

**Submission  
No 118**

## **COERCIVE CONTROL IN DOMESTIC RELATIONSHIPS**

**Organisation:** The New South Wales Bar Association

**Date Received:** 8 February 2021



SUBMISSION | NEW SOUTH WALES  
**BAR ASSOCIATION**

NSW Joint Select Committee on Coercive Control

8 February 2021

## Promoting the administration of justice

The NSW justice system is built on the principle that justice is best served when a fiercely independent Bar is available and accessible to everyone: to ensure all people can access independent advice and representation, and fearless specialist advocacy, regardless of popularity, belief, fear or favour.

NSW barristers owe their paramount duty to the administration of justice. Our members also owe duties to the courts, clients, and colleagues.

The Association serves our members and the public by advocating to government, the Courts, the media and community to develop laws and policies that promote the Rule of Law, the public good, the administration of and access to justice.

## The New South Wales Bar Association

The Association is a voluntary professional association comprised of more than 2,430 barristers who principally practice in NSW. We also include amongst our members Judges, academics, and retired practitioners and Judges.

Under our Constitution, the Association is committed to the administration of justice, making recommendations on legislation, law reform and the business and procedure of Courts, and ensuring the benefits of the administration of justice are reasonably and equally available to all members of the community.

This submission is informed by the insight and expertise of the Association's Family Law, Criminal Law, Diversity & Equality and First Nations Committees. If you would like any further information regarding this submission, please contact the Association's Director of Policy and Public Affairs, Elizabeth Pearson, at first instance on [REDACTED] or [REDACTED].

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## A. Executive Summary

1. The New South Wales Bar Association (**the Association**) thanks the Joint Select Committee on Coercive Control (**Joint Select Committee**) for the opportunity to make a submission to this important inquiry.
2. The Association has carefully considered the NSW Government's *Discussion Paper on Coercive control* (**the Discussion Paper**). The Association has reservations at this time as to the enactment of a specific offence of coercive control in circumstances where there is not a substantive proposal and especially given the difficulties surrounding how such an offence should be constructed or defined. These are matters of importance given that any proposed law must not be able to be used either deliberately or inadvertently against the very people it is intended to protect.
3. The prevalence of domestic and family violence (**DFV**) in this country is a national shame. This inquiry is a timely opportunity to consider and respectfully discuss potential legislative and non-legislative improvements that could be made to address this critical issue.
4. The Association holds reservations about the potential consequences of enacting a specific offence, both on a direct level and more systemically. The Association respectfully reserves its position on the merits or otherwise of creating a specific offence at this time, until it has had a further opportunity to:
  - a. consider the submissions advanced by other stakeholders to the Joint Select Committee, particularly by victim-survivors and the providers of DFV support, legal and other services who work closely with victim-survivors. In giving evidence on the Scottish model of coercive control offences, Chief Executive Officer of Scottish Women's Aid, Dr Marsha Scott, recently observed that:<sup>1</sup>

If I were to measure success, I would strongly suggest that success would look like accountability, making sure that they haven't been arrested when they were actually victims, making sure that your conviction rates were appropriate and, really importantly, making sure that children's and women's voices were embedded in the way you think about law.
  - b. consider the findings of the ongoing research undertaken by the NSW Bureau of Crime Statistics and Research (**BOCSAR**) about the use and effectiveness of existing stalking and intimidation offences in NSW. The Association agrees with the statement in the Discussion Paper that this research will be of great assistance to the Joint Select Committee and

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<sup>1</sup> Evidence to the Standing Committee on Social Policy and Legal Affairs, *Inquiry into family, domestic and sexual violence*, House of Representatives, Teleconference, 3 December 2020, 10 (Dr Scott).

stakeholders in informing further discussion as to what, if any, improvements can be made to the operation of existing NSW criminal offences to better address coercive and controlling behaviours;<sup>2</sup>

- c. better understand the precise form such an offence might take, including through Tasmania's experience as the first Australian jurisdiction to enact a specific coercive control offence. Women's Legal Services Tasmania (WLST) suggested last year that:<sup>3</sup>

a comprehensive review of the Tasmanian provisions would be timely and appropriate, should other jurisdictions in Australia consider introducing similar offences. The Tasmanian experience can provide valuable insights into the difficulties of operationalising coercion and control offences...

To be clear, the Association does not consider that the starting point should be an assumption that an offence of coercive control should be created. Rather, such analysis would be of assistance to stakeholders and the Joint Select Committee in tackling the questions in the Discussion Paper. The risk of unintended, adverse consequences arising from a new specific offence is significant, as the Discussion Paper recognised.<sup>4</sup> Further analysis of Tasmania's experience may assist in better illustrating and quantifying these risks.

5. If more specific proposals are put forward by the Department or other stakeholders in the course of the inquiry, the Association would welcome the opportunity to provide more detailed input on such proposals.
6. In the interim, there are immediate actions that could be taken to improve both the current legislative regime's operation and non-legislative activities to better address coercive and controlling behaviour, including other potential avenues for law reform that should be considered. These actions are the primary focus of this submission. The Association is mindful that:

even the best drawn laws function as a 'disguised betrayal' of women's justice claims without concurrent commitments of resources to infrastructure, nationally coordinated assistance to local surveillance and interdiction, and the comparable political will to pursue the equality agenda.<sup>5</sup>

7. This submission addresses six issues:
  - a. The challenges victim-survivors face in accessing Australia's justice institutions;
  - b. The importance of centering victim-survivors' and DFV groups' voices in law reform;
  - c. Considerations and inherent risks in seeking to legislate a more specific offence;
  - d. The role of properly resourced legal systems in protecting victim-survivors;
  - e. Inconsistency between state and federal governments' responses to DFV; and

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<sup>2</sup> NSW Department of Communities and Justice, *Discussion Paper on Coercive Control* (2020) 6, [1.14]. 6. [1.14].

<sup>3</sup> Women's Legal Services Tasmania, Submission No 31 to the Standing Committee on Social Policy and Legal Affairs (n 1).

<sup>4</sup> NSW Department of Communities and Justice (n 2) 27, [7.2]. 27, [7.2].

<sup>5</sup> Evan Stark, 'The 'Coercive Control Framework': Making Law Work for Women' in M McMahon and P McGorery (eds), *Criminalising Coercive Control: Family Violence and the Criminal Law* (Springer, 2020) 34, quoted in WLST (n 3).

- f. The need to properly fund the legal assistance sector to support victim-survivors.
8. Regrettably, DFV continues to impact many Australians. Domestic abuse of and violence against all women, men and their children is repugnant. The 2016 *Personal Safety Survey* found that “17% of women (1.6 million) and 6% of men (547,600)” had experienced violence by an intimate partner since the age of 15.<sup>6</sup> Intimate partner homicide is the most prevalent type of homicide in Australia,<sup>7</sup> with one woman dying at the hands of her partner every nine days and one man killed by his partner every 29 days.<sup>8</sup> Female victims of intimate partner homicide are more likely to be killed after separating, or expressing intention to separate, from their partner.<sup>9</sup>
  9. The danger coercive control poses to Australians is heightened when essential justice services are under-resourced, under-funded and chronically over-burdened. Delayed access to both state and Commonwealth Court systems and legal services, primarily caused by under-funding and under-resourcing, can be used by perpetrators of DFV as a further tool of abuse. Once accessed, delays in the determination of issues by the courts exacerbate those issues. The COVID-19 pandemic has added to existing pressures. It is critical that matters involving DFV – both state criminal law and Commonwealth family law matters - can be promptly brought before the courts, heard and determined.
  10. The 2020-21 NSW Budget in November forecast that the percentage of domestic violence related criminal offences finalised in the Local Court within three months of the first court appearance will fall in 2020-21 to 45% from 53.8% in 2019-20.<sup>10</sup> In December 2020 the NSW Local Court was placed in the unfortunate position of having to increase the ‘Time Standard’ under the *Local Court Practice Note Crim 1* for domestic violence cases to be heard and finalised from three months to six months. This was due to the combined effect of: consistent increases in the Court’s criminal caseload over the last seven years with limited, if any, provision of additional judicial resources; and the inadequate allocation of resources to deal with both the increased pending caseload as a result of arrangements put in place during COVID-19 and several legislative amendments to the *Criminal Procedure Act 1986* (NSW) announced prior to the facilities offered by the legislation being fully funded, implemented and accessible across Local Courts. This will have adverse implications for complainants and alleged perpetrators.
  11. Almost 70% of matters before the Commonwealth family courts involve allegations of family violence.<sup>11</sup> Even before COVID-19, some families were having to wait up to three years,<sup>12</sup> or longer, to have their family law disputes resolved by the Commonwealth family law courts. The Courts and the family law system must also be equipped with the necessary funding, resourcing and specialisation – and coordination between them – to support victim-survivors at all times.

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<sup>6</sup> Australian Bureau of Statistics, *Personal Safety Survey 2016*, 1, cited in NSW Department of Communities and Justice (n 2) 2.

<sup>7</sup> S Bricknell, *Homicide in Australia 2017-18* (Statistical Report No 23, 2020, Australian Institute of Criminology).

<sup>8</sup> Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia: Continuing the National Story*, Report (2019) 62.

<sup>9</sup> Ibid 53.

<sup>10</sup> NSW Government, *Outcome Statement – Stronger Communities Cluster* (2020) 7-12.

<sup>11</sup> Women’s Legal Services Australia, *Safety first in family law* (2019); see also House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A better family law system to support and protect those affected by family violence* (Report, 2017) [1.6] (**the 2017 House of Representatives Inquiry**).

<sup>12</sup> Explanatory Memorandum, Federal Circuit and Family Court of Australia Bill 2018 (Cth), [53].

## B. Recommendations

12. The Association recommends that this Joint Select Committee advocate to NSW Parliament to:
  - a. implement as a matter of urgency the technical underpinnings necessary to support the reforms to the *Criminal Procedure Act 1986* (NSW) to reduce delays in the Local Court;
  - b. acknowledge that funding, resourcing and maintaining the family law and justice system is a state as well as a Commonwealth responsibility;
  - c. properly fund and resource the NSW courts and family law system, including legal assistance, as a front-line service and critical protection for victim-survivors of DFV;
  - d. consistently and adequately resource DFV support services on an ongoing basis;
  - e. commit to adequately funding the legal assistance sector;
  - f. improve information sharing between state-based child protection and DFV prevention, and Commonwealth family jurisdiction and courts;
  - g. ensure further education, training and resources to police, the legal profession who practice in this area and judges in relation to the many forms of DFV;
  - h. commit to, properly fund and resource supports, education and initiatives that address perpetrators' behaviour and why perpetrators engage in DFV;
  - i. commit to addressing intersectionality and resourcing supports for First Nations Peoples, victim-survivors from non-English speaking backgrounds, culturally and linguistically diverse communities, and victim-survivors with disability or experiencing elder abuse;
  - j. commit to implementing education programs regarding DFV as part of the NSW high school curriculum to educate both potential victims and potential perpetrators to recognise coercive control and to provide strategies for dealing with it;
  - k. provide and promote timely recognition of domestic violence orders and issues emerging in federal jurisdictions by state authorities, including overcoming any jurisdictional gaps;
  - l. increase funding and resourcing of facilities for co-located family courts, and work with the Commonwealth Government to develop and implement co-location models of family law registries and judicial officers in local court registries across NSW;
  - m. carefully consider and promptly respond to recommendations by the Australian Law Reform Commission's 2018 *Review of the Family Law system (ALRC Report)* to improve collaboration, coordination and integration between Commonwealth and state family law systems, including family support services, DFV and child protection systems;
  - n. ensure due protections and safeguards for vulnerable people are built around any permanent changes to NSW e-witnessing and e-signature laws, following the COVID-19 pandemic;
  - o. draw also on the findings of relevant, existing Commonwealth DFV inquiries, including the ongoing House of Representatives *Inquiry into family, domestic and sexual violence* which has a specific term of reference concerning coercive control.



## C. Challenges facing victim-survivors in accessing Australia's justice institutions

13. There are many complex and intersecting reasons why victim-survivors do not access the justice system when experiencing domestic abuse and coercive control. Research shows that victim-survivors (mainly women) firstly try to de-escalate the abusive behaviour and seek help informally over a long period of time in an effort to deal with their situation themselves.<sup>13</sup> Many victim-survivors who approach the criminal justice system for assistance do so only when the violence, control and abuse “starts to escalate in nature and frequency, when the abuse is perceived as life-threatening, and when children have to witness the abuse”.<sup>14</sup>
14. In other words, victim-survivors often experience coercive control and abuse for extended periods of time before reaching out for assistance. When they do seek help, they try to do it discretely, informally and outside the justice system. That is, until the perpetrator's behaviour has dangerously intensified.
15. For law reform to be effective in addressing this issue, the Association believes it is necessary to first examine and understand the barriers to accessing justice for victim-survivors, including reasons why they may not be inclined to reach out to the justice system or its services.
16. The Law Council of Australia's 2018 *Justice Project* identified that people experiencing DFV encounter “complex and intersecting legal need” and a myriad of barriers preventing access to the justice system, including:<sup>15</sup>
  - a. Financial abuse and control;
  - b. Homelessness;
  - c. The relationship between imprisonment and family violence;
  - d. A fragmented and complex family violence system;
  - e. Limiting attitudes and lack of awareness and education regarding domestic abuse; and
  - f. Fear and reluctance to report.
17. The Australian Bureau of Statistics 2016 *Personal Safety Survey* found that out of the people who experienced violence from their current partner, 97.2% of men and 82.1% of women did not report it to police.<sup>16</sup> Of those who had experienced violence from a previous partner, 75.5% of men and 64.7% of women had not reported to authorities.<sup>17</sup>
18. Women victim-survivors have been found to delay reporting abuse to police due to fear of gender-based discrimination and lack of support from police.<sup>18</sup>

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<sup>13</sup> Silke Meyer, ‘Seeking Help for Intimate Partner Violence: Victims’ Experiences When Approaching the Criminal Justice System for IPV-Related Support and Protection in an Australian Jurisdiction’ (2011) *Feminist Criminology* XX(X), 3.

<sup>14</sup> Ibid.

<sup>15</sup> Law Council of Australia, ‘People who Experience Family Violence’, *Justice Project* (2018).

<sup>16</sup> Australian Bureau of Statistics, *Personal Safety, Australia, 2016* (Catalogue No. 4906.0, 8 November 2017).

<sup>17</sup> Ibid.

<sup>18</sup> Meyer (n 13) 8, 10.

19. Women’s Legal Services Australia has previously noted that “it is common for a victim-survivor to not report family violence”, including because of:
  - concerns that reporting the violence can lead to further risk of harm (from the perpetrator directly but also further trauma from participating in the family law system itself), feelings of shame and convictions of not being believed, as well as cultural and/or language barriers to reporting and fear or lack of trust in legal systems for some groups of victim-survivors, including Aboriginal and Torres Strait Islander or culturally and linguistically diverse (CALD) victim-survivors.<sup>19</sup>
20. The prevalence of DFV in Australia has meant it has already been viewed as a “national emergency”<sup>20</sup> for years. Crises can escalate the seriousness of violence and risk for people in situations of existing DFV as well as trigger violence in new cases and exacerbate barriers to reporting or accessing the justice system.<sup>21</sup>
21. While the COVID-19 pandemic has been unprecedented, it has been estimated that Australians have a “1 in 6 estimated lifetime exposure”<sup>22</sup> to natural disasters, which are also reported to increase the prevalence and severity of DFV during and following crisis and post-disaster recovery.<sup>23</sup> For example, one study found a 98% increase in violence against women as measured from before and after Hurricane Katrina.<sup>24</sup> Research by Women’s Health Goulburn North East following the 2009 Black Saturday bushfires in Victoria likewise evidenced an increase in DFV in bushfire affected communities.<sup>25</sup> The 2019-20 bushfires and the pandemic have exacerbated pre-existing challenges of resourcing and demand within Australia’s legal system and reinforced the importance of securing adequate, ongoing funding for services for victim-survivors,<sup>26</sup> including the legal assistance sector.<sup>27</sup>
22. Ensuring the community, including those at risk of DFV, can continue to access the courts at all times to protect their safety and rights in times of uncertainty and disruption is essential.

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<sup>19</sup> Women’s Legal Services Australia, Submission 22 to the Legal and Constitutional Affairs Committee, *Inquiry into the Family Law Amendment (Family Violence and Cross-Examination of Parties) Bill 2018* (2018) 6.

<sup>20</sup> Ursula Malone and Juanita Phillips, ‘Domestic violence of epidemic proportions a ‘national emergency’: campaign groups’, *ABC News* (online), 5 May 2014, <<https://www.abc.net.au/news/2014-05-05/domestic-violence-reaches-epidemic-proportions/5426214>>.

<sup>21</sup> Debra Parkinson and Claire Zara, ‘The hidden disaster: domestic violence in the aftermath of natural disaster’ (2013) 28(2) *Australian Journal of Emergency Management* <<https://ajem.infoservices.com.au/items/AJEM-28-02-09#>>.

<sup>22</sup> Women’s Health Goulburn North East, *‘The way he tells it...’ Relationships after Black Saturday* (2011) 1.

<sup>23</sup> See, eg, R Maguire, D Bozin and, G Mortimer, ‘Domestic violence will spike in the bushfire aftermath, and governments can no longer ignore it’, *The Conversation* (online) 18 November 2019 <<http://theconversation.com/domestic-violence-will-spike-in-the-bushfire-aftermath-and-governments-can-no-longer-ignore-it-127018>>.

<sup>24</sup> Ibid, citing Schumacher, Coffey, Norris, Tracy, Clements and Galea, ‘Intimate partner violence and Hurricane Katrina: Predictors and associated mental health outcomes’ (2010) 25(5) *Violence Vict.* 588, 588-603.

<sup>25</sup> Parkinson and Zara (n 21) 56, citing Women’s Health Goulburn North East (n 22) 57.

<sup>26</sup> See, eg, Yoni Bashan, ‘Bushfires: Agencies report post-natural disaster spike in domestic violence incidents’, *The Australian* (online), 16 January 2020 <<https://www.theaustralian.com.au/nation/politics/bushfires-agencies-report-postnatural-disaster-spike-in-domestic-violence-incidents/news-story/ea822344afac37cb4796ff3e4735759b>>.

<sup>27</sup> See, eg, Maguire, Bozin and, Mortimer (n 23) 58.

## D. The importance of survivors and DFV groups participating in law reform

23. Proceeding with policy and justice reform on coercive control without listening to the voices of victim-survivors undermines any progress the NSW Government would hope to achieve through this consultation process.
24. Studies have shown that the participation of victim-survivors of domestic abuse “can be very significant for policy development - including safety, fear, danger and confidentiality - that professionals may underemphasise”.<sup>28</sup>
25. The Association recognises the importance of understanding intersectionality and addressing how DFV affects people from diverse cultural backgrounds, including but not limited to First Nations Peoples, CALD communities, people with disability and older Australians. The Association encourages the Joint Select Committee to engage with appropriate stakeholder groups throughout their consultation to ensure these perspectives are heard and considered. It is critical to ensure specialised, culturally competent legal assistance and other services are properly resourced and readily accessible for all people experiencing DFV.
26. The Association also recognises the importance of supporting First Nations led specialist legal advice, representation and other assistance services. The ALRC Report outlined evidence that the presence of Indigenous Liaison Officers improved “access to family law justice” for First Nations Peoples.<sup>29</sup> The legal assistance needs of First Nations victim-survivors, in addition to their perspectives on introducing a coercive control law and the ramifications which may be felt by their communities as a result, are critical to development of appropriate responses.
27. In addition to the consultation which will be undertaken by this Joint Select Committee, the Association supports long term, thorough consultation with victim-survivors with their safety and confidentiality at the forefront.

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<sup>28</sup> Gill Hague and Audrey Mullender, ‘Who Listens? The Voices of Domestic Violence Survivors in Service Provision in the United Kingdom’ (2006) 12(6) *Violence Against Women* 568, 577.

<sup>29</sup> Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System* (Report No 135, April 2019) 50 (**ALRC Report**).

## E. Considerations and inherent risks in seeking to legislate a more specific offence

29. Reservations held by the Association about legislating a more specific offence include:
- a. the risk of victim-survivors experiencing retraumatisation, whether through direct arrest or the process of giving evidence;
  - b. insufficient education and training, police responses and community awareness as contributing factors to the effectiveness of existing DFV offences, let alone a new offence;
  - c. the need for further information and data, to enable, among other things, a better understanding of the effectiveness of existing offences and the impacts of (b);
  - d. the dangers in having an inconsistent approach across Australian jurisdictions;
  - e. the risks of a new offence capturing innocuous behaviour; and
  - f. the lack of resources to effectively implement, educate and train in relation to such an offence prior to its enactment.

### *a The risk of retraumatising victims*

30. While recent reforms have led to improvements, a substantial concern held by the Association is the risk of victim-survivors experiencing retraumatisation through the introduction of coercive control as a criminal offence, whether through the process of giving evidence or by direct arrest. Dr Scott was asked about this concern by the House of Representatives' inquiry and acknowledged it was a legitimate concern in Scotland's experience with coercive control:<sup>30</sup>

So many women and children have the experience that, when they call the police or they go to the system for justice, in fact they get retraumatised instead of justice. One of our biggest concerns is that there's lots of evidence over the decades that when you implement new laws that change arrest policies, one of the things that happens is you get a spike in arrests of women who are actually victims, but they have been arrested by police as perpetrators. That existed in Scotland. I expect it exists in Australia now before our new law. We're really concerned that it would get higher.

In Scotland, prior to our new law, arrests of women ran somewhere between 12 and 15 per cent of all arrests. That was way too high as it was. But we were really concerned that that was going to go even higher with the new law. So one of the things that we did was we did some evidence-gathering from researchers in the College of Policing in England and Wales—there's some great research out of there—and also some quantitative researchers in the US who'd done a huge amount of work on, essentially, 'What does the survey data say about women and men perpetrators of coercive control?' What they told us is that, at the very most, because domestic abuse is such a gendered phenomenon that, in terms of coercive control, women would be perpetrating at rates of under five per cent of the total. That means that, if we see arrests that were significantly over five per cent, then we're having real problems in the system. Those kinds

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<sup>30</sup> Evidence to the Standing Committee on Social Policy and Legal Affairs (n 1) 4-5 (Dr Scott).

of estimates came, as I said, from the College of Policing and Michael Johnson, who is a quantitative researcher in the US.

So we did a huge amount of prep work in meeting with our colleagues in the police, Police Scotland, in the Crown Office and in the government, to say, 'What are we going to do to prevent this from going wrong?' Mostly what we wanted was for people to gather the right data from the very beginning so that we could see how that was going. The Crown Office published a report in September, I think, about the data from the first year of implementation. I was very glad to see that the cases that were prosecuted pretty much reflected that five per cent figure.

So I totally understand the concerns of women's organisations, and I think the government should listen really carefully to the problems with current implementation and policing and be aware that you're going to have to do some work on your system to prevent miscarriages of justice.

31. Similarly, WLST outlined that:<sup>31</sup>

There are concerns that criminalising coercion and control may have unintended adverse effects on victims, particularly indigenous or marginalised women. There is a risk that creating new offences creates new opportunities for perpetrators to engage in 'legal systems abuse' by utilising the legal system to exert continued control over their victim. Research has shown that police misidentification of primary aggressors can often result in victims being mistakenly charged, or being made the subject of restrictive orders. Misidentification of female victims as primary aggressors is particularly acute in the Aboriginal and Torres Strait Islander community.

32. Dr Scott's evidence also implicitly reinforces the need to await BOCSAR's research in order to better foresee possible NSW-specific implementation and policing issues that might arise if an offence is implemented, by appreciating current shortcomings and opportunities for improvement. Those shortcomings may be institutional or pragmatic, rather than purely legal.

*b Insufficient education and training, police responses and community awareness*

33. The Association notes that one concern often put forward in favour of the creation of a specific coercive control offence is that existing laws are not sufficient to cover the scope of behaviours that would be captured by a coercion and control offence. However, the problem of an inadequate criminal justice response to intimate partner abuse is not necessarily caused by an absence of an appropriate or available offences.
34. Insufficient education, police responses and community awareness of the operation of existing offences and protections in NSW may also be contributing factors. For example, it can be seen from the *Domestic Violence Death Review Report* that in a substantial number of the case studies, the female homicide victim experienced behaviour which would be encompassed by the current stalking or intimidation offences, but either it was (wrongly) not recognised as such by police, or the victim did not report the behaviour or the full extent of the behaviour to the police. Further police training and community awareness raising of existing DFV offences should be encouraged.

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<sup>31</sup> Women's Legal Services Tasmania (n 3).

35. As outlined in the Discussion Paper, a wide range of offences and protections for victim-survivors of DFV already exist under protective and criminal laws in NSW, including:<sup>32</sup>
- a. more than a dozen offences in the *Crimes Act 1900* (NSW), such as Homicide, Conspiracy to murder, Attempts to murder, Documents containing threats (to kill), Acts causing danger to life or bodily harm, Assaults, Common assaults, Sexual offences against adults and children (including sexual assault and assault with intent to have sexual intercourse, sexual touching, sexual act), Kidnapping, Recording and distributing intimate images (including threats), Explosives and firearms offences, Housebreaking, Crimes against property generally, Intimate Image and Revenge porn offences, Computer offences (such as Unauthorised access, modification or impairment with intent to commit serious indictable offence); and
  - b. the *Crimes (Domestic and Personal Violence) Act 2007* (NSW), which provides offences of stalking and intimidation under section 13 of the Act and as a protective measure apprehended domestic violence orders, the breach of which is criminal. The definitions of intimidation and stalking appear in sections 7 and 8 of the Act. Intimidation means conduct amounting to *harassment or molestation*, an approach made to the person by any means *that causes the person to fear for his or her safety* and any conduct that causes a *reasonable apprehension of injury* to a person or any person with whom he or she has a domestic relationship *or of violence or damage* to any person *or property*. Notably, property includes pets and material possessions and there is a reasonable apprehension of any such damage or injury. The definition of stalking is not exhaustive and includes following a person about, watching or frequenting the vicinity of the places that the person frequents, contacting or otherwise approaching the person through technology. The court may have regard to any pattern of violence in behaviour. The common law permits also evidence of “context” or “relationship” where relevant to a charged offence or allegation of DV.

In addition, other laws not expressly identified in the Discussion Paper include:

- c. Commonwealth laws such as those for use of carriage services to harass, menace or offend in section 474.17 of schedule 1 of the *Criminal Code Act 1995* (Cth) (***Criminal Code***), or to share violent or abhorrent or suicide-related material in section 474.29A of the *Criminal Code* or for hoax or fake threat in section 474.16 of the *Criminal Code*, intimate image and revenge porn offences in the *Criminal Code*, and modern slavery offences found both in sections 80D-E, 93AA-93AC of the *Crimes Act 1900* (NSW) and sections 270.3-271.7 of the *Criminal Code*;
- d. offences under the *Surveillance Devices Act 2007* (NSW), including which prohibit the installation and use of listening, optical surveillance, data surveillance or tracking devices;
- e. the *Family Law Act 1975* (Cth), which includes in section 4AB an expansive definition of family violence, including of a coercive and controlling kind which permeates the protective, parenting and financial aspects of the operation of that Act.

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<sup>32</sup> NSW Department of Communities and Justice (n 2) 45.

36. There are also laws to facilitate the giving of evidence such as found in Parts 4B (Giving of evidence by domestic violence complainants), 5 (Evidence in sexual offence proceedings) and 10 of the *Criminal Procedure Act 1986* (NSW).
37. Looking to other jurisdictions, as outlined in the Discussion Paper,<sup>33</sup> assessing the support mechanisms surrounding criminalising coercive control is crucial for ‘getting it right’.
38. Police training in coercive control needs to be targeted and informed by victim-survivors. The Association agrees that further research into the efficacy of coercive control laws in other jurisdictions needs to occur. However, due to the complex nature of DFV, there are already growing concerns that perpetrators could use these laws as a tool to further victimise their victims.<sup>34</sup> The Association is concerned that an intent on behalf of the perpetrator in conjunction with inadequate police training may possibly result in a misuse of the coercive control legislation.
39. If coercive control legislation is introduced by the NSW Government, an adequately funded legal system is a crucial requirement. This includes specific police and prosecutorial training on coercive control and the complexity of DFV.
40. An example of a well-intentioned domestic abuse policy which may be being misused or misunderstood by the police is the ‘pro-charging’ policy employed by Canadian officers in response to domestic abuse situations. A study found women are more likely to be charged with minor assault when police have been called out to a DFV job,<sup>35</sup> yet these women often used violence as a means of self-defence to protect themselves and their children from ongoing abuse at the hands of a male perpetrator.<sup>36</sup> The onus on police to lay charges in domestic abuse call-outs due to a well-meaning policy has potentially resulted in victim-survivors being mistaken as perpetrators and, in turn, being criminalised and victimised by the legal system that is meant to protect them.
41. Another consideration noted in the Discussion Paper<sup>37</sup> is the low prosecution rate in Tasmania following the enactment of its coercive control legislation. The Association urges the Joint Select Committee to consider the nexus between education and training of justice actors about coercive and controlling behaviour and effective prosecution of the offences.
42. Police attitudes towards DFV can have a large impact upon victim-survivors’ experiences in the existing criminal justice framework. For example, a 2011 Queensland study interviewed 29 female victims of intimate partner violence who approached the criminal justice system and found that 70.6% of victims who sought help from police reported dissatisfying outcomes.<sup>38</sup> On reporting DFV to police, those interviewees reported being met with officers who expressed frustration with the victim-survivor (especially if they continuously reported and did not permanently leave their abusive relationship), a lack of understanding of the nature and seriousness of the abuse, and

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<sup>33</sup> NSW Department of Communities and Justice (n 2) 14-20.

<sup>34</sup> Ibid 26 [6.16]-[6.18].

<sup>35</sup> Danielle Bader, Myrna Dawson and David Walters, ‘Does Gender Affect the Number and Type of Charges Laid in Intimate Partner Violence Cases?’ (2019) *The British Journal of Criminology* 59(6), 1347.

<sup>36</sup> Ibid 1364.

<sup>37</sup> NSW Department of Communities and Justice (n 2) [4.35]-[4.36].

<sup>38</sup> Meyer (n 13) 9-10.

exasperation over the amount of paperwork required to report the incident and charge the perpetrator.<sup>39</sup> The Association acknowledges that this is a small sample of interviewees, however these experiences are not isolated or limited to the experience in Queensland, nor are they the universal experience. It highlights that police, as the interface with the justice system, are critical to responses to DFV.

43. The Association raises these issues because the enactment of any proposed coercive control offences will not automatically fix the national scourge of DFV. There needs to be widespread consideration of the factors which may present barriers to victim-survivors accessing the justice system. Systemic and individual change needs to occur within the police force which supports and understands victim-survivors of coercive control. This is particularly important as coercive and controlling patterns of abuse are complex and not as easily recognised as the signs of physical abuse.
44. To combat this persistent historical misunderstanding of DFV in policing in Scotland, over 2019 and 2020, the Scottish Police Authority trained over 14,000 officers to recognise the complex nature of DFV as not only physical or violent.<sup>40</sup> This, coupled with a public awareness campaign about coercive control since the *Domestic Abuse (Scotland) Act 2018* was enacted, has resulted in Scottish authorities prosecuting more coercive and controlling offences.
45. It is the Association's view that thorough training and resources should be supplied to key participants in the justice system whether or not coercive control legislation is to be enacted. Further education of police, the legal profession and Judges as to DFV is of great importance. The NSW justice system should look to implement a resource, similar to the support document used by police and prosecutors in England and Wales,<sup>41</sup> to ensure that the nature of coercive and controlling behaviour is scrupulously understood by those who are to apply the offence.

*c The need for further data and information*

46. A significant next step in the discussion concerning coercive control is to identify whether and where further information and data is required, to assist considerations and ensure the decision-making process is grounded in a sound evidential basis. The Discussion Paper does this well, for example, at [1.14] in acknowledging the value that BOCSAR's research will bring.
47. The Association supports completion of this research and review, particularly around the way that current stalking or intimidation offences are being used and interpreted, to inform decision-making about whether any extension of present offences is necessary or appropriate.
48. The Association considers that the Joint Select Committee would also be assisted by further information about the difficulties experienced under each of the Scottish, English and Tasmanian models of coercive control offences and also any positive attributes of the varying models. As noted above, in a submission to the House of Representatives inquiry last year WLST suggested that:<sup>42</sup>

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<sup>39</sup> Ibid 10-11.

<sup>40</sup> Chief Constable Iaian Livingstone QPM, '[Annual Assessment of Policing Performance 2019/20 and Quarterly Report January-March 2020](#)' (Speech, Scottish Police Authority Meeting, 30 June 2020) 2.

<sup>41</sup> UK Home Office, '[Statutory Guidance Framework on Controlling or Coercive Behaviour in an Intimate or Family Relationship](#)' (2015).

<sup>42</sup> Women's Legal Services Tasmania (n 3).



a comprehensive review of the Tasmanian provisions would be timely and appropriate, should other jurisdictions in Australia consider introducing similar offences. The Tasmanian experience can provide valuable insights into the difficulties of operationalising coercion and control offences...

49. As the first and only jurisdiction to enact a specific coercive control offence within Australia, the Association considers that Tasmania's experience would be useful in understanding the complexities of legislating a separate coercive control offence in this country and ongoing concerns as to the effectiveness of its operation.
50. The Association notes that the ongoing federal House of Representatives *Inquiry into family, domestic and sexual violence* also includes a specific term of reference concerning coercive control. That inquiry has received close to 300 submissions on the issue of coercive control, including from Tasmanian stakeholders such as the WLST.<sup>43</sup> In December 2020 the inquiry also heard evidence on the effectiveness and difficulties experienced under the Scottish and English systems.<sup>44</sup> The Association encourages the Joint Select Committee to build on this existing work.

*d The dangers of a nationally inconsistent approach to coercive control*

51. It is important to acknowledge that one of the challenges in responding to the Discussion Paper is that the devil will be in the detail of any proposed specific offence. As a nation that currently has nine different legal jurisdictions dealing with matters relating to aspects of DFV, differences in approaches between those jurisdictions may also be critical. A victim-survivor of DFV should not receive different treatment in Australia because of the state or territory they happen to be in. Appendix A of the Discussion Paper sets out the relevant but varied existing provisions relating to DFV in each state and territory.
52. The Law Council of Australia has previously stated that while "This is ultimately a matter for the states and territories, however, the Law Council considers the Australian Government is well-placed to facilitate a national dialogue on whether the offence [of coercive control] should be created".<sup>45</sup>
53. The Law Council also noted the importance of "a consistent, uniform definition for all states and territories".<sup>46</sup> Similarly, in 2020 Legal Aid NSW suggested "there should be a consistent and expansive definition of domestic and family violence across Australian jurisdictions that incorporates all forms of domestic and family violence".<sup>47</sup>
54. The Association agrees and recommends that any approach proposing enactment of an offence concerning coercive control should be considered and developed in concert with other states and territories through a forum such as the Council of Attorneys-General Family Violence Working Group to ensure consistency.

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<sup>43</sup> Ibid.

<sup>44</sup> See generally Evidence to the Standing Committee on Social Policy and Legal Affairs (n 1) (Dr Scott and Ms Kilburn).

<sup>45</sup> Law Council of Australia, Submission 101 (Supplementary) to the Standing Committee on Social Policy and Legal Affairs (n 1).

<sup>46</sup> Ibid [28].

<sup>47</sup> Legal Aid NSW, Submission 126 to the Standing Committee on Social Policy and Legal Affairs (n 1) 38.

*e Risks of a new offence capturing innocuous behaviour*

55. The Discussion Paper recognises the need to “protect against unintended capture of innocuous behaviour or behaviour which should not reach the threshold of criminality”.<sup>48</sup> There is existing community concern that if not appropriately calibrated, a new offence might have the effect of criminalising behaviour that is not within the intended scope of the offence. One example arises in relation to conduct regarding the parenting of a child. Drafting an offence to distinguish between coercive control and reasonable parental discipline of a child is very difficult to calibrate.

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<sup>48</sup> NSW Department of Communities and Justice (n 2) [3.7], [7.24].

## F. The role of properly resourced legal systems in protecting victim-survivors

56. Regardless of what the law is, and whether a specific offence for coercive control exists or not, it is of no effect if victim-survivors cannot access or afford to access justice services to enforce their legal rights and protect their safety in a timely manner. The Discussion Paper rightly acknowledged that introducing a specific offence “would likely have resourcing implications which would need to be carefully considered”.<sup>49</sup> This chapter outlines existing resourcing shortfalls which must be taken into account, and in any event should be addressed as a matter of urgency, regardless of whether a specific coercive control offence is enacted.
57. It is important to understand the context in which coercive control threatens the health and lives of millions of Australians, in order to combat it. These influences exist both within and external to the criminal law system, encompassing the family law and health systems.
58. It is undeniable that the timely and just resolution of family law matters promotes the health, safety and well-being of victim-survivors of DFV. State and Commonwealth Courts, family law support services and the legal assistance sector (including Legal Aid NSW) are frontline services that provide essential assistance and protection to victim-survivors. These must be recognised, resourced and funded as essential services at all times, to function properly in ordinary times and to meet the demands of crises when these occur.
59. Without properly resourced, funded and accessible courts, victim-survivors of DFV are left without a means to seek protection, enforce their rights and safety, and hold perpetrators to account. The courts and legal assistance providers were already over-worked, chronically under-funded and severely under-resourced before the COVID-19 pandemic struck. Despite best efforts, this has inevitably impacted upon their ability to respond swiftly to community need.
60. The Association appreciates the significant budgetary pressures facing both the NSW and Federal governments at this time and that there have been some funding allocations in this area. However, the allocations are inadequate to meet existing need.
61. For example, the 2020-21 NSW Budget in November provided \$55 million in 2020-21 for the Sustaining Critical Infrastructure Program which includes investment in audio visual link facilities across NSW Courts. The Budget also forecast that the percentage of domestic violence related criminal offences finalised in the Local Court within three months of the first court appearance will fall further in 2020-21 to 45% from 53.8% in 2019-20.<sup>50</sup> While this boost to infrastructure is welcome, funding remains inadequate to combat the sheer volume of matters and it goes without saying that delays in the DFV system comes with risks including leaving victims in danger and disengagement with the legal system.
62. In addition to the compelling health, welfare and safety imperatives to act, DFV has dire financial consequences. Violence against women and their children is estimated to cost the economy \$26

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<sup>49</sup> NSW Department of Communities and Justice (n 2) [7.28].

<sup>50</sup> NSW Government, *Outcome Statement – Stronger Communities Cluster* (2020) 7-12.

billion each year, with victim-survivors bearing around half of that cost.<sup>51</sup> Further, there is a direct causal link between resourcing and the timeliness and quality of justice delivered by the courts.

63. Failing to invest properly in the legal system is a false economy and only creates additional, unacceptable social and financial pressures on the Courts and our community.

#### *Backlogs and delays in the NSW Courts*

64. The operation of the existing law and ADVO system can be significantly improved by the provision of court and judicial resources to meet existing need and resolve delays caused in DFV matters by significant caseloads and backlogs.
65. The Association was concerned that during the COVID-19 pandemic, the NSW Parliament temporarily extended the requirement in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) that a matter must be listed on the domestic violence list at the appropriate court no more than 28 days after the making of the provisional order to six months. Six months is significantly too long to have such a provisional order in place, a breach of which is a serious criminal offence. Provisional orders are an important tool for police to manage the immediate circumstances of domestic violence. However, the ease with which provisional orders are obtained by police must be balanced with the requirement for judicial oversight.
66. Further, as outlined above, the Association was concerned that in December 2020 the NSW Local Court was placed in the position of having to increase the ‘Time Standard’ under the *Local Court Practice Note Crim 1* for domestic violence cases to be heard and finalised from three months to six months. This was stated to be due to the combined effect of: consistent increases in the Court’s criminal caseload over the last seven years without the provision of additional judicial resources and the inadequate allocation of resources to deal with both the increased pending caseload as a result of arrangements put in place during COVID-19 and several legislative amendments to the *Criminal Procedure Act 1986* (NSW) announced prior to the facilities offered by the legislation being fully funded, implemented and accessible across Local Courts. This is extremely concerning, as it will have adverse implications for complainants and alleged perpetrators alike.
67. This proposal would be of concern at any time, but is of particular concern in view of the shadow pandemic of DFV that accompanied the COVID-19 pandemic.
68. Throughout the pandemic, the Association has consistently raised concerns with the Department of Communities and Justice about initiatives that would impact on the speed with which matters involving DFV could be promptly brought before the court, heard and determined. The existing backlogs for DFV matters to be heard and resolved are significant and not only have an adverse impact on those waiting to have a matter determined, they may pose a real risk to the safety of victims and may also deter other victim-survivors from coming forward to seek safety and protection.
69. The Association encourages the Department to urgently consult with the courts and revisit the funding allocations provided to the Local Court in particular to assist with matters involving DFV

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<sup>51</sup> Australian Government, *Women’s Economic Security Statement* (2020) 62.

and urgently provide additional resourcing to enable these matters to be brought before the courts at the earliest opportunity.

*Chronic under-funding and under-resourcing of the family law system by successive federal governments*

70. There is a critical nexus between state and federal systems in dealing with DFV issues in Australia. Consequently, any state reforms concerning coercive control will impact on victim-survivors and perpetrators involved also in disputes in the federal family law system, and vice versa.
71. DFV and child abuse issues are ordinarily dealt with by the states and territories while financial and parenting issues arising on family breakdown are dealt with by the Commonwealth. All private proceedings concerning families fall within federal jurisdiction and are primarily dealt with by the Family Court and the Federal Circuit Court. However, the state and federal systems and proceedings are inextricably connected. Almost 70% of matters before the Commonwealth family courts involve allegations of family violence.<sup>52</sup> Section 4AB of the *Family Law Act 1975* (Cth) contains an expansive definition of family violence, including of a coercive and controlling kind.<sup>53</sup>
72. The Association has previously made detailed submissions about the under-funding and under-resourcing of the federal family law system and its courts,<sup>54</sup> despite their important role in protecting children and families impacted by DFV, in concert with state courts. This under-resourcing has produced delays and costs that impact on the accessibility and quality of justice for victim-survivors of DFV.
73. Before the COVID-19 pandemic, the Family Court and Federal Circuit Court were each already facing backlogs of more than a year's worth of cases.<sup>55</sup> The backlog of all pending non-appeal applications in the Family Court has grown from 4,997 to 6,720 (34%) from 2012-13 to 2018-19, while the backlog of all pending applications in the Federal Circuit Court has grown from 31,067 to 53,320 (72%).<sup>56</sup> Those backlogs continued to rise in 2019-20 in each court.
74. Where proceedings involve allegations of abuse, violence and risk, the determination of those allegations becomes more difficult with the passage of time. Delays also materially increase costs in providing services to address parties' ongoing needs while awaiting a determination and costs, including legal costs, incurred by parties to address their difficulties while awaiting a hearing. There is a further risk to victim-survivors if the courts can be used as a tool for abusers to control and intimidate their ex-partners, perpetrate financial abuse<sup>57</sup> and weaponise the custody of children. Adequate resourcing of the Commonwealth Courts is important to better protect victim-survivors by reducing delay and moving people through the system in a safer, more timely way.

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<sup>52</sup> Women's Legal Services Australia, *Safety first in family law* (2019) <[www.wlsa.org.au/campaigns/safety\\_first\\_in\\_family\\_law](http://www.wlsa.org.au/campaigns/safety_first_in_family_law)>; see also the 2017 House of Representatives Inquiry (n 11) [1.6].

<sup>53</sup> See *Family Law Act 1975* (Cth) s 4AB, which permeates the Act's protective, parenting and financial aspects and operation.

<sup>54</sup> See <https://nswbar.asn.au/the-bar-association/publications/submissions>.

<sup>55</sup> Nicola Berkovic, 'Courts reject questions over delays and judges', *The Australian* (online) 23 October 2019, citing Family Court and Federal Circuit Court *Annual Reports 2018-19* (2019).

<sup>56</sup> Australian Productivity Commission, 'Part C – Justice', *Report on Government Services 2021*, table 7A.21.

<sup>57</sup> Jonathan Hair, 'Ex-partners use finances and court systems to continue abuse: report', *ABC News* (online) 7 March 2018 <<https://www.abc.net.au/news/2018-03-07/womens-legal-service-victoria-financial-abuse-report/9522344>>.

### *The need for adequate emergency planning*

75. Failing to be alert to and address DFV in both proactive and reactive emergency planning and responses puts victim-survivors of DFV at risk. Parkinson and Zara noted that “Emergency management can play a part in preventing DFV after disaster by attending to it in planning, response and recovery stages”.<sup>58</sup>
76. It has been recommended that targeted funding should be provided to emergency management agencies involved in disasters to upgrade policies, practices and provide training in DFV recognition, response and reporting, DFV services should be “a visible and engaged part of disaster recovery”, and funding for these services and women’s groups should be increased when demand increases post-disaster.<sup>59</sup> The Association reiterates these and further recommends that Governments should plan and budget for the downstream justice impacts and demands on legal services and courts. Although difficult to quantify, these impacts must nonetheless be anticipated.
77. The UN has declared domestic violence in the context of the COVID-19 pandemic a “shadow pandemic”,<sup>60</sup> and NSW has not been immune. During August and September 2020 Women’s Safety NSW conducted an online survey of 53 frontline DFV specialists, including each of the Women’s Domestic Violence Court Advocacy Services, on the impacts of COVID-19 on DFV in NSW. Survey findings included that:<sup>61</sup>
- a. 45% of respondents stated that their client numbers have continued to rise since COVID restrictions began to lift and when compared to the same time in 2019;
  - b. 80% had noticed an increase in the percentage of higher risk cases since the lifting of COVID restrictions, identifying the worsening economic and financial impacts of COVID as a key factor;
  - c. 86% have noticed an increase in the complexity of client needs since the lifting of COVID restrictions, also due to the economic and financial impacts of COVID;
  - d. 73% noticed an escalation in violence and abuse triggered by drug and alcohol abuse;
  - e. 63% stated that a key service issue for their clients is inconsistent police responses.
- One Regional WDVCAS reported seeing “at least a 75% increase in referrals having an ADVO application” and a tripling of Safety Action Meeting referrals for serious threat matters.<sup>62</sup>
78. The survey also found that “Frontline services have continued to report that the current system is unable to provide the support needed to increasingly vulnerable women and children who have experienced violence during COVID”.<sup>63</sup> Key Service gaps identified included:

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<sup>58</sup> Parkinson and Zara (n 21) 56.

<sup>59</sup> Women’s Health Goulburn North East (n 22).

<sup>60</sup> UN Women, ‘Violence against women and girls: the shadow pandemic’, (Media Release, 6 April 2020) <<https://www.unwomen.org/en/news/stories/2020/4/statement-ed-phumzile-violence-against-women-during-pandemic>>.

<sup>61</sup> Women’s Safety NSW, *Continued Impacts of COVID-19 on Domestic and Family Violence* (September 2020) 6 <[https://www.womenssafetynew.org.au/wp-content/uploads/2020/09/Continued-impacts-of-COVID-19\\_WSNSW-1.pdf](https://www.womenssafetynew.org.au/wp-content/uploads/2020/09/Continued-impacts-of-COVID-19_WSNSW-1.pdf)>.

<sup>62</sup> Ibid 7-8.

<sup>63</sup> Ibid 13.

- a. Access to ongoing accommodation (71%);
  - b. Inconsistent police responses (63%);
  - c. Access to support/case management to support clients in their complex needs (58%);
  - d. Inconsistent court outcomes (50%);
  - e. The ability to call police safely and silently (i.e. without the abuser knowing) (42%);
  - f. Access to culturally specific community supports (for particular women e.g. Aboriginal, CALD, women with disabilities, older women, younger women and LGBTIQ+ ) (31%);
  - g. Access to free legal services, for example to assist with cross applications or child recovery where there are child safety concerns (29%).
79. It is difficult to ascertain the scale of impact for many reasons, including that a number of people exposed to DFV may not currently be able to safely access support services due to public health restrictions or isolation. Anecdotal reports of increased escalation of DFV in Australia surfaced early.<sup>64</sup> Over four weeks in March and April, the number of urgent applications filed increased 39 per cent in the Family Court and 23 per cent in the Federal Circuit Court.<sup>65</sup> The Courts responded on 26 April by establishing a COVID-19 list.<sup>66</sup> Urgent parenting disputes arising out of the crisis are dealt with on this list and matters on the list are required to be assessed and referred to a judge within 72 hours. This has placed strain on the Courts and judicial officers, who are already under significant pressure and crippling workloads.
80. While a breakdown of COVID-19-related matters or DFV matters across geographic registries is not available, as at November 2020, five Federal Circuit Court Judges in the Sydney registry had between 300 to 400 cases each in their dockets.<sup>67</sup> Another Sydney-based Federal Circuit Court Judge and three Federal Circuit Court Judges at the Parramatta Registry had between 400-500 cases in their dockets.<sup>68</sup> The single Federal Circuit Court Judge in the Wollongong registry had more than 600 cases in their docket.<sup>69</sup> The Chief Judge of the Federal Circuit Court has previously indicated that the ideal manageable number should be around 100 cases per Judge's docket.<sup>70</sup>
81. While platforms like Teams and Zoom have enabled some court hearings to continue remotely during lockdowns and social distancing requirements, the use of such technology has raised considerations as to whether it is in the interests of justice and the parties for all matters to proceed through video-conferencing. Technology must not be used in matters where it would undermine the integrity of processes such as giving evidence or cross-examination. For children or victim-

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<sup>64</sup> See, eg, Julie Baird, 'Domestic abuse advocates warn of an increase in violence amongst coronavirus crisis', *ABC News* (online), 20 March 2020 <<https://www.abc.net.au/news/2020-03-20/domestic-violence-spike-amid-coronavirus-crisis/12074726?nw=0>>.

<sup>65</sup> Family Court, 'The courts launch COVID-19 list to deal with urgent parenting dispute' (Media Release, 26 April 2020) <<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/news/mr260420>>.

<sup>66</sup> Ibid.

<sup>67</sup> Family Court of Australia and Federal Circuit Court of Australia, [Responses to written questions on notice](#), 16 November 2020 (received 18 November 2020).

<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

<sup>70</sup> See 2017 House of Representatives Inquiry (n 11) 153 [4.250].

survivors of DFV giving evidence from home, there are risks that the witness may be influenced by who they think may be listening in, or be subjected to duress by someone else present in the room off-camera. How clearly a witness's facial expressions are visible due to the quality of the equipment or video connection can impact on how credibly their testimony is received.

82. The importance of ensuring emergency responses specifically address DFV has been recently illustrated in the risks posed by e-witnessing and e-signature arrangements during COVID-19. Many jurisdictions have introduced temporary measures to allow e-witnessing and e-signature of legal documents previously required to have been witnessed or signed in person.<sup>71</sup> Providing continuity in the service of witnessing documents is important to allow individuals to continue to manage their affairs during the pandemic. These provisions have also enabled urgent protections to be obtained for some victim-survivors of DFV, which would not have been possible otherwise.
83. However, these provisions contain inherent risks which must be balanced by careful safeguards to prevent abuse and any unintended consequences. Before COVID-19, in-person requirements for witnessing or signature were considered important safeguards, including against fraud, duress or undue influence. The Association is concerned about the possibility for vulnerable people in situations of DFV to be coerced into e-witnessing or e-signing significant documents during the pandemic. This could include a person being pressured into e-signing or e-witnessing a document under duress from an abuser in the room off-camera. Organisations, such as banks, may not be able to discern signs of duress including facial cues and body language as readily, as videoconferencing technologies can make it more difficult for a person's features to be seen clearly, particularly if internet coverage/bandwidth is insufficient. This may also give rise to fraud or unauthorised action as intimate partner abusers may be aware of their partner's personal details, security questions and able to access ID documents such as a passport or driver's licence.
84. The protection of wet-ink requirements should only be departed from as a last resort where in-person signature is not safe or practicable. The Association recommends that further consideration be given to protecting victim-survivors of DFV from duress and financial abuse in this context. These could include a possible requirement for a signatory or testator to identify all persons present in a room (including off camera), a prohibition on obscuring a background during a videoconference or a requirement to retain a video record of a videoconference involving signing/witnessing of a document. Any emergency measures should be repealed at the earliest opportunity. If governments consider such measures have merit on a more permanent basis, these should be introduced through primary – not secondary – legislation to ensure these receive the benefit of full parliamentary scrutiny and consultation with all relevant stakeholders.

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<sup>71</sup> See, eg, *Corporations (Coronavirus Economic Response) Determination (No. 1) 2020* (Cth); *Coronavirus Economic Response Omnibus (Measures No. 2) Act 2020* (Cth) Sch 5; *Electronic Transactions Amendment (COVID-19) Witnessing of Documents) Regulation 2020* (NSW).



## G. Inconsistency between state and federal governments' responses to DFV

85. Justice services operate on the front line in responding to violence, alongside police and support services. It is very difficult for victim-survivors of DFV and children at risk to access support and resources to stay safe, including to enforce their legal rights, when the system is fragmented.

86. There is consensus that the interaction between differing legal frameworks governing DFV in Australia needs to be improved,<sup>72</sup> as “there is no single pathway into the family violence system”.<sup>73</sup>

87. The ALRC’s 2018 root and branch review of Australia’s family law system identified the risk of children and victim-survivors of DFV falling through what the ALRC called the “jurisdictional gap” between state/territory and Commonwealth systems.<sup>74</sup> The ALRC Report explained that:<sup>75</sup>

Many submissions to the Commission complained of the confusion that people felt about their involvement in the family law system that may have required them to attend different courts for different aspects of the issues they were facing in family law, child protection and family violence.

Essentially, much of the “first aid” processes about violence occur in the state magistrates courts. Child protection matters (which may result in a child is being placed in care apart from his or her parents) are typically heard in Children’s Courts (which may be magistrates courts acting in that capacity.) These are state or territory courts because the law involved is state or territory law.

Inter-parental disputes about children and disputes about the division of property between parties to an intimate relationship which has broken down and most financial matters between them, are dealt with either in the Commonwealth Family Court of Australia or the Commonwealth Federal Circuit Court.

88. The ALRC Report made several recommendations intended to overcome jurisdictional gaps and information sharing blind-spots that pose risks to children because of the fractured jurisdiction and agencies associated with state child protection and federal family law jurisdictions.<sup>76</sup> These recommendations included that the Federal Government should work with states/territories to:

- “develop and implement a national information sharing framework to guide the sharing of information about the safety, welfare, and wellbeing of families and children between the family law, family violence, and child protection systems...”; and
- “consider expanding the information sharing platform as part of the National Domestic Violence Order Scheme to include family court orders and orders made under state and territory child protection legislation”.

89. Further, the ALRC Report’s first recommendation was that:

The Australian Government should consider options to establish state and territory family courts in all states and territories, to exercise jurisdiction concurrently under the *Family Law Act 1975*

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<sup>72</sup> See ALRC Report (n 29) [4.43], [4.83].

<sup>73</sup> Royal Commission into Family Violence, *Summary and recommendations* (2016) No 132 Session 2014-16, 19.

<sup>74</sup> Ibid.

<sup>75</sup> ALRC Report (n 29) [4.98]-[4.100].

<sup>76</sup> Ibid Chapter 4 ‘Closing the Jurisdictional Gap’.

(Cth), as well as state and territory child protection and family violence jurisdiction, whilst also considering the most efficient manner to eventually abolish first instance federal family courts.

90. The Commonwealth Government is yet to respond to the ALRC's 60 recommendations. While there is no statutory requirement for a state government to respond to an ALRC report, the Association considers that NSW should actively collaborate with the Commonwealth to ensure there is no further delay in responding to the recommendations directly relating to matters of state government jurisdiction and overlap. This is particularly important given the interconnected nature of issues arising in connection with coercive control and DFV.
91. In 2019 the Federal Government announced \$11 million to seed fund a pilot co-location mode to "embed state and territory family safety officials (such as child protection or policing officials) in family law courts across Australia" and scope technological solutions to facilitate timely information sharing between the family law courts and the DFV and child protection systems. The Association recommends that the Joint Select Committee have regard to the impacts of these developments as part of the context of this inquiry. NSW law does not and cannot operate in a vacuum because of the overlapping subject matter between federal and state jurisdictions.
92. Further, the Association recommends that the Joint Select Committee carefully consider the potential for the ALRC's recommendations to improve protections under existing law for victim-survivors, such as through improved collaboration, coordination and integration between Commonwealth and State family law systems, including family support services and DFV and child protection systems. The Association encourages the NSW Government to work collaboratively with the Commonwealth in relation to the ALRC Report's recommendations where there is overlap and state concerns are engaged.
93. The Association considers these matters are within the Joint Select Committee's terms of reference, as questions 3, 4, 14 and 15 of the Discussion Paper are not specific to NSW Courts or laws.

#### *The importance of maintaining a stand-alone, specialist Family Court*

94. Consideration of the issue of coercive control exists in a context where a bill is currently before the Federal Parliament proposing to abolish the specialist, stand-alone Family Court as we know it by collapsing it into the generalist, lower level, overburdened and under-resourced Federal Circuit Court.<sup>77</sup> The prevalence of DFV in the system makes specialisation critical to promote safe engagement for all victim-survivors with the courts, from the time a matter is filed.
95. The Government's merger proposal is opposed by more than 110 stakeholders,<sup>78</sup> including the legal profession, Women's Legal Services Australia, Community Legal Centres and the Association. Abolishing a stand-alone specialist, multi-disciplinary court ecosystem dedicated exclusively to family law matters is contrary to the advice of experts and is not in the best interests of those in need of its services, including victim-survivors. Further, the merger will not resolve the jurisdictional gap identified by the ALRC or address the impacts of chronic under-resourcing.

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<sup>77</sup> See Federal Circuit and Family Court of Australia Bill 2019 (Cth).

<sup>78</sup> Law Council of Australia, 'Put families over politics, abandon flawed family court merger' (Media Release, 20 November 2020) 1.

## H. The need to fund the legal assistance sector to support victim-survivors

96. Access to legal assistance services is amongst the many challenges faced by victim-survivors of DFV. Equal and fair access to the law is undermined by the reality that, without the support of legal assistance providers or Legal Aid NSW (together, the **Legal Assistance Sector**), many people are not able to afford legal representation in criminal, civil or family law matters.
97. The Association has consistently raised concern about the adverse impacts of underfunding the Legal Assistance Sector on access to justice and the quality of justice in NSW.
98. The Senate acknowledged in May 2018 that while 14% of Australia's population live below the poverty line, just 6% would actually qualify for Legal Aid through a state/territory Legal Aid Commission under the contemporary tests due to a chronic lack of resourcing.<sup>79</sup> Funding for state and territory Legal Aid Commissions had been progressively cut by successive federal governments of both political persuasions, to the point where Commonwealth funding had reached its lowest level in more than two decades.<sup>80</sup>
99. In 2019, Legal Aid NSW urgently requested an increase of funding \$236.8 million to reduce delays in the District Court. While the Association welcomed an \$88 million injection over four years, announced in 2019 by the NSW Government into the state's chronically underfunded legal aid system, it warned that this funding must be followed by further funding to improve justice. The \$88 million announced was only about a third of what Legal Aid NSW advised was needed.
100. This is not just a state responsibility - the Commonwealth Government must take its share of the responsibility for the current Legal Aid crisis as a 50:50 partner with state governments, a commitment it has failed for many years to keep. Federal funding is falling hundreds of millions of dollars short of what is required to meet current demand.
101. Further, even before the pandemic, at any given time, Family Violence Prevention Legal Services had to turn away between 30 to 40% of people contacting them for support because they simply did not have the resources to meet community demand.<sup>81</sup>
102. In May 2020 the NSW and Federal Governments announced \$21 million in funding for DFV services, including to increase staff at Legal Aid's NSW Domestic Violence hotline and improve service capacity at the WDVCAS's.<sup>82</sup> However, as outlined above, the Women's Safety Survey demonstrates that there continue to be significant areas of unmet need.

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<sup>79</sup> Ibid.

<sup>80</sup> Commonwealth, *Parliamentary Debates*, Senate, 10 May 2018, 2868 (Senator Griff, South Australia), cited in Law Council of Australia, 'Senate calls for legal aid funding increase post Budget' (Media Release, 10 May 2018) <<https://www.lawcouncil.asn.au/media/media-releases/senate-calls-for-legal-aid-funding-increase-post-budget>>.


<sup>81</sup> Australian Women Against Violence Alliance, 'Women's lives will be at risk because of decision not to act today – domestic violence experts' (Media Release, March 2020).

<sup>82</sup> Ministers Speakman and Ruston, 'COVID-19: Funding to boost domestic violence support' (Media Release, 26 May 2020).

### *Consequences of under-funding and under-budgeting*

103. Underfunding the Legal Assistance Sector continues to adversely impact clients, victim-survivors and witnesses of crime, and places further pressure on an already overstretched court system. Equal and fair access to the law is undermined by the reality that, without legal assistance, many people are not able to afford legal representation in criminal, civil or family law matters.
104. One-off funding injections are not enough. The Legal Assistance Sector must be proactively funded on an ongoing basis to ensure the justice system and the legal assistance sector are best equipped to respond to and support victim-survivors of DFV at all times, including during crises. This must include adequate, sustained funding for specialised legal assistance providers, such as First Nations' and Women's Legal Services and family violence service providers.
105. Chronic under-funding of the Legal Assistance Sector has meant that already complex and emotionally-fraught matters are made more difficult by high rates of unrepresented litigants. Most litigants who are unrepresented cannot afford legal representation.<sup>83</sup> Dewar, Smith and Banks' 2000 *Litigants in person in the Family Court of Australia* research study identified that unrepresented litigants have a wide range of needs and assistance, including information about relevant support services and court procedures, advice such as on form filling, court etiquette, preparing court documents or the rules of evidence, and emotional and practical support.<sup>84</sup>
106. For these reasons, cases involving one or more parties without legal representation take significantly longer to conduct properly and justly. For any litigant, appearing without representation is intimidating, time-intensive, imposes significant stress and emotional strain, and may carry a financial cost if a person is required to take time off work to attend court. These pressures are compounded for victim-survivors of DFV who may be placed at greater risk of harm through exposure to retraumatisation or further abuse at the hands of their perpetrator through behaviour or signalling in a courtroom. It is also difficult for virtual hearings to be conducted effectively if litigants are self-represented, including because they may not be able to access to sufficient technology, and virtual hearings compound communication difficulties, especially if assistance is required from an interpreter.

## I. Conclusion

107. Thank you again for the opportunity for the Association to make a submission to the Joint Select Committee. The Association would be pleased to assist the Joint Select Committee with any questions it may have. If you would like any further information, or to discuss this submission, please contact the Association's Director of Policy and Public Affairs, Elizabeth Pearson, via .

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<sup>83</sup> John Dewar, Barry Smith, Cate Banks, *Litigants in Person in the Family Court of Australia* (2000), Research Report No 20, 1.

<sup>84</sup> Ibid.