Aboriginal & Torres Strait Islander
Legal Service (Qld) Ltd

www.atsils.org.au

Level 5, 183 North Quay Brisbane Qld 4000
PO Box 13035, George Street Brisbane Qld 4003
T: 07 3025 3888 | F: 07 3025 3800
Freecall: 1800 012 255
ABN: 116 314 562

11 November 2022

The Hon. Mark Dreyfus KC MP
Attorney-General
4 National Circuit
BARTON ACT 2600
By email: coercivecontrol@ag.gov.au

Dear Attorney-General,

RE: RESPONSE TO CONSULTATION - *CONSULTATION DRAFT – NATIONAL PRINCIPLES TO ADDRESS COERCIVE CONTROL*

Thank you for the opportunity to provide comments on the Consultation Draft – National Principles to Address Coercive Control (**DNPs**). ATSILS welcomes the identification in the DNPs of some of the key disadvantages that Aboriginal and Torres Strait Islander peoples suffer in the intersection of the police, the courts and child protection agencies in the context of DFV, however, there are some gaps as will be outlined in this submission.

Preliminary consideration: Our background to comment

The Aboriginal and Torres Strait Islander Legal Service (Qld) Limited (**ATSILS**), is a community-based public benevolent organisation, established to provide professional and culturally competent legal services for Aboriginal and Torres Strait Islander people across Queensland. The founding organisation was established in 1973. We now have 24 offices strategically located across the State. Our Vision is to be the leader of innovative and professional legal services. Our Mission is to deliver quality legal assistance services, community legal education, and early intervention and prevention initiatives which uphold and advance the legal and human rights of Aboriginal and Torres Strait Islander people.

ATSILS provides legal services to Aboriginal and Torres Strait Islander peoples throughout Queensland. Whilst our primary role is to provide criminal, civil and family law representation, we are also funded by the Commonwealth to perform a State-wide role in the key areas of Community Legal Education, and Early Intervention and Prevention initiatives (which include related law reform activities and monitoring Indigenous Australian deaths in custody). Our submission is informed by nearly five decades of legal

practise at the coalface of the justice arena and we, therefore, believe we are well placed to provide meaningful comment, not from a theoretical or purely academic perspective, but rather from a platform based upon actual experiences.

General Comments on the DNPs

The DNPs are expressed in high-level terms and while touching on critical issues, there are parts which feel aspirational in nature with the risk of being out-of-touch with the grassroots reality of Aboriginal and Torres Strait Islander peoples, in particular, relating to:

(a) ongoing and *ingrained* systemic discrimination, in particular, by police as first responders, and other key players such as child protection agencies; and

(b) the fact that it will take a significant amount of time to substantially reduce if not eliminate such discrimination by such institutions and that this certainly will not occur before any legislation criminalising coercive control is enacted in Queensland, judging by the current legislative momentum on this issue.

While touched upon in the DNPs, there needs to be a much larger focus on the role of the police as first responders to complaints or reports of domestic and family violence (**DFV**). The statistics on overrepresentation of our Aboriginal and Torres Strait Islander peoples and misidentification of Aboriginal and Torres Strait Islander women as perpetrators rather than victims are clear. The current Independent Commission of Inquiry into QPS (**QPS Inquiry**) has revealed damning evidence of a culture of racism and misogyny within its ranks. Legislating to give more breadth for police to exercise discretion when attending to and dealing with complaints or reports of DFV will exacerbate these issues and result in more of our Aboriginal and Torres Strait Islander peoples in prison.

Below are some specific comments that we had in relation to the DNPs:

(a) The *common features* as described in the DNPs state that coercive control can also be used by perpetrators in broader family relationships including cultural kinship relationships (page 11). In Aboriginal and Torres Strait Islander communities, it is a cultural norm that elders, family and/or extended family have a say and often decide on matters relating to a particular individual in their community. The DNPs do not appear to address how accepted cultural norms such as collective decision-making within Aboriginal and Torres Strait Islander communities would be reconciled with the concept of coercive control as described in the DNPs and how legal frameworks could or should address this issue.

(b) The statement (page 11) "The person who experiences coercive control is never to blame for the abuse they experience" is, in our view, simplistic and does not appear to address the complicated nature family and domestic violence, for example, in a relationship of mutual abuse involving coercive control.

(c) The discussion on page 15 relating to reinforcing factors which are associated with an increased risk of coercive control being used, while touching on the "ongoing impacts of colonialism of Aboriginal

and Torres Strait Islander communities" and the dot points under Principle 4 (page 20) should more explicitly state the impacts of institutions which enable and/or themselves perpetuate abuse against victims, for example, police as first responders.

(d) Statements such as "while gender inequality drives family and domestic violence" (page 20), give the reader the impression that male victims are invisible or that their experiences don't matter.

The prevalence of DFV for individuals that identify as Aboriginal and Torres Strait Islander

Current and reliable statistics on the prevalence of DFV for Aboriginal and Torres Strait Islander peoples are hard to come by. The Australian Institute of Health and Welfare (**AIHW**) recently conducted a study examining public hospital data from all state and territory jurisdictions, excluding Western Australia and Northern Territory and found that Aboriginal and Torres Strait Islander peoples made up more than a quarter of all those hospitalised as a consequence of DFV over an eight-year period. Considering that Aboriginal and Torres Strait Islander peoples make up only 3.2% of Australia's population, that is cause for alarm. Further, the reality is that these statistics would not have picked up on those individuals who attended hospital, however, chose not to reveal DFV as the cause of their injuries or those who decided not to attend hospital to obtain treatment for any reason including a lack of confidence in being provided with proper treatment due to systemic racism in public hospitals[1]. It is clear that DFV is a significant concern for Aboriginal and Torres Strait Islander peoples, however, what we know is that the current legal frameworks and systems that are supposed to protect individuals and children from DFV are failing Aboriginal and Torres Strait Islander people.

ATSILS does not support the creation of a standalone criminal offence of "coercive control"

We are concerned that while the DNPs states that criminalisation of coercive control is a matter for States and Territories to decide, release of this document will add to the existing momentum for such legislative reform which, if enacted, will disproportionately disadvantage Aboriginal and Torres Strait Islander peoples.

Accordingly, we consider it imperative that we take this opportunity to reiterate the reasons why we do not support the creation of a standalone criminal offence of coercive control.

1. *Existing civil and family and domestic violence laws in Queensland already contain pathways for addressing and obtaining remedies for coercive control*

Queensland already has expansive laws which allow for the imposition of domestic violence orders and penalise breaches of those orders, and those laws include a variety of domestic violence offences. Coercive and controlling behaviour is already included in the definition of domestic violence in the *Domestic and Family Violence Protection Act 2012 (Qld)* (**DFVP Act**). Furthermore, civil protective orders can be obtained on the basis of coercive and controlling behaviour. Once in place, coercive and

[1] Gatwiri, K., Rotumah, D., & Rix, E. (2021). BlackLivesMatter in Healthcare: Racism and Implications for Health Inequity among Aboriginal and Torres Strait Islander Peoples in Australia. *International journal of environmental research and public health*, *18*(9), 4399. https://doi.org/10.3390/ijerph18094399.

controlling behaviour can be punished as a breach of that protection order.

2. *Creation of a coercive control offence gives rise to a lack of certainty in the law and its application*

It is well-established in the underpinnings of our legal system that laws need to be clear and precise such that they deliver predictability and allow individuals that are subject to those laws to regulate their conduct accordingly. Coercive control, which can often be a pattern of subtle behaviours, is difficult to police and difficult to prove. The dividing line between lawful and unlawful behaviour is unclear. Unlike physical harm, property damage or overt threats, the clear evidence needed to trigger police powers to respond is largely absent. The reality is that it will be very challenging to prosecute an offence of coercive control on its own, unless when piggybacked with other offences such as those for which there is more evident proof. As the current legal framework already contains pathways for addressing coercive control, we question whether the creation of a standalone offence serves to be more symbolic rather than effective.

Additionally, it is a cultural norm within Aboriginal and Torres Strait Islander communities that elders and/or members of the extended family network may have a say or, in some circumstances, make decisions on behalf of individuals within a community. Under the scope of coercive control as broadly contemplated by the proposed amendments, that behaviour could be considered to be coercive control and, therefore, criminal. We have significant concerns that police officers who will be attending to reports or complaints of DFV will not be sufficiently equipped to be able to apply such broadly drafted laws with certainty and fairness.

3. *The proposed amendments including creation of a criminal offence for coercive control will compound existing disadvantage and discrimination that Aboriginal and Torres Strait Islander peoples already experience*

<u>Overrepresentation of Aboriginal and Torres Strait Islander peoples in prisons</u>

It is well-established that Aboriginal and Torres Strait Islander peoples are significantly over-represented in the criminal justice system. According to the Australian Bureau of Statistics (**ABS**) Census data for the quarter of June 2021, 812,828 people identified as an Aboriginal and/or Torres Strait Islander person. That represents 3.2% of Australia's population, with almost 30% living in Queensland. In the same quarter of June 2021, ABS recorded 42,970 Australian people in prison. Of that figure, 13,039 were Aboriginal and/or Torres Strait Islander persons.

Therefore, despite Aboriginal and Torres Strait Islander peoples making up only 3.2% of the Australian population, Aboriginal and Torres Strait Islander peoples represent 30% of incarcerated Australians[2].

While the figures themselves are astounding, according to the ABS, the rate of incarceration of Aboriginal and Torres Strait Islander peoples is increasing.

[2] Australian Bureau of Statistics (2021), *Census of Population and Housing - Counts of Aboriginal and Torres Strait Islander Australians*, ABS Website, accessed 28 October 2022.

We know that overrepresentation of Aboriginal and Torres Strait Islander peoples in prison is caused by a range of complex factors including, entrenched disadvantage, ongoing impacts of colonisation, intergenerational trauma and, systemic racism – even in institutions such as the Queensland Police Service (**QPS**). As the first responders to reports and/or complaints relating to DFV, it is imperative for police to have an informed consideration and appreciation of the existence and impact of intergenerational trauma, ongoing effects of colonisation and entrenched disadvantage when dealing with DFV involving Aboriginal and Torres Strait Islander peoples. Evidence given in the current Independent Commission of Inquiry into QPS (**QPS Inquiry**) has revealed a culture of racism and misogyny within the force with offending behaviour being undertaken by QPS officers, including at those at the highest ranks, and a failure of systems within the QPS to swiftly and effectively quash offending behaviour. It appears that QPS has a long way to go to get its 'own house in order' and this will not occur before any legislation broadening their powers, such as creating a criminal offence of coercive control, occurs.

Furthermore, it is well-established that Aboriginal and Torres Strait Islander women in particular are often misidentified by police as perpetrators, rather than victims of DFV even when the woman reports DFV to police. Misidentification of victim-survivors of DFV as perpetrators can be devastating as an Aboriginal and/or Torres Strait Islander woman. It could result in the incarceration of the woman, involvement by child protection agencies and the potential that their children will be taken from them, loss of housing and income support, mistrust of police and legal systems, long and complicated court proceedings and negative effects on health and wellbeing.

The concerns raised in the Victorian Aboriginal Legal Services Policy Paper, *Addressing Coercive Control Without Criminalisation – Avoiding Blunt Tools that Fail Victim-Survivors* (2022) also represent the crux of our concerns in Queensland - that creation of a coercive control offence would create significant ambiguity and room for police discretion in the application of those laws and there is a high risk that this would lead to the laws being disproportionately enforced against First Nations people due to both individual biases and systemic racism within the QPS.

Accordingly, the creation of a criminal offence of coercive control would increase the ways in which Aboriginal and Torres Strait Islander persons can become entangled with the criminal justice system, which is a constant fear within First Nations communities. Once an Aboriginal and/or Torres Strait Islander person is in the "system", we know that the disadvantage often snowballs (for example, the individual may be apprehended into custody and risk death or injury in custody, Child Protection Services may become involved and threaten to take away - or take away - children, the individual/s involved may not be able to obtain a blue card to undertake paid work due to the criminal charge/offence against them, etc.).

We note that outcomes 10 and 11 of the federal government's National Agreement on Closing the Gap (July 2020) Closing the Gap National Agreement state as follows:

- 10 – Adults are not overrepresented in the criminal justice system
  - Target – By 2031, reduce the rate of Aboriginal and Torres Strait Islander adults held in incarceration by at least 15 percent.
- 11 – Young people are not overrepresented in the criminal justice system

- Target – By 2031, reduce the rate of Aboriginal and Torres Strait Islander young people (10 – 17 years) in detention by 30 percent.

We cannot see how the enactment of laws which further expand the powers of police and ultimately will increase the amount of First Nations peoples in prison, accords with these critical commitments.

Increasing the reluctance of Aboriginal and Torres Strait Islander peoples reporting DFV

There already exists a level of reluctance among Aboriginal and Torres Strait Islander peoples to report DFV to the police due factors including the following:

(a) a fear that seeking help will result in incarceration of the perpetrator and the risks that custody poses to Aboriginal and Torres Strait Islander peoples;

(b) there may be instances where, for example, a female victim (or indeed, a male victim) might not want a non-contact domestic violence order (**DVO**) as s/he needs assistance from their partner to share parenting responsibilities such as taking the children to school, attending medical appointments, doing grocery shopping, etc., and, when police arrive to attend to a report or complaint regarding DFV, the victim prefers not to make a statement, which the police take as being obstructive;

(c) the fact that there might be no alternative accommodation available to the respondent on a no-contact order, especially in remote and regional communities, resulting in recurring breaches upon the respondent returning home;

(d) that not all parties might be able to secure legal assistance (e.g., they might not qualify for legal assistance and might be unable pay lawyers to represent them);

(e) a reluctance to place a DVO on the mother of children as this might push her towards incarceration and that may, in turn, risk Child Safety[3] getting involved and removing the children;

(f) the historical mistrust of authorities and fear of children being removed by Child Safety, for example, Child Safety may threaten to remove the children if a DVO is not issued, or the partner is not asked to leave the house;

(g) victim-survivors not being believed by police because they do not fit a stereotype of victim; and

(h) victim-survivors frequently being misidentified as being the abuser by police and the courts, perhaps unintentionally, due to deliberate manipulation by the actual abuser or bias (or lack of training) on the part of the police.

The creation of a coercive control offence will provide more discretion for police to exercise when attending to reports or complaints of DFV and we foresee an increased likelihood that Aboriginal and Torres Strait Islander people will be even less likely to report DFV to police. This would be an entirely counterproductive result and marginalise Aboriginal and Torres Strait Islander communities even further from the systems that are supposed to protect them.

[3] Child Safety is the child protection unit of administration contained within the Queensland Department of Children, Youth and Multicultural Affairs.

Recommendations in lieu of creating a criminal offence of coercive control

It is our view that a much more effective way of improving community safety and addressing coercive control, is through the following:

(a) well-funded and – in the case of Aboriginal and Torres Strait Islander peoples – culturally competent community education on what it means to have healthy domestic and family relationships delivered by Aboriginal and Torres Strait Islander peoples for their own communities;

(b) comprehensive police training including regular re-training on coercive control and how to handle complaints and reports of coercive control, noting that it is imperative that such training include comprehensive cultural competency training to equip police officers with a thorough understanding of DFV in a cultural context (including for some vulnerable First Nations communities, entrenched disadvantage and intergenerational trauma);

(c) strengthening police policies, procedures and/or standard operating procedures to support cultural competency practices in dealing with DFV reports and/or complaints when they involve Aboriginal and Torres Strait Islander persons;

(d) comprehensive training including regular re-training of judicial officers, Child Safety, lawyers and other support services on coercive control including comprehensive cultural competency training to equip the same with a thorough understanding of DFV in the context of vulnerable Aboriginal and Torres Strait Islander communities;

(e) well-funded justice reinvestment programs;

> Example - The Maranguka Justice Reinvestment Project in Bourke New South Wales achieved massive reductions in offences such as domestic violence offences through early intervention, wrap around community support and the use of "circuit breakers" to break re-enforcing cycles of incarceration and community violence. There were many benefits from that project not least of which was substantially improved community safety.

(f) more innovating sentencing options, rather than increases in head sentences (for the imposition of jail time) to deal with domestic violence offences noting that jails are a less than ideal place to lead the process for behavioural changes needed to address offending behaviour.

The problems with the lack of programs for offenders on short prison sentences has been expressed particularly well in two passages in the Sofronoff Report, the first problem detailing the lack of access to rehabilitation programs for short sentences of imprisonment:

> *There may be an assumption that a prisoner released on parole will have begun a process of rehabilitation while in prison, by attending appropriate training or therapy and by a growth in self-discipline. However, prisoners on sentences under 12 months and those assessed as low risk do not engage in rehabilitation programs in Queensland prisons. They are either ineligible or not referred for most rehabilitation programs inside prison. While a few prisoners may be able to access low intensity programs with self-referral, this does not typically occur due to long waiting lists. In addition, programs are not delivered in Queensland for … prisoners who are on remand and have not been convicted of the offences for which*

they have been charged. This means that offenders who serve short periods of imprisonment or time on remand prior to sentence are not given the opportunity to attempt to address their offending behaviour before their release from custody.[4]

CONCLUSION

The disadvantage and discrimination that Aboriginal and Torres Strait Islander peoples face in Australia is, in no uncertain terms, a human rights' crisis. It is well-established that entrenched racism/biases in systems such as the QPS have a direct impact on the amount of Aboriginal and Torres Strait Islander peoples in prison. While the DNPs identifies some of the crucial issues faced by Aboriginal and Torres Strait Islander people when considering DFV, there are some gaps which we have sought to shed light on in this submission. Our more crucial concern relates to the momentum that the release of the DNPs would create towards legislative amendments to create a criminal offence of a coercive control in various relevant jurisdictions in Australia, including in Queensland. ATSILS does not support the criminalisation of coercive control for the reasons outlined in this submission on the basis that doing so would unnecessarily and disproportionately target Aboriginal and Torres Strait Islander peoples such that they may be at a higher risk of becoming entangled in the criminal justice system and, therefore, incarcerated. For the reasons outlined in this submission, the creation of a coercive control offence is not justified and the risks posed outweigh the benefits. In its stead, needs to be a holistic and multi-pronged approach to DFV with its basis in systemic change and comprehensive education programs and campaigns for families and communities, QPS, Child Safety and other support services.

We thank you for the opportunity to provide feedback on this proposed amendment.

Yours faithfully,

Shane Duffy
Chief Executive Officer

[4] Sofronoff Report, Ibid, paras 429-431. And see as an example of a self-represented prisoner trying to escape from the no programs no parole conundrum: *R v Hood* [2005] QCA 159 at paras [24]-[25]. https://www.sclqld.org.au/caselaw/QCA/2005/159.