrator intent.

78. This risk is pronounced in the case of marginalised women, including Aboriginal and Torres Strait Island women, women from culturally and linguistically diverse communities and women with mental illness.

## **F. Other avenues for reform and non-legislative measures (DP questions 14,15)**

***Q14: Are there any other potential avenues for reform that are not outlined or included in the questions above?***

***Q15: What non-legislative activities are needed to improve the identification of and response to coercive and controlling behaviours both within the criminal justice system and more broadly?***

### Community education, professional training and prosecution guidance

79. Regardless of the content of any new legislation, there needs to be a public education campaign about the reforms, as well as training and guidance for justice system personnel. A lack of community education, police training and guidance have been recognised as key factors resulting in the slow uptake of the offences in Tasmania.<sup>131</sup>
80. Community education should be directed at professionals employed in a broad range of fields (including health, education and financial), as well as the general community. As we have stated in our response to questions 1 and 2, there must be clear messaging and accessible legal information about the various forms of domestic and family violence and how the law responds to them.
81. Police officers, prosecutors (police prosecutors and prosecutors from the NSW Office of the Director of Public Prosecutions) and judicial officers must be given training and updated policies, guidelines and other resources to assist them in implementing and applying the legislation. The Crown Prosecution Service (“CPS”) in England and Wales has issued legal guidance on the offence of controlling or coercive behaviour.<sup>132</sup> This publicly available guidance deals with a range of issues, including the gendered nature of the behaviour, the elements of the offence, examples of relevant behaviour, gathering evidence and case building, selecting the most appropriate charge, taking an offender-centric approach and the impact of coercive control on victims. The CPS’s legal guidance builds upon the Home Office’s Statutory Guidance which was published on commencement of the offence.<sup>133</sup> Detailed guidance must be developed prior to

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<sup>131</sup> Kerryne Barwick, Paul McGorrery and Marilyn McMahon, “Ahead of Their Time? The Offences of Economic and Emotional Abuse in Tasmania, Australia” in Marilyn McMahon and Paul McGorrery (eds) *Criminalising Coercive Control: Family Violence and the Criminal Law* (2020) Springer, Singapore, 137, 150-151.

<sup>132</sup> Crown Prosecution Service, Controlling or Coercive Behaviour in an Intimate or Family Relationship, Legal Guidance, Domestic abuse, Reviewed 30 June 2017: <https://www.cps.gov.uk/legal-guidance/controlling-or-coercive-behaviour-intimate-or-family-relationship>

<sup>133</sup> Home Office, Controlling or Coercive Behaviour in an Intimate or Family Relationship: Statutory Guidance Framework, December 2015: [Controlling or coercive behaviour - statutory guidance.pdf \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/474242/controlling-or-coercive-behaviour-in-an-intimate-or-family-relationship-statutory-guidance.pdf)

the introduction of any offence in NSW and these guidelines should be regularly updated to ensure they reflect the current law, legal developments and improved understandings of best practice.

### Resourcing of services

82. The investigation of coercive control has the potential to be more labour intensive than investigations into discrete incidents.<sup>134</sup> The authors of an analysis of the Tasmanian legislation (one of whom is a police prosecutor<sup>135</sup>) described some of the challenges as follows:

Inevitably, a further statement must be obtained from the victim to obtain more detail about what happened, and any potential supporting evidence (including statements from other witnesses) must be obtained. ... In long-standing abusive relationships, these statements can be lengthy; in one case, the statement was close to 50 pages long and had to be taken over several days.

Following the taking of that statement, corroborative evidence must be collected. This often includes obtaining statements from friends, family, and neighbours, and obtaining banking and financial records, phone records, downloads from social media and medical records. The witness list usually includes a much wider circle of persons than those involved in the initial incident to which police first responded. Police will try to obtain evidence from people who have had dealings with the parties over time. This evidence is quite often circumstantial, involving reports from family who were suddenly cut off from the complainant, or from an employer who had to terminate the employment of the complainant because of frequent unexplained absences and being uncontactable. That evidence can be difficult to track down given the passage of time between the early stages of the 'course of conduct' and the time that police become aware of it. For economic abuse cases in particular, the investigation can be akin to a fraud investigation, requiring investigators to determine where the money has gone. This would normally require specialist detective skills, but generally these matters are investigated by the same uniformed first responders who attended the initial reported assault incident. It is not usually their role to conduct complex investigations, and they generally do not have the necessary time to dedicate to it.

83. As noted in the Discussion Paper, the Scottish government provided funding to deliver enhanced training to police officers and staff to support the implementation of the new offence, as well as funding to Scottish Women's Aid.<sup>136</sup>

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<sup>134</sup> Barwick, McGorery and McMahon, above n 131, 152.

<sup>135</sup> Ibid, 155.

<sup>136</sup> Discussion Paper, [4.11].

84. Apart from adequately resourcing police, prosecutors, judicial officers and other court staff to accommodate these investigations and proceedings, further resources are necessary to ensure that the Women’s Domestic Violence Court Assistance Schemes are able to provide comprehensive support for victims and complainants in the Local Court, and for the Director of Public Prosecution’s Witness Assistance Scheme to provide similar support for victims in the District Court.

#### Arrangements for giving evidence

85. Further legislative reforms are necessary to ensure the effectiveness of any new laws. The *Criminal Procedure Act 1986* was recently amended to enable complainants in domestic violence offence proceedings to give evidence by alternative means.<sup>137</sup> The provision only applies to ADVO proceedings if they are attached to criminal proceedings.<sup>138</sup> RDVSA recommends extending this provision to stand-alone ADVO proceedings, as provided in corresponding legislation in the Northern Territory,<sup>139</sup> Queensland,<sup>140</sup> South Australia,<sup>141</sup> Victoria<sup>142</sup> and Western Australia.<sup>143</sup> RDVSA has indicated its strong support for coercive control to the form the basis of obtaining an ADVO. A person who has been subjected to coercive and/or controlling behaviour should have the option of providing evidence by alternative means, whether this be in criminal or civil proceedings.

86. RDVSA also submits that sexual assault complainants, domestic violence complainants and persons in need of protection in ADVO proceedings should be given the right to give evidence by alternative means, subject only to the individual’s preference to give evidence in court. Currently, the sexual assault and domestic violence offence provisions leave open the option of the court ordering that alternative means not be used when it is in the “interests of justice”.<sup>144</sup> The experience of giving evidence in court in the presence of the defendant in these matters not only has the potential to cause undue distress to a witness, but can inhibit their ability to provide their best evidence. The interests of justice could not be served by forcing the witness to give evidence in court against their wishes.

87. The NSW Parliament has also recently passed legislation to prohibit the cross-examination of self-represented defendants in domestic violence offence proceedings.<sup>145</sup> The new provision (s.289VA of the *Criminal Procedure Act 1986*) is to commence on 1 September 2021 or on a day appointed by proclamation, whichever is sooner.<sup>146</sup> This too should be extended to stand-alone ADVO proceedings. Every other

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<sup>137</sup> *Criminal Procedure Act 1986* (NSW), s.289V.

<sup>138</sup> *Criminal Procedure Act 1986* (NSW), s.289T(1)(b).

<sup>139</sup> *Domestic and Family Violence Act 2007* (NT), s.110.

<sup>140</sup> *Domestic and Family Violence Protection Act 2012* (QLD), s.150.

<sup>141</sup> *Intervention Orders (Prevention of Abuse) Act 2009* (SA), s.29(1)-(2).

<sup>142</sup> *Family Violence Protection Act 2008* (VIC), s.69.

<sup>143</sup> *Restraining Orders Act 1997* (WA), s.44E.

<sup>144</sup> *Criminal Procedure Act 1986* (NSW), ss.289V(3)-(4), 294B(5)-(6).

<sup>145</sup> *Stronger Communities Legislation Amendment (Domestic Violence) Act 2020*, Schedule 2[3].

<sup>146</sup> *Stronger Communities Legislation Amendment (Domestic Violence) Act 2020*, s.2(3).

jurisdiction in Australia has legislation either prohibiting or restricting a self-represented defendant from cross-examining the person in need of protection in proceedings for a protection order, including adults.<sup>147</sup> By contrast, in NSW, the *Crimes (Domestic and Personal Violence) Act 2007* offers this protection only for child witnesses.<sup>148</sup> NSW is the only jurisdiction not to have taken steps to implement the Australian and NSW Law Reform Commissions' recommendation that "State and territory family violence legislation should prohibit the respondent in protection order proceedings from personally cross-examining any person against whom the respondent is alleged to have used family violence."<sup>149</sup> As stated in the Family Violence Report:<sup>150</sup>

... allowing a person who has allegedly used family violence to personally cross-examine a victim of that violence ... provides an opportunity for a person to misuse legal proceedings and exert power and control over the victim of his or her family violence. Considering the nature and dynamics of family violence, this may significantly inhibit the ability of a victim, or another witness, to provide truthful and complete evidence in protection order proceedings.

88. RDVSA recommends that the protections for complainants in sexual assault proceedings under s.294A and domestic violence offence proceedings under s.289VA be extended any person seeking protection under an ADVO.

#### Monitoring and review

89. There should be a statutory mechanism for ongoing monitoring and evaluation of any legislative amendments, as well as changes in community understandings of domestic and family violence. This is crucial to understand the effectiveness of the reforms, identify gaps and determine whether the legislation is achieving its intended purposes. In the event a new offence is introduced, detailed data must be collected from the date of commencement to identify the characteristics of complainants and defendants, the basis of the charges and the outcomes of prosecutions.

## Conclusion

90. RDVSA advocates for whole-of-government reforms in the justice system's responses to domestic and family violence, including a greater appreciation of and effective responses to non-physical forms of domestic and family violence such as coercive control. NSW first needs to develop a statutory definition of domestic and family violence that includes coercive control. This definition must be accessible to the

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<sup>147</sup> *Family Violence Act 2016* (ACT), s.63; *Domestic and Family Violence Act 2007* (NT), ss.114-114A; *Domestic and Family Violence Protection Act 2012* (QLD), s.151; *Intervention Orders (Prevention of Abuse) Act 2009* (SA), s.29(4); *Evidence (Children and Special Witnesses) Act 2001* (TAS), s.8A; *Family Violence Protection Act 2008* (VIC), s.70; *Restraining Orders Act 1997* (WA), s.44C.

<sup>148</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW), s.41A.

<sup>149</sup> Australian Law Reform Commission and NSW Law Reform Commission, above n 59, recommendation 18-3.

<sup>150</sup> Australian Law Reform Commission and NSW Law Reform Commission, above n 59, [18.149].

community and consistent with public messaging about what constitutes domestic and family violence and how the law – criminal and civil – responds to it.

91. RDVSA strongly recommends the amendment of the *Crimes (Domestic and Personal Violence) Act 2007* to ensure that the type of conduct that amounts to coercive control can unambiguously form the basis of an application for an Apprehended Domestic Violence Order. This would bring NSW into line with other jurisdictions in Australia, serve to educate the community that coercive control is a form of domestic and family violence warranting legal intervention, with the potential to disrupt abusive behaviour, and provide protection and avenues for support to those experiencing it.
92. There is scope within the current law for prosecutors to adduce evidence of coercive control as context and relationship evidence in proceedings for criminal offences. Further consultation should be undertaken with relevant stakeholders about whether codification is desirable. Jury directions may go some way towards addressing misunderstandings concerning the nature of domestic and family violence and its impacts. RDVSA supports recommendations by the NSW LRC to amend the sexual assault provisions in the *Crimes Act 1900* to ensure that consent is negated in all cases involving coercion and intimidation, whether it occurs on a single occasion or as part of an ongoing pattern.
93. The receipt of evidence of coercive control should also be encouraged in sentencing proceedings to ensure that courts take into account the context in which an offence occurs and the impact on the victim-survivor. A sentencing court should be able to take a prior history of domestic and/or family violence by the offender into account as an aggravating factor on sentence. The controlling or coercive nature of a relationship, and the breach of trust involved in the commission of an offence, should be recognised as matters relevant to the assessment of the objective seriousness of an offence.
94. Coercive control is a complex legal and social issue. RDVSA recommends caution in introducing a criminal offence. Lessons can be learned from experiences in other jurisdictions but assumptions should not be made based on outcomes where different demographics, cultures and frameworks operate. In particular, RDVSA urges further consultation and consideration of the scope of any offence, how it would work within the existing criminal law framework and what measures would be introduced to ensure the offence is not misused. A significant investment in training and increased resourcing of the justice system is crucial to the success of any reforms.
95. Procedural reforms should be introduced to ensure that complainants in sexual assault proceedings, domestic violence offence proceedings and ADVO proceedings have the right to give evidence by alternative means and are not exposed to cross-examination by a self-represented defendant. Substantive reforms to the civil and criminal law could be undermined if not accompanied by measures to ensure that complainants feel safe when giving evidence.

96. A mechanism for the ongoing monitoring of the legislation should be included as part of any legislative reform to assess the effectiveness of the reforms, identify gaps and determine whether the reforms are achieving their intended purposes.

If you have any questions or would like to discuss further, please do not hesitate to contact me on [REDACTED] or by email at [REDACTED]

Yours faithfully,

**Rape & Domestic Violence Services Australia**

[REDACTED]

**Natalie Gouda**

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