

**Submission  
No 139**

## **COERCIVE CONTROL IN DOMESTIC RELATIONSHIPS**

**Organisation:** Legal Aid NSW

**Date Received:** 19 February 2021

**NSW Parliamentary Inquiry  
into Coercive Control**

**Legal Aid NSW submission to the  
Joint Select Committee**

*19 February 2021*

323 CASTLEREAGH ST

HAYMARKET NSW 2000 / DX 5 SYDNEY

**Legal Aid**   
NEW SOUTH WALES

## About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, early resolution legal assistance, extended legal assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with LawAccess NSW, community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 27 Women's Domestic Violence Court Advocacy Services, and health services with a range of Health Justice Partnerships.

The Legal Aid NSW Family Law Division provides services in Commonwealth family law and state child protection law. Specialist services focus on the provision of Family Dispute Resolution Services, family violence services through the specialist, multidisciplinary Domestic Violence Unit (**DVU**) and the early triaging of clients with legal problems through the Family Law Early Intervention Unit. Legal

Aid NSW provides duty services at a range of courts, including the Parramatta, Sydney, Newcastle and Wollongong Family Law Courts, all six specialist Children's Courts and in some Local Courts alongside the Apprehended Domestic Violence Order (**ADVO** or 'protection order') lists. Legal Aid NSW also provides specialist representation for children in both the family law and care and protection jurisdictions.

The Civil Law Division provides advice, minor assistance, duty and casework services from the Central Sydney office and 20 regional offices. It focuses on legal problems that impact on the everyday lives of disadvantaged clients and communities in areas such as housing, social security, financial hardship, consumer protection, employment, immigration, mental health, discrimination and fines. The Civil Law practice includes dedicated services for Aboriginal communities, children, refugees, prisoners and older people experiencing elder abuse.

The Criminal Law Division assists people charged with criminal offences appearing before the Local Court, Children's Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court. The Criminal Law Division also provides advice and representation in specialist jurisdictions including the State Parole Authority and Drug Court.

Should you require any further information, please contact:

Brianna Terry  
Senior Law Reform Solicitor  
Strategic Law Reform Unit  
Phone [REDACTED]  
Email [REDACTED]

## Executive Summary

Legal Aid NSW welcomes the opportunity to provide a submission to the Joint Select Committee (**Committee**) inquiry into coercive control in domestic relationships.

### *Legal Aid NSW services*

Domestic and family violence cuts across Legal Aid NSW's family, civil and criminal law divisions and impacts on many of our clients. We provide specialist services to victims<sup>1</sup> of domestic and family violence, including the Domestic Violence Unit (**DVU**), a trauma-informed multidisciplinary service made up of lawyers, social workers and financial counsellors who work together to assist victims escaping domestic and family violence to address their legal and non-legal needs.<sup>2</sup>

Our Women's Domestic Violence Court Advocacy Program (**WDVCAP**) administers NSW Government funding to 27 non-government organisations to provide Women's Domestic Violence Court Advocacy Services (**WDVCASs**), the main frontline, specialist support service for female victims of domestic and family violence in NSW.<sup>3</sup>

The specialist Elder Abuse Service (**EAS**), established at the Gosford office with federal Government funding for three years under the *Protecting the Rights of Older Australians Elder Abuse Service Trials*, is focused on supporting older people at risk of or experiencing elder abuse. It provides advice to older people on a range of issues, including Apprehended Violence Orders (**AVO**), physical and sexual abuse, financial abuse, and psychological abuse (bullying, harassment, isolation and neglect).

Our criminal defence practice represents people charged with domestic and family violence offences, and in some instances, defends applications for Apprehended Personal Violence Orders (**ADVOs**).

We also acknowledge the significant impact of COVID-19 on victims of domestic and family violence. For example, the Legal Aid NSW Domestic Violence Unit took over 5,000 calls and 3,400 email referrals between March 4, 2020 and 1 February 2021, which is a

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<sup>1</sup> Victim is used in this submission to denote a person who is the victim or complainant or alleged victim of domestic and family violence or sexual violence. Some people who experience violence prefer the term 'victim' and others prefer the term 'survivor'. In this submission, the term 'victim' is intended to be inclusive of both victims and survivors. This submission acknowledges every person's experience is unique and individual to their circumstances.

<sup>2</sup> Legal Aid NSW's Domestic Violence Unit provides duty lawyer services alongside the Apprehended Domestic Violence Order (**ADVO**) list days at Bankstown, Burwood, Fairfield, Liverpool and Wyong Local Courts each week and on the roster at Port Kembla and Toronto Local Courts. The DVU also provides state-wide telephone advice to clients, free outreach advice clinics and conducts litigation casework for matters involving complex domestic and family violence problem

<sup>3</sup> WDVCASs provide women experiencing domestic and family violence and their children with information, safety planning, referrals and support in relation to the court process at all NSW Local Courts. WDVCASs receive referrals of all domestic violence reports made to NSW police about victims under the NSW Government 'Safer Pathway' program.

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significant increase in enquiries compared to prior years which averaged 1,000 calls per year.

Our submission is informed by our experience assisting both victims of domestic and family violence, defendants to ADVO applications and those charged with domestic and family violence offences.

#### *Overall position on proposal to criminalise coercive control*

Legal Aid NSW acknowledges the significant and long-lasting impacts of coercive and controlling behaviour on victims of domestic and family violence—as stated in the Discussion Paper—it impacts on their dignity, liberty, autonomy and personhood, as well as to their physical and psychological integrity. We also acknowledge the evidence cited in the Discussion Paper and elsewhere, that coercive control is a significant predictor of intimate partner homicide, and that the current justice system does not adequately recognise and appropriately respond to the danger and harm posed by patterns of controlling behaviour, particularly non-physical controlling behaviour.

However, Legal Aid NSW considers that at this time, the risks of criminalising coercive control as a standalone offence in NSW outweigh the benefits. Specifically, we are concerned that creating a standalone offence of coercive control could be difficult to prosecute, given the complex, highly contextual nature of coercive control, which includes acts that in other contexts would not be considered potentially criminal. We are concerned that it would place a significant burden on victims as witnesses, and risks re-traumatising victims through the potentially lengthy court process.

Additionally, we are concerned that if the scope of the offence is drafted too broadly, it risks inadvertently capturing non-abusive behaviours and individuals. This risk is particularly acute in relation to diverse communities, who may adhere to more traditional gender norms and divisions of household tasks, Aboriginal and Torres Strait Islander communities who are already over-policed and who experience layers of intergenerational disadvantage and trauma,<sup>4</sup> and victims who are misidentified by the justice system as perpetrators.

In considering whether a new criminal offence is necessary, it is also important to consider the existing NSW legislative framework for domestic and family violence, the *Crimes (Domestic and Personal Violence) Act 2007 (CDPV Act)*, before looking to other jurisdictions where a standalone coercive control offence has been introduced, such as Scotland and the United Kingdom. The legislative framework for responding to domestic and family violence in NSW:

- Already recognises both physical and non-physical forms of violence and abuse.<sup>5</sup>

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<sup>4</sup> See for example: Don Weatherburn and Stephanie Ramsey, 'What's causing the growth in Indigenous Imprisonment in NSW?', *NSW Bureau of Crime Statistics and Research Bureau Brief*, (August 2016). 2; Australian Law Reform Commission, *Pathways to Justice – an inquiry into the incarceration rate of Aboriginal and Torres Strait Islander Peoples*, (December 2017), 92.

<sup>5</sup> See for example, *Crimes (Domestic and Personal Violence) Act 2007* s 9(3)(d), and s 13.

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- Applies to a very broad range of domestic relationships.<sup>6</sup>
  - Recognises that any criminal offence can be recorded as a domestic violence offence if it is committed against a person with whom the perpetrator has a domestic relationship.<sup>7</sup>
  - Both 'stalking' and 'intimidation' are broadly defined and are not limited to conduct involving physical injury/harm or threats of physical injury/harm. The definitions also enable the court to take into account any pattern of violence (especially violence constituting a domestic violence offence) in the defendant's behaviour and applies to a broad range of harassing or intimidating conduct. These broad definitions apply both in respect of the offence provision in section 13 of the CDPV Act and in relation to the grounds for making an ADVO in civil proceedings.<sup>8</sup>
  - Enables a court to make an ADVO against a person, with the aim of protecting another person with whom they have or have had a domestic relationship, from further or future harm.<sup>9</sup>
  - Enables senior police to make provisional ADVOs that offer immediate protection for the victim.<sup>10</sup> While ADVOs are civil orders, contravening an ADVO, including an interim or provisional order, is a criminal offence punishable by up to two years imprisonment.<sup>11</sup>

However, Legal Aid NSW acknowledges that despite this legislative framework, the current justice system does not adequately recognise and appropriately respond to the

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<sup>6</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 5, which defines 'domestic relationship' to be where two people are or have been: married; in a de facto relationship; in an intimate relationship regardless of whether this is sexual or not; living in the same houseful; living as long-term residents in the same residential facility at the same time; in a relationship involving dependence on the ongoing paid or unpaid care of the other person; relatives; or in the case of an Aboriginal person or a Torres Strait Islander, part of the extended family or kin of the other person according to the Indigenous kinship system of the person's culture. Two people also have a domestic relationship with each other if they have both been married, in a de facto relationship or an intimate relationship with the same person.

<sup>7</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 12. This includes personal violence offences, non-personal violence offences that arise from substantially the same circumstances as those in which a personal violence offence arose; and non-personal violence offences committed with the intention of coercing or controlling the other person, or causing them to be intimidated or fearful (section 11).

<sup>8</sup> Stalking is defined in section 8 to include following a person; watching or frequenting the vicinity of places which the person frequently visits; or contacting or approaching the person using the internet or other forms of technology. Intimidation is defined in section 7 to include conduct, including cyberbullying, that harasses or molests a person, approaching a person by any means including phone or over the internet that causes the person to fear for their safety, or any conduct that causes a reasonable apprehension of injury or violence to the person or another person or damage to property).

<sup>9</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ss 16, 39. A court may make an ADVO if it is satisfied on the balance of probabilities that a person has reasonable grounds to fear and in fact fears that the other person will commit a personal violence offence against them or stalk or intimidate them, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 19.

<sup>10</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 28A. A senior police officer may make a provisional ADVO where an incident occurs involving the person against whom the provisional order is sought to be made and the person who would be protected, and a police officer has good reason to believe a provisional order needs to be made immediately to ensure the safety and protection of the person to be protected or to prevent substantial damage to any property of that person, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 26.

<sup>11</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 14.

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danger and harm posed by patterns of coercive and controlling behaviour, particularly non-physical coercive and controlling behaviour.

As outlined further below, we consider that in the current NSW context, these shortcomings should be addressed through non-legislative measures, and that the proposal to create a standalone offence of coercive control should be revisited only after:

1. An extensive training package for frontline justice staff is delivered regarding the dynamics of domestic and family violence, the complex nuances of coercive control and approaches to identifying the primary victim, including for police, supervising police officers and other criminal justice participants including prosecutors, defence lawyers and lawyers working with victims, court staff and judicial officers. This should aim to improve the way domestic and family violence is responded to by the justice and domestic and family violence service system as a whole.<sup>12</sup>
2. An extensive primary prevention and awareness-raising campaign has been implemented for the broader NSW community that acknowledges the gendered drivers of domestic and family violence, and seeks to change the behaviours and norms, in all areas of society that excuse, justify or even promote violence against women and their children.<sup>13</sup>
3. The results of the BOSCAR research about the utilisation of stalking and intimidation offences in NSW are available and have been properly considered.
4. There is sufficient qualitative research and analysis of the operation of similar offences in other jurisdictions, including the United Kingdom and Scotland.

We reiterate that Legal Aid NSW supports further consideration of whether creating a standalone offence is necessary and appropriate, after the above measures have been taken.

*If a standalone coercive control offence is introduced*

We also acknowledge that there is currently significant support from some sectors of the community to introduce a standalone coercive control offence. Therefore, if the NSW Government supports in-principle creating a standalone offence of coercive control, we strongly support the need for more detailed consultation about the specific elements and features of such an offence.

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<sup>12</sup> See for example, *Council of Attorneys-General Communique 23 November 2018*, which noted that at the time, that the Family Violence Working Group is undertaking work to examine the measures to improve family violence competency of professionals across family violence and family law systems participants, to identifies options for improving the family violence competency of professionals working in the family law and family violence systems, < <https://www.ag.gov.au/sites/default/files/2020-03/Council-of-Attorneys-General-communique-November-2018.pdf>>

<sup>13</sup> Commonwealth and State and Territory Governments, *Fourth Action Plan National Plan to Reduce Violence against Women and their Children 2010–2022*, National Priority One: Primary Prevention is Key, (October 2019), 19.

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Against that strongly qualified background, we provide below some preliminary comments on the features of a standalone offence that we consider would be appropriate. Overall, we consider that any standalone offence should be approached cautiously and should be narrowly defined, to minimise the inherent risks of such an offence.

We provide more detailed responses below to relevant questions in the Discussion Paper on coercive control, released by the NSW Department of Communities and Justice (DCJ) to guide this inquiry.

Questions 1, 2 and 9 - What would be an appropriate definition of coercive control? How should it distinguish between behaviours that may be present in ordinary relationships with those that taken together form a pattern of abuse? If an offence of coercive control were introduced in NSW, how should the scope of the offence be defined, what behaviours should it include and what other factors should be taken into account?

Legal Aid NSW considers that it is premature to comment on the specific scope and definition of a standalone offence of coercive control. Legal Aid NSW's strong preference is that, if there is in-principle support from the NSW Government to create a standalone offence of coercive control after the outcome of the present inquiry, consultation should then be undertaken on the specific elements of the offence. However, if the NSW Government supports immediately creating a standalone offence, our preliminary view is that it would be appropriate to have the following features.

- Apply to intimate partner/ex-partner relationships only.

Legal Aid NSW has considered the potential benefits of a standalone offence applying to a wider range of domestic relationships, including the protection this would afford to our clients who experience non-physical forms of abuse in non-intimate partner domestic relationships, such as victims of elder abuse, people abused by their carer, and child victims of forced marriage. However, at this stage, we consider that the risks of capturing non-criminal behaviour and a broader range of relationships outweigh the benefits of potential criminalisation of coercive control in a broader range of exploitative relationships, and the offence should therefore be confined to intimate partner/ex-partner relationships only. This position also acknowledges that coercive control is a significant predictor of intimate partner homicide.

- Apply to knowing and persistent behaviour, and not apply to reckless conduct. This would be consistent with the existing stalk/intimidate offence in the CDPV Act (which does not apply to reckless conduct).
- Require the defendant to intend to cause the victim to fear physical or psychological harm, and require the prosecution to establish that the victim actually feared physical or psychological harm.
- Require a minimum number of incidents to be specified, so that a defendant can know the charge against them, and meaningfully respond to it. This reflects

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fundamental principles of natural justice and procedural fairness to an accused in criminal proceedings.

- Include a non-exhaustive list of behaviours that could be coercive and/or controlling. For example, as in the definition of ‘family violence’ in section 4AV *Family Law Act 1975* (Cth), or the approach in the *Domestic Abuse (Scotland) Act 2018*). We acknowledge that if a new offence is created, some legislative guidance would be useful for the justice sector, and the community.
- Be required to be prosecuted by specialist domestic violence police prosecutors. This recognises the complexity of prosecuting a new offence, and acknowledges the importance of police prosecutors with particular expertise and experience in prosecuting domestic and family violence offences.
- Exclude child defendants under 18 years of age.

Legal Aid NSW considers that the dynamics of domestic and family violence perpetrated by children differ significantly from adult domestic and family violence behaviour, as acknowledged in the Youth Justice Domestic and Family Violence Strategy.<sup>14</sup>

Specifically, the Youth Justice Domestic and Family Violence Strategy recognises that there are a number of key differences between domestic and family violence experienced and perpetrated by adults compared to young people including:

- juveniles domestic and family violence offenders are often victims of domestic and family violence themselves, and have experienced trauma
- juveniles reoffend at double the rate of adults
- there are substantially more juvenile females charged compared with adult females
- the majority of victims of adolescent violence in the home are the young person’s mother and younger siblings; compared to female intimate partners for adult domestic and family violence
- young people exhibiting these behaviours are highly likely to be victims and witnesses of domestic and family violence, historically and currently.
- juveniles using violence in the home are likely to be experiencing mental health issues and trauma
- there is a lack of awareness about adolescent violence in the home which has an impact on the availability of services and the representation of children and young people in domestic and family violence strategies.

Legal Aid NSW strongly agrees with the observation in the Discussion Paper that any standalone offence would need to be complemented by comprehensive social services support for victims and adequate frontline training. We consider that this training should also extend beyond frontline domestic and family violence services and general duties police, and include all criminal justice participants including supervising police, prosecutors, defence lawyers and lawyers working with victims, court staff and judicial officers.

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<sup>14</sup> Youth Justice Domestic and Family Violence Strategy 2019-2022, (November 2019) 4 <<http://www.juvenile.justice.nsw.gov.au/Documents/youth-justice-domestic-and-family-violence-strategy-2019-2022.pdf>>

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Questions 3 and 4 - Does existing criminal and civil law provide the police and courts with sufficient powers to address domestic violence, including non-physical and physical forms of abuse? Could the current framework be improved to better address patterns of coercive and controlling behaviour? How?

We acknowledge that the CDPV Act, in recognising domestic and family violence, extends beyond physical violence and involves the exploitation of power imbalances and patterns of abuse over many years.<sup>15</sup> However, in the experience of Legal Aid NSW, while the existing provisions in the CDPV Act do provide some protections for victims, these are not as effectively utilised as they could be, and the justice system does not adequately recognise non-physical forms of abuse. This is in part because of a lack of widespread understanding of coercive control and non-physical forms of abuse: the key issue is that existing and available measures to tackle coercive and controlling behaviour are not used, rather than the lack of such measures in the first place.

For example, in the experience of our solicitors, it is not uncommon for police to be reluctant to follow up on incidents and patterns of non-physical abuse, or take legal steps to protect the victim. The following case studies demonstrate the experience of our clients in the Domestic Violence Unit.

***Mary's story***

Legal Aid NSW's Domestic Violence Unit recently assisted a woman whose husband has engaged in a pattern of non-physical abuse towards her and their children, over several years.

His behaviour involves swearing, insults, derogative put downs, threatening to physically assault her or the children, spitting on her, forming his fingers into the shape of a gun and banging on the windows while our client and her children barricaded themselves in the car.

Our client has contacted police several times, however police have not applied for an ADVO or made a provisional order, have not contacted her after call outs, or returned her calls when she has attempted to reach them.

***Hanna's story***

Our client experienced ongoing psychological abuse by her ex-partner, involving put downs, swearing, insults, threats to kill, intimidation (carrying a large knife around the house), destroying her property, locking her out of the house on multiple occasions, and interrogating her on her daily life, including her spending, where she went and who she spoke to. He also cut down her favourite tree in the garden that held significant sentimental value to her.

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<sup>15</sup> *Crimes (Domestic and Personal Violence) Act 2007* s 9(3)(d).

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Our client feared for her safety and reported some of her ex-partner's behaviour to police. Police took no further action and no reports were made.

Hanna had fears for her safety and left the home.

Similarly, our solicitors in the Elder Abuse Service<sup>16</sup> note that, while there is much overlap between domestic and family violence and elder abuse, there are issues relating to age that can make it more difficult for older clients to access and enforce their rights and where they are more susceptible to the controlling behaviour of their abusers, which is not adequately captured in the existing provisions of the CDPV Act. These include dependence on the perpetrator, isolation due to incapacity (physical or mental), end of life issues, and tension between the role as parent, where the adult child often needs help with mental health or substance addiction issues. The following case study illustrates an example of behaviour that does not necessarily reach the threshold for the making of an ADVO, but which necessitates an accessible remedy to a vulnerable older person and a consequence to the perpetrator of elder abuse.

### ***Joan's story***

Joan was connected to the Legal Aid NSW Elder Abuse Service (**EAS**) through a friend. Joan is almost blind and has significant hearing issues. She lived alone and receives an aged pension. Her ex son in law was evicted from his own house and just moved in with Joan. There was no discussion – he just turned up and moved in. He came and went at hours of the day and just ignored Joan's request to leave. He wasn't violent.

The EAS issued a Notice to Vacate under section 4 of the *Inclosed Lands Protection Act 1901* (NSW). Eric ignored it. Joan contacted the police but they declined to become involved.

Currently, Joan's options are limited. With the police unwilling to become involved in either an AVO or trespass, Joan's only option is to seek injunctive relief in the Supreme Court which is simply not practicable with filing fees alone of nearly \$1,500.

As a first step, these issues should be addressed by comprehensive training for frontline justice staff regarding the dynamics of domestic and family violence, the complex nuances of coercive control and approaches to identifying the primary victim, including for police, supervising police officers and other criminal justice participants including prosecutors, defence lawyers and lawyers working with victims, court staff and judicial officers. This would improve the way the justice and domestic and family violence service system responds to domestic and family violence. For example, additional training could improve how police consider and act on information about prior domestic and family violence incidents when attending an incident, or the way that the domestic and family violence

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<sup>16</sup> The Elder Abuse Service (EAS) is a Commonwealth funded two-year pilot under the Protecting the Rights of Older Australians Elder Abuse Service Trials. It commenced in October 2019.

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system identifies high-risk cases. We also support consideration of other legislative reforms to address elder abuse.

#### *Offence of stalking and intimidation*

We welcome BOCSAR's current analysis of police utilisation of the offence of stalking and intimidation in section 13 of the CDPV Act, which arises from a recommendation of the Domestic Violence Death Review Team Annual Report 2017-2019. Legal Aid NSW does not support any legislative changes to section 13 of the CDPV Act until the outcome of this research has been properly considered.

However, if a standalone offence of coercive control is implemented in NSW, the definition and scope of the offence of stalking and intimidation should be reviewed to ensure that it does not overlap with the new offence.

#### *Victim impact statements*

Legal Aid NSW is not aware of particular concerns arising regarding Victims Impact Statements, concerning the impact of domestic and family violence offending involving coercive controlling behaviour. We support the current common law position that a sentencing court should only take into account the impact of the charged offence.<sup>17</sup> This position reflects the fundamental principles of procedural fairness and the notion that a person should be punished in respect of the conduct for which they have been charged and found (or have plead) guilty. If there is evidence of particular deficiencies in the current (and recently broadened) Victim Impact Statement scheme as it applies to sentencing proceedings in domestic and family violence matters, then we would be happy to respond further.

## 7. What are the advantages and/or disadvantages of creating an offence of coercive control?

#### *Benefits of creating a standalone offence*

Legal Aid NSW acknowledges that creating a standalone offence of coercive control would enable the justice system to better recognise and address coercive control as an unacceptable form of behaviour in and of itself. It would provide recognition of the distinct and harmful impact that these behaviours can have on an individual, and may prevent such behaviours from occurring. It may enable earlier intervention from the justice and domestic and family violence service system, with the aim of potentially preventing intimate partner homicides.

#### *Risks of creating a standalone offence*

Legal Aid NSW submits that the risks of creating a standalone offence of coercive control outweigh its potential benefits, at this time. Specifically, it presents difficulty in drafting an offence that strikes an appropriate balance between being sufficiently targeted to minimise the risk of capturing non-abusive behaviour and individuals, without creating an

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<sup>17</sup> See *PWB v R* [2011] NSWCCA 84.

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unreasonably high bar for conviction and placing an unduly high burden on victims to provide detailed evidence about the accused's conduct and its impact on them.

There is a risk that a standalone offence, if drafted broadly, may inadvertently capture and criminalise non-abusive behaviours and individuals. By its nature, coercive control includes a range of acts and behaviours that may not be seen as problematic in other contexts, for example, discouraging a partner from visiting their family, assuming full responsibility for household finances. The nuances of this form of abuse can be difficult to translate into legislation.

There is also a risk that criminalisation of some of these behaviours and relationships may disproportionately impact on vulnerable and diverse communities. For example, there may be some culturally and linguistically diverse communities where there is greater adherence to more traditional gender norms and divisions of household tasks. We are also concerned about the potential impact of such an offence on Aboriginal and Torres Strait Islander communities. Aboriginal and Torres Strait Islander men and women are overrepresented in the criminal justice system, and experience layers of intergenerational disadvantage and trauma. Finally, we are concerned that such an offence would capture victims who are misidentified by the justice system as perpetrators.

Legal Aid NSW submits that, given the incident-based nature of the current justice system, and the complex, highly contextual nature of coercive control, a standalone coercive control offence may be very difficult to successfully prosecute, and also presents challenges to evidence-gathering. We are concerned that potentially significant resourcing would need to be invested in a wide range of system changes and training, in return for what may be a small number of successful convictions.

We are also concerned that a standalone offence of coercive control would be more commonly used where it is added to existing criminal charges, which would add little value or additional protection for victims. As noted in the Discussion Paper, coercive control can include acts that are already criminal offences (e.g. physical assault, sexual assault, stalking), as well as acts that in other contexts would not be considered potentially criminal (e.g. discouraging someone from contacting their family, criticising someone for the way they perform household chores, questioning someone's memory). If these latter acts are considered part of a coercive control offence, there could be significant evidentiary challenges associated with obtaining a conviction. This may lead to coercive control charges being laid where other charges are already being laid (e.g. physical assault). The added value of the additional coercive control charge in these cases seems limited.

Prosecution of a standalone coercive control offence may also place a significant burden on victims as witnesses. Depending on how the offence is drafted, victims may have to provide police with very detailed, lengthy statements relating to an accused's conduct over an extended period of time, and then potentially be cross-examined about these statements. The risk of re-traumatising victims through this process is high, and should be considered carefully, especially if the likelihood of a successful conviction is largely uncertain.

We support reconsidering the need for a standalone offence of coercive control, after comprehensive training for police and other criminal justice participants, awareness raising for the general community has taken place, and after a more comprehensive evaluation of the operation of the coercive control offence in other jurisdictions.

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## Question 8 - How might the challenges of creating an offence of coercive control be overcome?

See above our response to questions 1, 2 and 9.

## Question 10 - Could the current legislative regime governing ADVOs better address coercive and controlling behaviour? How?

Legal Aid NSW considers that the Discussion Paper has not provided sufficient evidence or justification to support the need for additional amendments to expand the existing ADVO regime, which already allows courts to make an ADVO where the person in need of protection has reasonable grounds to fear that they will be subject to a domestic violence offence, intimidation or stalking.<sup>18</sup> We repeat our comments above concerning the already broad definitions of intimidate and stalk, which inform the court and police's determination of ADVOs under section 16 of the CDPV Act. The risks that we have highlighted of inappropriate application of a new coercive control offence would be amplified in the civil context, where there is a lower onus of proof of balance of probabilities applies.

## Questions 5 and 11 - Does the law currently provide adequate ways for courts to receive evidence of coercive and controlling behaviour in civil and criminal proceedings? Should the common law with respect to context and relationship evidence be codified within the CPA (or other relevant NSW legislation) to specifically govern its admissibility in criminal proceedings concerning domestic and family violence offences? If yes, how should this be framed?

Legal Aid NSW does not support specific legislative change in respect of the current common law concerning context evidence. The common law already provides for such evidence to be considered in the hearing and in sentencing.<sup>19</sup> Changes that are intended to better capture the dynamics of domestic and family violence may have the unintended consequence of reducing guilty pleas and increasing the trauma of proceedings for victims' families due to the reduced likelihood of the parties agreeing to the facts of the case.

Further, the Discussion Paper has not provided sufficient evidence to justify the need for law reform to codify the common law with respect to context and relationship evidence. In the experience of our solicitors, the current common law test is sufficient and is operating as intended.

## Question 12 - Would jury directions specifically addressing domestic and family violence be of assistance in criminal proceedings? If so, what should a proposed jury direction seek to address?

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<sup>18</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW), s 16.

<sup>19</sup> See, for example, *R v Villaluna* [2017] NSWSC 1390

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Legal Aid NSW does not support legislated jury directions. We consider that mandatory, codified, jury directions can unsettle and complicate law which has developed over many years. We consider that the appropriate place for jury directions is in the Bench Book.

The Bench Book is a valuable resource for the judiciary and contains suggested directions that can be tailored to the individual case. In our experience, legislated jury directions, particularly mandatory ones, do not encourage individual tailoring of jury directions. Ritualistic jury directions are highly undesirable.<sup>20</sup>

Jury directions in the Bench Book also allows for updates in response to appellate decisions, updated evidence on domestic and family violence and changing attitudes and misconceptions in the community about the types of behaviours that constitute domestic and family violence.

Again, the Discussion Paper has not provided examples of jury misdirections, or any additional evidence to illustrate the problem. Legal Aid NSW is not aware of specific instances of juries being inappropriately directed in criminal proceedings involving domestic and family violence.

However, if a standalone offence of coercive control is introduced, as submitted above, Legal Aid NSW strongly supports the need for comprehensive education and training for the justice system and the community, about the types of behaviours that constitute domestic and family violence, and the particular behaviours that would be captured by a coercive control offence.

### Questions 6 and 13 - Does the law currently allow evidence of coercive control to be adequately taken into account in sentence proceedings? Should provisions with respect to sentencing regimes be amended? If so, how?

Legal Aid NSW submits that the current sentencing framework sufficiently captures aggravating factors that the court can take into account, in determining the appropriate sentence.

The NSW Sentencing Council considered this issue in 2016.<sup>21</sup> It observed that the Criminal Court of Appeal (**CCA**) has recognised the element of abuse and control as an aggravating factor on a number of occasions.<sup>22</sup> For example, in assessing the seriousness of an offence of unlawful detention in a domestic and family violence setting, the CCA has looked to the context of the offender's "controlling and violent relationship" with the victim.<sup>23</sup>

The CCA<sup>24</sup> has approved a statement by the Alberta Court of Criminal Appeal:

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<sup>20</sup> Judicial Commission of NSW, *Conviction Appeals in New South Wales*, Monograph 35 (June 2011) 91.

<sup>21</sup> NSW Sentencing Council, *Sentencing for domestic violence offences*, (February 2016) <[http://www.sentencingcouncil.justice.nsw.gov.au/Documents/Projects\\_Complete/Domestic%20Violence/Report%20DV.pdf](http://www.sentencingcouncil.justice.nsw.gov.au/Documents/Projects_Complete/Domestic%20Violence/Report%20DV.pdf)>

<sup>22</sup> *R v Hamid* [2006] NSWCCA 302; 164 A Crim R 179 [74]-[77]; *R v Ball* [2013] NSWCCA 126 [98].

<sup>23</sup> *R v Burton* [2008] NSWCCA 128 [95].

<sup>24</sup> *R v Hamid* [2006] NSWCCA 302; 164 A Crim R 179 [75]

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When a man assaults his wife or other female partner, his violence toward her can be accurately characterised as a breach of the position of trust which he occupies. It is an aggravating factor. Men who assault their wives are abusing the power and control which they so often have over the women with whom they live. The vulnerability of many such women is increased by the financial and emotional situation in which they find themselves, which makes it difficult for them to escape.<sup>25</sup>

The Tasmanian Court of Criminal Appeal has also adopted this statement as setting out the principles by which sentencing for DV offences should proceed.<sup>26</sup>

The principles in *R v Burton* have most recently been reiterated by the CCA in *Jibrán v R*<sup>27</sup>, where in sentencing for an aggravated kidnapping offence the Court referred to a number of features of the offence are relevant to the court's assessment of objective seriousness:

.... although the offence was not committed as part of a pattern of violence in the Applicant's relationship with the victim, the offence took place in the context of an intimate relationship - it constituted domestic violence so that significant weight must be accorded to general deterrence and denunciation: *Majzoub v R* [2019] NSWCCA 94 at [26].... the Applicant acted in a controlling and violent way towards the victim demonstrating a sense of misplaced entitlement which courts have observed in domestic violence offences....<sup>28</sup>

In light of the above we do not consider that legislative reform of the *Crimes (Sentencing Procedure) Act 1999* is presently necessary or justified.

## Question 15 - What non-legislative activities are needed to improve the identification of and response to coercive and controlling behaviours both within the criminal justice system and more broadly?

### *Primary prevention activities aimed at the whole NSW community*

Legal Aid NSW acknowledges significant research that demonstrates that while both men and women can be perpetrators of violence, overwhelmingly the people who carry out domestic, family and sexual violence are men, who commit violence against women.<sup>29</sup>

Australia's Fourth Action Plan under the National Plan to Reduce Violence against Women and their Children 2010–2022 recognises that primary prevention is key to addressing violence against women and their children. Legal Aid NSW strongly supports the NSW Government adopting initiatives consistent with this priority, including to:

- Advance gender equality, respect for women and healthy notions of masculinity through effective primary prevention initiatives. Improve coordination across

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<sup>25</sup> *R v Brown* (1992) 73 CCC (3d) 242, 249.

<sup>26</sup> *Parker v R* (Unreported, Tasmanian Court of Criminal Appeal, 21 July 1994) 11 (Underwood J).

<sup>27</sup> [2020] NSWCCA 86.

<sup>28</sup> [2020] NSWCCA 86 [185].

<sup>29</sup> Commonwealth and State and Territory Governments, *Fourth Action Plan National Plan to Reduce Violence against Women and their Children 2010–2022*, National Priority One: Primary Prevention is Key, (October 2019),8.

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primary prevention activities to maximise their impact on community attitudes and behaviours that lead to violence.

- Implement targeted primary prevention activities designed by, and tailored for, the specific communities they are intended to support.
- Address intergenerational trauma for Aboriginal and Torres Strait Islander peoples through primary prevention, including holistic healing strategies, and by strengthening connections to culture, language, knowledge and identity.
- Promote healthy and safe relationships and healthy notions of masculinity, and build gender equitable values through initiatives for children and young people.

We consider that primary prevention education and programs are an integral first step in influencing changes to the way that domestic and family violence is responded to by the justice and domestic and family violence service system as a whole, as well as by the general community.

#### *Comprehensive training for all criminal justice participants*

Legal Aid NSW considers that there is a large gap in education programs on domestic and family violence for all criminal justice participants including general duties police, supervising police, prosecutors, defence lawyers and lawyers working with victims, court staff and judicial officers. As noted above, in the experience of our solicitors, it is not uncommon for police to be reluctant to follow up on incidents and patterns of non-physical abuse, or take legal steps to protect the victim.

There are currently valuable resources, including the National Domestic Violence Bench Book, that recognise a broad spectrum of abusive behaviours. However, to date, this has not translated into a widespread understanding of the power and control inherent in domestic and family violence and the nuanced nature of non-physical abuse, which can present differently in different relationships.

Legal Aid NSW strongly supports comprehensive domestic and family violence training for all criminal justice participants, to improve the sector's understanding of the nuances of coercive and controlling behaviours, and provide better responses to victims.

#### *Diversionary programs and domestic and family violence behaviour change programs*

Legal Aid NSW supports greater investment in, and availability of, diversionary, intervention and behaviour change programs that seek to address offenders' abusive behaviour, informed by research and best practice evidence on what works in preventing domestic and family violence, and in particular, addressing recidivism.

For example, we would support investment in programs that are aimed at addressing the underlying drivers of domestic and family violence offending behaviour and have been shown to work. We note that there are several initiatives underway as part of the Premier's Priority to Reduce Domestic Violence Reoffending program of work, including the ENGAGE intervention for domestic and family violence defendants.

We also acknowledge the NSW Government's work to develop the Practice Standards for Men's Behaviour Change Programs, to provide guidance to ensure that programs reflect

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good practice and are safe and effective in changing the behaviour of men that use violence. We strongly support the NSW Government's ongoing monitoring of data from these services to support continuous improvements in practice and system delivery.

We are also aware of the Caledonian System in Scotland, which the Inquiry and the NSW Government may want to examine. The Caledonian System seeks to reduce the risk of harm to women and children through combining a court-ordered program for men (lasting at least 2 years),<sup>30</sup> aimed at changing their behaviour, with support services for women<sup>31</sup> and children.<sup>32</sup> It was developed from 2004, and has been in operation since 2011. The key principles underpinning the program are:

- A 'systems approach' – working together with the whole family through a combination of services for men, women and children.
- Working towards 'good lives' – the program for men focuses not only on their negative behaviour, but also on their personal goals for a 'good life' and how they could achieve these as a means of motivating them towards positive change.
- An 'ecological model' of behaviour – which views behaviour as influenced at various levels, from the individual, to the familial, to broader social and cultural contexts. This influences the delivery of the program, for example, by examining social stereotypes about gender roles, and exploring specific factors in individual men's lives that may have contributed to their propensity to abuse, such as their own exposure to violence and their use of alcohol and drugs.

The Caledonian System was evaluated in 2016. While the evaluation acknowledged numerous limitations and shortcomings,<sup>33</sup> monitoring data did indicate that those men who completed the program posed a lower risk to partners, children and others by the end of the program, and a strong belief among women interviewed by the Women's Service, and the fact that it works together with the Men's Program as a system, had significantly contributed to making them safer.<sup>34</sup>

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<sup>30</sup> The men's program is highly structured and comprises a minimum of 14 one-to-one preparation and motivation sessions (pre-group stage), a group work stage of at least 26 weekly three-hour sessions, and further post group one-to-one work (maintenance stage). Men are referred by the court if they have been convicted of offences involving domestic abuse and are assessed for their suitability based on the risk and readiness to change. Participation can be mandatory under court order.

<sup>31</sup> Support for women is voluntary and provides safety planning, information, advice and emotional support to women partners and ex-partners of men referred to the Men's Programme. It is provided by dedicated Women's Workers, who aim both to reduce the risk to women and their children, and to improve women's social and emotional wellbeing.

<sup>32</sup> This does not necessarily involve working with children (whose father or whose mother's (ex) partner is on the Men's Programme) directly but rather ensuring their rights and needs are being considered both within the Caledonian System and by wider services.

<sup>33</sup> Including the lack of a control group and challenges in measuring and evidencing 'success', such as police call outs potentially being a measure of both offending, and also women's confidence in reporting abuse, the reliability of men's self reports of their behaviour and issues in triangulating accounts.

<sup>34</sup> Rachel Ormston, Ciaran Mullholland and Lucy Setterfield, *Caledonian System Evaluation: Analysis of a programme for tackling domestic abuse in Scotland*, (Report, September 2016).