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Committee Secretary
Legal Affairs and Safety Committee
Parliament House QLD 4000

By email: lasc@parliament.qld.gov.au

Dear Secretary,

RE: RESPONSE TO CONSULTATION ON THE DOMESTIC AND FAMILY VIOLENCE PROTECTION (COMBATING COERCIVE CONTROL) AND OTHER LEGISLATION AMENDMENT BILL 2022

Thank you for the opportunity to provide comments on the Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Bill 2022 (**Bill**). While we agree that coercive control is a legitimate and damaging behaviour that must be part of the conversation when addressing domestic and/or family violence (**DFV**), overrepresentation of Aboriginal and Torres Strait Islander peoples in prisons is a clear and present reality and one which both the federal and state governments have committed to address. The proposed expansion of police powers as contemplated by the Bill and the creation of a standalone criminal offence of "coercive control" in the second wave of the proposed amendments are, for reasons outlined in this submission, not justified and will unnecessarily expand the ways in which Aboriginal and Torres Strait Islander peoples may become entangled in the criminal justice system and, therefore, incarcerated. Put simply, when considering Aboriginal and Torres Strait Islander peoples and the disadvantage and discrimination that they already face, the risks of these proposed amendments far outweigh the purported benefits.

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.

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. In this submission we will seek to shed light on those failings as well as make recommendations of what we consider will be much more effective in addressing DFV rather than expanding police powers and creating a further criminal offence of coercive control.

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

While we appreciate that the Bill is a response to recommendations 52 to 60 and 63 to 66 of the Women's Safety and Justice Taskforce (**Taskforce**) in Chapter 3.8 of its first report, *Hear her voice*, and represents the first wave of amendments which were recommended to be implemented before amendments are made to create a standalone criminal offence of "coercive control", we consider it imperative that we firstly outline the reasons why we do not support the creation of a standalone criminal offence of coercive control.

[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.

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 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.

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) is also 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

[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.

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.

<u>Increasing the reluctance of Aboriginal and Torres Strait Islander peoples reporting DFV</u>

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 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.

As the proposed amendments provide more discretion for police to exercise when attending to reports or complaints of DFV, we would 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.

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.[3]

Comments on specific amendments in the Bill - *DFVP Act*

1. *Definition of domestic violence to include a "pattern of behaviour"*

The proposed amendments create uncertainty in interpretation.

Domestic violence applications usually make reference to recent acts of domestic violence. The drafting is not clear as to whether historical actions are able to be raised in applications. For example, if a current domestic violence order is nearing expiry and there have not been any breaches, could the aggrieved seek a further order by making reference to historical conduct? How easy or difficult would it be to prove or provide evidence of the behaviour envisaged? The minimum appears to be "more than one act".

A "pattern of behaviour" is a term that is broadly contemplated under the proposed amendments and includes at minimum more than one act. We assume that thorough training has or will be provided to all of the relevant actors in the DFV context including judicial officers, police, lawyers and relevant support services with respect to what constitutes a "pattern of behaviour" and, in particular, specific training regarding how to determine what a "pattern of behaviour" constitutes within the complex and nuanced family dynamics in Aboriginal and Torres Strait Islander families.

We agree that DFV is a gendered issue, however, family and intimate relationship dynamics are inherently complex and not always binary in nature. We uncertain as to how would the proposed laws be applied in the following scenarios:

(a) in a relationship of mutual abuse involving mutual coercive control;

(b) in a relationship where one person demands that the other not make any social engagements without consulting that person's calendar, how would this be viewed if a woman makes the demand in contrast with if a man makes that same demand? And how would this be viewed if the behaviour is in an ongoing relationship versus when the relationship comes to an end?;

(c) in a relationship where a parent withholds contact of their children with the other parent based on a perceived risk of harm;

[3] 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.

(d) where an individual makes ongoing threats to a grandparent to stop spending time with their grandchild; or

(e) where a partner, on more than one occasion, rejects the culture of another parent.

In our experience, police have a tendency to err on the side of caution by preferring to make domestic violence applications and leave it to the magistrate to decide if an order is to be made. However, in most circumstances the magistrate is dependent on the information provided by the police and, therefore, this could lead to a DVO being placed on the victim.

In addition, we are concerned that, given the tendency of police to err on the side of caution, the amendments will run the risk of exposing teenage or other young Aboriginal and Torres Strait Islander persons who are in relationships or family groups to further criminalisation where police deem behaviour as falling within the confines of coercive control and issue DVOs. This concern extends to children in the care of the Department of Children who are not adequately prepared for life outside of the system and get into domestic violence relationships after they are released from child protection orders.

Currently, there is not the requisite understanding of "coercive control" within the wider community. Wide-ranging educational programs about domestic violence and coercive control in schools and communities are essential to assist parties to understand what the proposed laws involve. This is especially important for First Nations men and women in remote and regional as well as urban communities.

We note that although section 4(2)(c) of the DFVP Act provides that perpetrators of domestic violence should be held accountable for their use of violence and its impact on other people and, if possible, provided an opportunity to change, there is currently insufficient funding for culturally safe men's behaviour change programs resulting in a paucity of such programs in Queensland. A respondent or perpetrator desperately wishing to see his children whose mental health is impacted by the same continues to be frustrated by the long wait involved in undertaking such programs or their local non-availability. Furthermore, we have not come across any assessments of the existing programs for effectiveness.

Once an application is before the court, if the parties are not legally represented, they are most often unable to put forward their position clearly which may have an adverse effect especially on the respondent. The availability of duty lawyer services may address this issue to some extent, however, due to the numerous constraints faced by parties in a court setting there could potentially be pressure to consent to an order noting also that many older clients and younger ones who come from discrete communities have had interrupted or limited education.

2. *Cross applications*

The proposed amendments with respect to cross applications are particularly concerning. The ability for an individual to make a cross-application provides a pathway for that individual to seek protection/redress for unlawful behaviour directed at them. This is in accordance with principles of natural justice. Requiring identification of the "person in most need of protection" in the relationship such that only one domestic violence order is in force appears to be predicated on a simplistic, binary

view of family and domestic violence (in that there is one victim and one perpetrator). It does not appear to contemplate the complicated nature family and domestic violence and, in particular, the complex and nuanced dynamics in Aboriginal and Torres Strait Islander families and intimate relationships.

For example, we have often seen in practice that:

(a) when attending to reports or complaints regarding DFV which involve an Aboriginal and/or Torres Strait Islander party/parties, police will often take a side, for example, if the male partner is a stealth offender and the woman is in the backyard yelling and not cooperating with the police, she will most likely be named the respondent (even if she is the victim);

(b) in the context of no-contact DVOs, if a female partner instigates a fight with their partner with verbal and/or physical violence and the male partner retaliates with violence, the male is often the only person charged.

3. *Award of costs against a party who has deliberately used the process as a means of committing or continuing DFV including coercive control*

While we agree to this amendment in principle, we question whether this means that an applicant who does not have legal advice and has mistakenly made an application or has not thought it through, will be penalised. For example, a parent (living separately) having serious concerns about domestic violence in the other parent's home and who is seeking to keep the children safe might be seen as someone attempting to control the other party.

4. *Release of criminal and domestic violence history*

We have concerns regarding the confidentiality of the criminal and domestic violence history of a respondent. The Bill provides for QPS to ensure that the court is informed of the criminal and domestic violence history of the respondent. If there is no such criminal and domestic violence history, then the Police Commissioner is required to inform the court of that fact. The court has the ability to make orders relating to access to and disclosure of the respondent's criminal and domestic violence history, however, this appears to be discretionary. There does not appear to be any assurance of confidentiality to the extent this is left to the court. Even if the court makes an order, there is no assurance that the other party will not share that history. Ordering that a copy of the history given to a party be returned to the court might be too late. We recommend that the records be made available for inspection only rather than by way of copies.

5. *Substituted service*

Currently personal service is required by police officers. In our experience, police officers serving applications on a respondent (often with temporary protection order in place) often advise the party they do not need to attend, resulting in non-attendance at court. Non-attendance could also be due to other matters taking priority, e.g., community or family bereavement, children's requirements, etc. which could result in orders being made in their absence. Most often both the respondent and the aggrieved do not understand the order or the consequences of breach if both are not in court when the order is made. What we hear from clients is that detailed explanations of the seriousness of the order are usually not forthcoming.

The proposed amendments relating to substituted service will inevitably cause challenges for Aboriginal and/or Torres Strait Islander respondent parties. For example, if electronic service is ordered, there is a possibility that the individual may not have access to text messages or emails due to not having credit or reception where they are residing or even a phone (particularly a concern for individuals living in remote areas). Furthermore, if the individual is not used to receiving messages in that way (noting most people would have a reasonable expectation that formal service occurs in paper and in person), or if there are other factors such as the individual having a limited or disrupted education, they may not pay attention to the message or realise that they need to.

6. *Reopening proceedings*

Whilst we acknowledge the intent to provide procedural fairness to the respondent by enabling the respondent to apply for proceedings to be reopened, some of the issues raised above could still be an obstacle given the 28-day time limit to act. We recommend consideration of including a discretionary power of the court to extend the 28-day time limit if sufficient grounds are put before the court.

7. *Cross examination of protected witnesses*

We agree in principle to this proposed amendment on the basis that it is a safety net for victims of violence and other vulnerable persons. However, the requirement for lawyers to cross examine protected witnesses raises the issue of funding for lawyers to provide this service. Is there an arrangement in place for Legal Aid Queensland or other funding to be made available in all such instances? Currently, in family law matters, when a section 102NA order is made, appointment of counsel is said to be dependent on the availability of funds.

Comments on specific amendments in the Bill - *Coroners Act 2003*

Removal of the limitation upon the number of terms of re-appointment of the State Coroner and the Deputy State Coroner

As coronial matters can take years to be finalised, to the extent that this proposed amendment may enable longer tenure of coroners such that the same judicial officer may be able to have carriage of a matter to completion, the proposed amendments would be beneficial, from a practical standpoint and also lead to less confusion for the family, especially with respect to deaths in custody where there can be suspicion of the system and its players.

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. The proposed expansion of police powers as contemplated by the Bill and the creation of a standalone criminal offence of "coercive control" in the second wave of the proposed amendments are, in our view, will 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