

**Submission
No 106**

COERCIVE CONTROL IN DOMESTIC RELATIONSHIPS

Organisation: Elizabeth Evatt Community Legal Centre

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Acknowledgement of Country

We respect the Original peoples of the land on which we live and work, we acknowledge that the lands of Darug, Gundungurra, Wiradyuri, and other sovereign lands were illegally and forcibly taken without treaty or agreement and the sovereign rights of those First Nations are still intact and are to be respected.

Submission to the NSW Government's Joint Select Committee on Coercive Control

We welcome the opportunity to provide a submission to this Inquiry.

About us

Elizabeth Evatt Community Legal Centre (EECLC) is a non-government organisation that provides free legal advice and representation to disadvantaged members of the community living in the Blue Mountains, Greater Lithgow, Bathurst, Oberon, and Orange regions of NSW. EECLC attends local court list days in Katoomba, Lithgow, Bathurst, and Orange in matters involving applications for Apprehended Domestic Violence Orders and are a member of the Coalition Against Violence Alliance in the Blue Mountains and Lithgow Cares, which links us to other services and agencies providing frontline services to domestic violence and sexual assault survivors.

While our Centre is a generalist service, over 80% of our direct client work involves working with victims of violence, many of whom are women. In addition to histories of trauma, our clients are also vulnerable due to homelessness, lower literacy skills, lack of English, poverty, disability, mental ill-health, social exclusion, substance abuse, and the on-going experience of further acts of violence.

Due to our proximity to these issues and our casework, we consider ourselves experts in working with victim-survivors of sexual, domestic, and family violence (SDFV). We have firsthand knowledge, from the frontline, with the experiences of victim-survivors in their interactions with Police, Local Courts, and the Family Law System. We welcome the opportunity to provide a submission to this Inquiry.

Introduction

We know SDFV is an epidemic in our communities, and we know there must be changes. We will not repeat statistics in this submission that are well known and easily found. Millions of dollars are being spent every year by Governments to address the pervasive harms of SDFV. Many reforms have been made to various laws in the interests of protecting women and children and better recognising the complex nature of SFDV.

It could be argued that many of the previous reforms, and the current proposal to criminalise coercive control, are symbolic in sending a message about the state's condemnation of SDFV, in

that we may see a change in societal norms about the acceptability of such behaviour.¹ Similarly, it has been argued that criminalising non-physical abuse could have a broader educative function, enabling victim-survivors to put a name to their experience and reducing the stigma associated with staying in an abusive violent situation.² However, while potentially symbolically important, the ability of increased criminalisation to meaningfully address domestic abuse and improve the lives of victim-survivors remains entirely unclear.

If we consider the many decades that we have been condemning SFDV, strengthening policy and relying on criminalisation as a deterrent, or an agent of societal change, should we not already be living in a society free from violence?

Experts such as Deakin University researchers Paul McGorrery and Professor Marilyn McMahon have cautioned against rushing through coercive control legislation as a “knee jerk reaction to do something”.³ They also are concerned that we do not yet know how effective Scotland’s legislation is (or indeed if it even is) as there is no empirical evidence available. In a study by those researchers⁴ the majority of cases analysed, the offender was reported as having committed some kind of physical or sexual violence against the victim, including strangulation, punching, and attempted drowning — some of which could have been charged under existing laws.

There are 3 important points that we wish to make in this submission: first, that criminalisation will be challenging to implement in practice; second, that criminalisation will have unintended negative consequences; and third, that criminalisation alone will be ineffective at addressing domestic abuse and we make some suggestions as to alternatives.

We question whether this push for criminalisation is indeed yet another quick fix for political gain under pressure from lobby groups who are not well-versed in the nuances of the legal system.

We argue that governments need to look beyond criminalisation, recognise the harms of incarceration and pursue alternative means through which perpetrators are held to account, and victims are supported and safe, in addition to the much-needed preventative work.

Difficulties in Implementation

While supporters of the push to criminalise coercive control suggest that greater care will be taken by Police in taking the full history of violence, instead of focussing on individual incidents of violence, we do not consider that this is the case. Law does not exist in a vacuum. The reliance on those who enforce the law to even identify coercive controlling behaviour, let alone prosecute, is unlikely to result in the outcomes that the proponents of this proposal wish to see.

¹ Leigh Goodmark, ‘Should Domestic Violence be Decriminalised’ (2017) 40 Harvard Journal of Law and Gender, 66-67.

² Evan Stark, ‘Looking Beyond Domestic Violence: Policing Coercive Control’ (2012) 12 Journal of Police Crisis Negotiations 199.

³ <https://www.theguardian.com/society/2020/feb/29/coercive-control-and-domestic-abuse-what-might-have-saved-hannah-clarke-and-her-children>

⁴ McGorrery P, McMahon M. Prosecuting controlling or coercive behaviour in England and Wales: Media reports of a novel offence. Criminology & Criminal Justice. October 2019.

We work every day with victims who report their interactions with Police to us. Many times, we have heard that Police have made statements such as:

“it didn’t happen in the last 24 hours so what do you want us to do.” (in response to a report of a physical assault.)

“He has rights too, he’s a Father.”

“Why do you keep going back?”

“It seems a bit like tit for tat”

“It’s your word against his there’s nothing we can do.”

“But he’s a good bloke and you can’t prove he was threatening you” (in this case the Police officer went to school with the offender.)

“You didn’t tell us you were having a sexual relationship with [the offender] – he’s cut it off now and that’s why you’re saying he’s been abusive.”

“You need to get a solicitor, get a settlement and get a life.”

“We are too busy to take a report from you.”

“You were drunk, how can you even know what happened”. (client suffers complex PTSD and was not intoxicated)

“You need to give him contact with the kids.” (after a Recovery order was made for the return of the children to the mother.)

“We will serve him with the ADVO and make sure he has accommodation so he can have the children.”

“There’s just no evidence for an ADVO.” (after client had reported threats to kill)

“Abuse is subjective, what some people call intimidation, for other people it's just a normal part of their relationship.”

Victim blaming and shaming comments serve to reinforce patriarchal societal views, further traumatise people and cause victims to not want to report. We also know that many cases that do end up before the courts now, also receive similar comments from the judiciary.⁵

Similarly, many women report to us that they do not feel they have been provided any ‘justice’, even when cases are prosecuted. Many women must continue to have contact with the person who has caused harm due to having children and property together. It is a common misconception that once the Police are involved, ADVOs in place, and charges laid, that the violence will stop and the perpetrator will be removed from society. This, in our experience, is incredibly rare.

Problems identifying the primary aggressor

Police decisions about who is the primary aggressor are often made on the spot. ANROWS research into accurately identifying the person in most need of protection was recently completed in November 2020. Key findings include:

- Women—especially Aboriginal and Torres Strait Islander women—are being misidentified as perpetrators on protection orders and the effects of this are far-reaching.
- Police practice is guided by a focus on single incidents of visible or physical violence. This focus does not always support the appropriate application of DFV legislation, where violence would be considered in context in order to assess the need for protection from future harm.

⁵ <https://www.theguardian.com/society/2016/aug/15/lawyers-use-victim-blaming-language-in-domestic-violence-cases-says-report>

- Police sometimes err on the side of caution in making applications, deferring to the magistrate to determine if an order is warranted. However, magistrates in turn may rely on the initial assessments made by police, as may prosecutors. This can create a pinball effect where each decision-maker defers to another’s assessment of the appropriateness of an order. Accordingly, this means that accountability for that assessment is unclear.”⁶

We do not have confidence that the NSW Police force will be able to identify coercive controlling behaviours, because in many cases Police currently cannot (or will not) identify intimidation, harassment or even physical assault under the current law. In part, this arises due to the challenge in using subjective interpretations of individuals to apply the law. We are not of the view that more training, resources or skills will overcome this error - and that factors such as implicit bias, racism and cultural dissonance will continue to plague interpretation and application of the law as it currently stands. Suffice to say that adding additional offences types – or more law, will not stop prevent or reduce domestic violence – but will have unintended consequences as outlined herein.

As noted in the discussion paper there is no agreed definition of coercive control and there is also difficulty with definitively categorising some behaviours as coercive control when in other circumstances they may not be considered as such. We consider that the inherent subjectivity in identifying coercive control will not be able to be addressed by any definition. The law requires a measure of objectivity that is highly problematic when dealing with issues such as coercive control.

We are also concerned about the pervading cultural, class and gender bias in the Police force and note additionally, that as the Police are made up of members of the public, they are at least as likely to use violence against their partners,⁷ and indeed may be known to be perpetrators themselves.⁸ The recent ABC investigation also showed that police culture is one that supports their own, where violence is minimised and excuses are made.⁹ There is also a structural issue within the Police Force with the Domestic Violence Liaison Officers (DVLOs) not being able to progress beyond the rank of Senior Constable, meaning those officers with specialist training do not carry the same weight within the stations as their Sergeants, or Inspectors. We work closely with DVLOs and have heard that often their recommendations to the Officer in Charge of the matter are not being listened to.

Training in the FDV sector has only just begun to recognise the need to carefully tease out and document perpetrator patterns of behaviour.¹⁰ The sector is still in the early stages of moving away from focussing on incident-based responses, and the NSW Police Force is not, in any way whatsoever, equipped to be able to sit with the victim for long periods listening carefully to

⁶ Australia’s National Research Organisation for Women’s Safety. (2020). Accurately identifying the “person most in need of protection” in domestic and family violence law: Key findings and future directions (Research to policy and practice, 23/2020). Sydney: ANROWS.

⁷ Dr. Ann-Claire Larsen and Marika Guggisberg, Police Officers, Women and Intimate Partner Violence: giving primacy to social context, <http://www.austlii.edu.au/au/journals/AUJIGendLaw/2009/1.pdf>

⁸ <https://www.abc.net.au/news/2020-10-19/police-in-australia-are-failing-to-take-action-against-domestic/12757914?nw=0>

⁹ ABC, Ibid

¹⁰ For example, work being done through Domestic Violence Service Management’s Insight Exchange see further here - <https://www.insightexchange.net/>

obtain their full histories. This is what is necessary to ascertain the “full scope of coercive control as a form of abuse [as it] only becomes apparent when these behaviours are interwoven into a pattern over time and when obeying an abuser’s demands is largely based on fear.”¹¹

This is particularly the case when the abuser’s demands correspond with traditional gender roles.¹² As noted by Bishop, ‘compliance with demands about dressing, shopping or cooking in a particular way to avoid repercussions may seem voluntary to an outsider with little or no understanding of the dynamics in the relationship.’¹³ While gender roles may play a part in shaping the forms of abuse, perpetrators have been shown to adapt tactics ‘through trial and error based on their relative benefits and costs and the perceived vulnerabilities of their partner’ meaning the specific tactics may differ substantially from case to case.¹⁴

Additional barriers to the identification of abuse may arise in the case of same sex intimate relationships, where heterosexist assumptions about the egalitarian nature of such relationships may obscure other power dynamics and abusive behaviours.¹⁵ Criminal justice practitioners will be required to navigate these complexities when engaging with victim-survivors’ and perpetrators’ narratives. Research suggests that perpetrators construct narratives that focus on individual isolated incidents,¹⁶ while victim-survivors may have normalised their experiences of abuse to the extent that they do not consider it as justifying a criminal intervention.¹⁷ Indeed, the complexities of family and relationship dynamics and the centrality of ‘normalisation’ to long-term patterns of abuse does make identifying and naming the abuse very difficult.

The writers have direct experience of speaking with hundreds of victim-survivors over many years in NSW. It is often the case that we must carefully and sensitively tease out the details of the violence, whether it be financial, physical, sexual, or coercive control. Often this takes more than an initial meeting in a safe, trauma-informed environment. It requires great care and skill as well as the ability to build trust and rapport. As lawyers, we hold a privileged position in being able to reassure our clients that they are protected by the highest level of confidentiality that exists, legal professional privilege.

Police do not have the same privilege. In fact, in NSW Police are mandatory reporters and must report to Family and Community Services when they attend a DFV incident where children are

¹¹ Stark (2009) n 2

¹² Stark Ibid

¹³ Charlotte Bishop, ‘Why it’s so hard to prosecute cases of coercive or controlling behaviour’ (The Conversation, 31 October 2016)

¹⁴ Stark (n 2) 207. See also Marianne Hester, ‘The Three Planet Model: Towards an Understanding of Contradictions in Approaches to Women and Children’s Safety in Contexts of Domestic Abuse’ (2011) 41(5) British Journal of Social Work 837.

¹⁵ Carrie Brown, ‘Gender-Role Implications on Same-Sex Intimate Partner Abuse’ (2008) 23 Journal of Family Violence 457.

¹⁶ Liz Kelly and Nicole Westmarland, ‘Naming and Defining ‘Domestic Violence’: Lessons from Research with Violent Men (2016) 112(1) Feminist Review 113.

¹⁷ Amanda L Robinson, Andy Myhill and Julia Wire, ‘Practitioner (Mis) Understandings of Coercive Control in England and Wales’ (2018) 18(1) Criminology and Criminal Justice 29.

present.¹⁸ It is well known and documented that this obligation causes many women, in particular Aboriginal and Torres Strait Islander women to not report SFDV to police or other government agencies who are mandatory reporters, for fear of their children being removed from their care.

Studies in jurisdictions where coercive control is criminalised have shown that practitioners continue to prioritise isolated incidents of violence or property destruction.¹⁹

While Police might identify coercive control practices when they appear alongside other forms of physical violence, they have a tendency to dismiss non-physical coercive control alone as 'weak' or 'unverifiable' evidence,²⁰ 'arguments between partners'²¹ or simply 'horseshit'.²² Studies have also suggested that police officers can grow frustrated when repeatedly called to the same address, demonstrating ignorance about the power dynamics of coercive control,²³ and its eroding impact on the options available to victim-survivors.²⁴ Such mindsets have implications for both the way risk is assessed, and the follow up and support that is offered to victim-survivors in light of that assessment.²⁵

Evidence gathering is already fraught, with evidence rules around 'relationship evidence', context, tendency and coincidence evidence calling into question the credibility of witnesses (who are the victim-survivors).

Some suggest that further training is all that is required, however the SDFV sector has been calling for training and indeed providing training to Police, Prosecutors and Magistrates for years. This has not stemmed the rise in SDFV nor has it resulted in consistent appropriate responses from Police and the criminal justice system. We should also not forget that Police are not necessarily going to have the interests of victims at heart when called out to respond.

Strengthening ADVO provisions and making it mandatory for Police to take out an ADVO²⁶ regardless of the victims wishes, as well as to press charges for assault where ever there was an injury, were heralded by the sector as important reforms. Though again, we have not seen a drop in SDFV. What we have seen is women and children continuing to be murdered. The mandatory policy in NSW goes against best practice evidence that victims are the best judge of what will keep them safe. In our experience we have seen many instances where Police

¹⁸ NSW Government,

https://www.police.nsw.gov.au/crime/domestic_and_family_violence/children_in_domestic_And_family_violence

¹⁹ E.g. Andy Myhill 'Renegotiating Domestic Violence: Police Attitudes and Decisions Concerning Arrest' (2019) *Policing and Society* 52; Amanda L. Robinson, Gillian M. Pinchevsky and Jennifer A. Guthrie, 'A Small Constellation: Risk factors Informing Police Perceptions of Domestic Abuse (2018) 28 (2) *Policing and Society* 189; Nicole Westmarland and Liz Kelly, 'Why Extending Measurements of Success in Domestic Violence Perpetrator Programmes Matters for Social Work' (2012) 43 *British Journal of Social Work* 1

²⁰ Charlotte Barlow and others, 'Putting Coercive Control into Practice: Problems and Possibilities' (2020) 60 *British Journal of Criminology* 160.

²¹ *ibid*, 171.

²² Sylvia Walby and Jude Towers, 'Untangling the Concept of Coercive Control' (2018) 18 *Criminology & Criminal Justice* 7.

²³ *ibid*, 37

²⁴ Julia Tolmie, 'Coercive Control: To Criminalize or Not to Criminalize' (2018) 18(1) *Criminology and Criminal Justice* 50.

²⁵ Robinson, Myhill and Wire (n 22) 41

²⁶ s27 Crimes (Domestic and Personal Violence) Act 2007 (NSW)

applications for ADVOs on behalf of victims do more harm and do not create safety. In addition, we have seen many cases of victims being charged with assault where in fact it was self-defence and resistance. This is often the case where the perpetrator can show Police a bite mark or scratch. We have also seen many cases of cross-applications – this is the default position for the NSW Police Force when there is a question about who the primary aggressor is. We have heard on many occasions Police express the view that ‘if they both have an AVO, they’ll both have to behave themselves’.

There currently many challenges in prosecuting the existing domestic violence offences. Often, we have heard from Police ‘it is her word against his’. This of course is true as the Police rely on a complainant to make a report and cooperate with an investigation. It is well known that victim-survivors may become uncooperative, hostile or simply unreliable witnesses. This can arise for many different reasons, from fear of reprisal to a desire for reconciliation and resistance to criminal sanctions (discussed below).²⁷ Indeed, victim-survivors may not have a clear idea of their own narrative; in some cases, this is only possible once they have accessed safety and skilled support, as mentioned earlier.

Some reasons why victims-survivors may not cooperate fully:

- Concerns or fears about angering the accused by cooperating in the prosecution;
- Concerns or fears about increased stalking or harassment or an escalation to physical violence or other criminal offences from the defendant as a result of involving law enforcement and/or cooperating in the prosecution;
- Not truly wanting to see the accused prosecuted, but rather hoping instead that simply reporting to law enforcement will stop the conduct;
- Fear, embarrassment and concerns over aspects of the victim's personal life being exposed in the public setting of a courtroom;
- Fear, confusion or a lack of understanding about the processes, procedures and roles of the judge, law enforcement, the prosecution and defence counsel;
- Reconciliation with the accused where the victim and the accused have an ongoing relationship with each other.

Criminalisation will have unintended negative consequences

If there is a new offence of coercive control, we are greatly concerned about the impacts that could be seen in the Family Law system. Victims of abuse may find themselves criminalised for, for example, seeking to deny their violent partner parental access to their shared children, or using self-defence or force in an attempt to stop or escape from violence. This is linked to gendered expectations, with women who are perceived to be stepping out of the passive norm facing harsher treatment.

Conversely, unsuccessful prosecutions of coercive control in state proceedings will be required to be taken in to account in Family Law proceedings. A dismissal or a finding of not guilty may mean that the courts are not able to fully take into account the effects of coercive control as they are doing now, because a state court making ‘findings of fact’ after a trial will be very persuasive.

²⁷ Cheryl Hanna, ‘No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions’ (1996) 109 Harvard Law Review 1849.

The risk of secondary victimisation begins from the moment a victim-survivor or third-party contacts the police. In addition to risking an escalation of abuse, legal interventions can expose victim-survivors as well as perpetrators to the oppressive force of law enforcement. In particular marginalised individuals may have justified concerns about bringing the police into their homes and communities; racism, homophobia, transphobia, classism, and other forms of discrimination may taint police responses.

Once their abuse has become subject to a criminal investigation, victim-survivors find themselves with little to no agency over how the case proceeds. Depending on their ability to access support services, they may receive only limited information and support, and may be faced with a lengthy wait before their abuser faces trial. It is well known and uncontroversial that victims who have to give evidence face many challenges, and protecting their dignity, while also maintaining the rights of the defendant, is an ongoing challenge for the adversarial criminal justice system.

Following the conclusion of what may have been a traumatising experience, victim-survivors face the possibility of a harmful outcome. This is a risk regardless of the victim-survivors' attitude towards the criminal justice process. On the one hand, those who seek a conviction may see their abuser acquitted or a prosecutor may also accept a 'charge bargain', potentially invalidating a victim-survivor's understanding of their own experience.

On the other hand, some victim-survivors may see the conviction and incarceration of their abuser as an intrusion rather than a welcome intervention.²⁸ Their preference may be for the abuse to stop but for the perpetrator to remain in their lives, for a variety of personal, social, practical and/or economic reasons.²⁹

Criminalisation alone will be ineffective at addressing domestic abuse

It is time that we start questioning whether the solution to the epidemic of SDFV can be found in the criminal justice system. We do not believe that the solution to addressing violence in our communities are to be found in the criminal justice system.

There is much available evidence to show that imprisonment consistently fails to rehabilitate or deter offenders.³⁰ Created as a means of inflicting punitive harm through social isolation, austere conditions and in some incidence's physical violence, prison sentences do little to encourage community reintegration. Rather, they have long been critiqued for reducing the future prospects for ex-prisoners, inflicting and triggering experiences of trauma, and creating the conditions for more violence and offending following release. As such, any new offence, aggravating factors and harsh sentences are unlikely to succeed in delivering justice to victim-survivors or making communities safer. Indeed, it is notable that overall levels of domestic abuse rarely decrease following the introduction of criminal justice interventions.

We strongly believe that criminalisation as the dominant response to SDFV is problematic and diverts resources away from policies and initiatives that seek to address the underlying causes

²⁸ M. Joan McDermott and James Garofalo, 'When Advocacy for Domestic Violence Victims Backfires' (2004) 10 *Violence Against Women* 1245; Edna Erez and Joanne Belknap, 'In Their Own Words: Battered Women's Assessment of the Criminal Processing System's Responses' (1998) 13 *Violence and Victims* 251.

²⁹ Goodmark (n1) 85-86

³⁰ See Jail is Failing - <https://www.justicereforminitiative.org.au/resources>

and societal problems. Behavioural research³¹ shows that there is a need for intensive work with men who use violence. The paucity of programs available means that men who do show help seeking behaviours are not able to access appropriate supports when they reach out.³² Of the programs that are available, few run for more than 6-12 weeks and there is little evidence of their effectiveness.³³

It is interesting to note that the NSW government is providing 6.8 million dollars over 3.5 years to a program that is providing anti-depressants to men who use violence.³⁴ This program has little evidence base yet is seemingly signalling a willingness of the NSW Government to look more deeply at the causes of SDFV.

Long-term, sustainable, investment in specialist support services would be an obvious way to increase the safety of women and children as well as improved access to secure housing, refuges, financial assistance, childcare, and other appropriate supports. Many people in the SFDV sector have been greatly concerned that awareness raising initiatives, whilst important have not been matched with resources to respond to SFDV. Refuges remain full, affordable housing is practically non-existent in either urban, regional or rural parts of the state, counselling services have waitlists, and legal services remain overburdened and unable to assist to the fullest extent possible.

Specifically, the precarious funding models for Aboriginal and Torres Strait Islander health, wellbeing and legal services are a significant issue. We, along with many others, argue that we need culturally and collectively responsive, holistic, and integrated responses to harm. This would enable us to build strong communities, collective care ethics and structural changes to housing, health, and social services. This could enable us to confront the violence of colonisation and address the very real structural and systemic oppressions impacting Aboriginal and Torres Strait Islander communities.

We consider that instead of pursuing further criminalisation, the government should look to other community-based accountability measures.

As mentioned, there are few evidence-based perpetrator accountability programs. This is an enormous issue that needs urgent attention. We know from our records that there are men who have used violence against several women in their lifetimes. It is devastating to know that without intervention these men will continue to use violence. Many may at times want to reach out for assistance; yet they are likely to not find any programs operating in their local area. This is especially true in rural and regional areas and has a disproportionate impact on men without the financial means to access private psychological supports. We submit that there needs to be long-term investment into holistic healing where men who use violence hear impacts of violence on their partners and children. These interventions should be 6-12mth programs and

³¹ See for example JAC Brown PhD (2004) Shame and domestic violence: treatment perspectives for perpetrators from self-psychology and affect theory, *Sexual and Relationship Therapy*, 19:1, 39-56,

³² A full list of programs available in NSW can be found here -

http://www.crimeprevention.nsw.gov.au/domesticviolence/Pages/MiniStandardsforMen'sBehaviour/Minimum_Standards_for_Men's_Behaviour.aspx

³³ Day, A., Vlasis, R., Chung, D., & Green, D. J. (2019). Evaluation readiness, program quality and outcomes in men's behaviour change programs (Research report, 01/2019). Sydney, NSW: ANROWS.

³⁴ <https://www.abc.net.au/news/2021-01-05/reinvest-trial-men-domestic-violence-antidepressant/12988544>

include an option for a residential program such as Communicare’s Breathing Space in Western Australia.³⁵

In addition to addressing current and ongoing violence, there needs to be an investment in prevention. In NSW, there is a piecemeal approach that often relies on individuals within communities to scramble around finding funding and resources. Our Watch states “The evidence is clear that one-off or single activities in isolation are not effective in achieving long-term social change.”³⁶

Restorative Justice

Another option that we advocate for is the use of Restorative Justice (RJ) in cases of SFDV. In other jurisdictions, within Australia and internationally, progress has been made to incorporate restorative justice processes and practices in the community and formal justice responses, with survivor’s needs at the centre.

The United Nations defines RJ as:

“..any process in which the victim, the offender and/or any other individuals or community members affected by a crime actively participate together in the resolution of matters arising from the crime, often with the help of a fair and impartial third party.”³⁷

RJ is underpinned by the theory that when a harm or trauma occurs, the person responsible for the harm has responsibilities and obligations, and the person harmed has rights and needs. In practice, restorative justice processes are about bringing together the people impacted by a crime, either in a direct or indirect communication which can be an empowering engagement. There are good reasons to be cautious about how restorative justice is practiced, especially as there are potential risks that arise from bringing together the victim and perpetrator. However, within carefully delineated parameters, adherence to best practice, it is our view that restorative justice approaches might improve both the access to, and the experience of, justice for some survivors.³⁸

Restorative justice hinges on three potentially powerful mechanisms for addressing harm:

1. Victim’s Voice: Restorative justice enables survivors to give a direct, first-hand narrative of the assault and its harmful impacts, unmediated by police statements, external parties or court processes.
2. Validation: Restorative justice enables perpetrators (and others involved) to bear witness to the survivor’s narrative and, in so doing, gain insight into and potential accountability for their crime.
3. Future Plan: Restorative justice focuses on finding solutions to the harm caused. In most cases, it includes a pragmatic plan to address the immediate and longer-term impacts. In so doing, it

³⁵ <https://www.communicare.org.au/Family-Violence-Justice-Services/Men%E2%80%99s-Support-Services/Communicare-Breathing-Space>

³⁶ <https://handbook.ourwatch.org.au/resource-topic/tailor-primary-prevention-to-groups-and-settings/where-can-prevention-work-happen/>

³⁷ United Nations 2002, Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters Article 1 (3)

³⁸ Bolitho, J and Freeman, K. 2016, “The Use and Effectiveness of Restorative Justice in Criminal Justice Systems following Child Sexual Abuse or Comparable Harms” The Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney.

provides some sense of justice to the survivor, though is not necessarily the end of their recovery journey.³⁹

Survivor-focused restorative justice emphasises and prioritises the survivor identifying all the components of harm (physical, social, emotional, material, symbolic or spiritual). Once harms have been articulated, the framework considers what restorative justice options could address, all, some, or none of these harms. Evidence suggests the combination of these restorative justice processes provides survivors with a counterpoint to the loss of power and control inherent in SFDV.⁴⁰

Survivor-oriented restorative justice processes could be introduced either alongside or outside of the criminal legal systems. For example, restorative processes could be implemented by utilising adjournment provisions and diversion processes such as Youth Justice Conferencing in the children's court jurisdiction. In adult courts, such as Local Court management of domestic violence matters and ADVO matters - discretion could be used to adjourn matters to enable defendants to participate in restorative justice processes as is the case for where referrals are made for the purpose of treatment or therapy. This discretionary window could allow referral into a restorative process, which would be strictly consent-based for all participants. Our service is currently working to develop a community model of restorative justice, one which is unique in New South Wales and will be an important piece of work moving forward in the reform of our systems and imagining new and innovative ways to respond to insidious problems such as domestic and family violence. Similarly, family mediation processes through Relationships Australia could be supported with the addition of a restorative component to pre litigation mediation. This is currently being explored in ACT and we welcome opportunities to explain more about our work as specialist sexual, domestic violence and family law practitioners and the ways in which we are working collaboratively with stakeholders and survivors to implement these initiatives.

We also support the introduction of national standards and training and accreditation of restorative justice practitioners. This would ensure that restorative justice programs can be formally recognised and monitored. It would also bring Australia into line with international best practice. For example, countries such as New Zealand, the UK and Canada have formal training, mentoring and accreditation schemes for restorative facilitators. These jurisdictions also rely also on the involvement of the community to ensure that restorative justice processes are transparent, and outcomes are owned and supported by those most affected. New Zealand is leading in the restorative justice space, with formal tertiary qualifications and national legislation formalising restorative opportunities within the criminal legal framework and are also available in the community.

We are working to share knowledge about the efficacy of restorative justice that comparable jurisdictions have recognised and applied over many decades and will be delivering specialised sexual violence training to restorative justice practitioners, clinicians and community members later in the year.

³⁹ Daly, K. (2015). What is restorative justice? Fresh answers to a vexed question. In *Victims & Offenders*, Vol. 11 (1), 1-21.

⁴⁰ Daley Ibid

In 2019 one of our solicitors completed a Churchill Fellowship examining community based restorative justice processes for sexual and family violence and her research points to this work taking place in a wide number of communities cross comparable jurisdictions. That research pointed to programs such as:

- Contra Costa Family Justice Centre, California, USA <http://www.cocofamilyjustice.org/>
- Constructing Circles of Peace, Arizona, USA <https://www.circlesofpeace.us/>
- Victims Voices Heard, Delaware, USA <https://www.victimsvoicesheard.org/>
- Collaborative Justice Program, Ontario, Canada <https://www.collaborativejustice.ca>

We note also that an option for referral to restorative justice programs is legislated in New Zealand and a common process for serious and violent offences and an increasingly common pathway for both criminal and community referrals in matters involving domestic and sexual violence. We refer to the specialist program Project Restore, New Zealand and the evaluation of this program by Dr Shirley Julich⁴¹ as well as the specialist domestic violence restorative justice process in New Zealand.

Encouragingly, our consultations over the past 18 months have revealed cautious, yet widespread, support for restorative justice as part of the suite of responses available to survivors of SFDV in NSW. This has included in principle support from government, the private sector, NGOs, advocates and stakeholders from both sides of our usually adversarial legal system, as well as members of the judiciary. Health and mental health services that often assist survivors to deal with the impacts of trauma have also expressed support for restorative justice responses. This is key because SFDV is foremost a societal, health and relational problem, which impacts survivors, their families and communities.

Reviews of RJ have identified the following concerns for victims: victim safety, manipulation of the process by offenders, pressure on victims, mixed loyalties; cheap justice. Indeed, these concerns are real. However, such concerns arise regardless of whether a matter proceeds to RJ or not, or to court or not; these are real and well-founded concerns for victims that arise in the context of trauma. There is no doubt that the power imbalance of SFDV places victims in positions of vulnerability and exposes them to posttraumatic stress and associated psychological and psychiatric impacts. The RJ pathway being proposed does not claim to mitigate, effect or remedy the impacts of trauma, nor to treat a psychological or psychiatric condition. It would be overly simplistic to suggest that RJ is a silver bullet for the effects of trauma, or that the “solution” to diagnoses such as PTSD could be found through this process alone. However, more recent reviews of RJ have suggested that it has role in recovery for some survivors and this potential benefit of RJ is in need of ongoing consideration and exploration.⁴²

That we need a health-justice response to SFDV is not remarkable. People dealing with complex issues like the impacts of trauma, do not simply have ‘legal’ or ‘health’ problems - they just have problems. It is our responsibility to meet them where they are at, to re-imagine the systems we have made and work collectively to address survivors’ needs holistically,

⁴¹Julich, S., & Thorburn, N. (2017). Sexual Violence and Substantive Equality: Can Restorative Justice Deliver?. *Journal of Human Rights and Social Work*. 2(1-2), 34-44

⁴² Bolitho, Jane “Inside the restorative justice black box: The role of memory reconsolidation in transforming the emotional impact of violent crime on victims”, *International Review of Victimology*, 2017.

therapeutically, and legally. And above all, by being guided by the wishes of the experts, our clients.

Maintaining the current system of justice is not an option for victims and survivors of sexual and personal violence; however, to advocate for amendments to the criminal justice system alone, means continuing to struggle with an adversarial system oriented around prosecutorial priorities rather than around victim survivor needs and rights. By expanding our justice processes, and reimagining a system that includes a restorative justice framework, victims could be offered choices, options, and to make decisions about what they want, and the terms on which they may want to engage with the person responsible for their harm. Tangible benefit comes from the process of providing real choices, the potential for victim recognition and validation of the impact of the trauma experience.

The RJ project run by South Eastern Centre for Sexual Assault (SECASA) was recently evaluated⁴³ by Monash University. This program emerged organically from the requests of the victim survivors accessing counselling services and the review captured the impact on participants.

The evaluation of this small community-led project revealed benefits for both victim-survivors and the accused person and importantly, and surprisingly, all accused who have been invited to attend a conference, have done so. This observation alone sets SECASA's process apart from the criminal justice model in which SFDV is so often denied or minimized, and the claims of victims challenged. We believe that restorative justice is the best available and existing mechanism for victim-survivors to achieve many of the components of justice that cannot or will not be achieved through conventional criminal and civil legal processes. Therefore, we are seeking to begin a robust discussion, leading to reform and the development of options and advocacy for work in this sphere and welcome this review to engage with the literature provided here.

Thank you for the opportunity to contribute to this inquiry. We would welcome the opportunity to speak further on the matters raised in our submissions.

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⁴³ Gang, D., Loff, B., Naylor, B., & Kirkman, M. (2021). A Call for Evaluation of Restorative Justice Programs. *Trauma, Violence & Abuse*, 22(1), 186-190