

11 November 2022

Dr Jackie Hartley
The Law Reform and Sentencing Council Secretariat
NSW Department of Communities and Justice

By email: sentencingcouncil@justice.nsw.gov.au

Dear Dr Hartley,

Response to Consultation Paper on Fraud

1. Women's Legal Service NSW (**WLS NSW**) thanks the NSW Sentencing Council for the opportunity to comment on the Consultation Paper on Fraud. This submission has been developed in conversations with a range of services and is endorsed by a number of organisations listed below.
2. WLS NSW is a specialist accredited women-led community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims support, care and protection, human rights and access to justice. We have been established for 40 years.
3. For over twenty years WLS NSW has provided a statewide First Nations Women's Legal Program (**FNWLP**). This program delivers a culturally safe legal service to First Nations women, including regular engagement with communities across NSW. An Aboriginal Women's Consultation Network supports and enhances the work of the FNWLP. It meets quarterly to ensure that Women's Legal Service NSW delivers a culturally safe service. The members include regional community representatives and the FNWLP staff. There is a representative from the Aboriginal Women's Consultation Network on the WLS NSW Board.
4. For more than a decade WLS NSW has provided culturally safe, specialised, family and civil law advice, casework and education services to hundreds of criminalised women across NSW, including women defending Apprehended Violence Orders, women in custody, women under supervision in the community and to women post release from custody.
5. We work in partnership with Wirringa Baiya Aboriginal Women's Legal Centre and the Western Sydney Community Legal Centre to provide the Legal Education and Advice in Prison (**LEAP**) for women, which is a family and civil law program in the four Sydney women's correctional centres. WLS NSW is also available as a free phone call for advice in other correctional centres around the state. LEAP prioritises access for First Nations women. This work is unfunded and provided from core WLS NSW (and the partner community legal centre) resources and is always under threat. The majority of referrals are made by Corrective Service NSW staff.



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6. We also provide advice, casework and culturally safe services to young women in Youth Justice detention or under community supervision. Additionally, many of the clients that we work with in adult correctional centres are in the vulnerable 18-24 year age range, with recent youth detention and/or child protection experiences.

Better recognition of coercive control as mitigating factor in sentencing

7. In our experience of working with women in custody, it is not uncommon for women to be charged with fraud offences, particularly identity offences. Women may commit fraud because they are coerced to do so, for example by a partner or ex-partner. They may also commit fraud in response to trauma - many seeking to dull their pain through alcohol and other drugs or gambling and the fraud offences may provide a way for them to access alcohol and other drugs or fund gambling activities. We also note social security fraud committed in the context of domestic and family abuse and the need to better recognise and respond appropriately to this, but this is prosecuted through the Commonwealth ODPP and outside the terms of reference.
8. As we raised during preliminary consultations, it is important that domestic and family abuse (coercive control) be considered in the context of mitigation factors in sentencing for fraud offences. We also emphasise the need for decriminalisation of the use and possession for personal use of prohibited drugs, and a focus on this as a health issue with the need to ensure access to trauma informed, culturally safe treatment programs consistent with the recommendations of the Special Commission of Inquiry into the Drug 'Ice'.
9. We note the Queensland Women's Safety and Justice taskforce made a number of pertinent recommendations in *Hear her Voice Report One, Addressing Coercive Control and Domestic and Family Violence in Queensland* which must be considered as part of the sentencing review for fraud and fraud-related offences.
10. Specifically, we refer to the recommendations below.

Recommendation 63:

The Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence immediately progress amendments to section 132B of the Evidence Act 1977 to remove the restriction of the application of the section to offences only in Chapters 28 to 30.

The effect of this amendment is to clarify that relevant evidence of the history of the domestic relationship between the defendant and the person against whom the offence was committed is admissible in evidence in the proceeding on any offence.

Recommendation 64:

The Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence immediately progress amendments to the Evidence Act 1977 modelled on section 39 of the Evidence Act 1906 (WA) to allow relevant expert evidence to be admitted in criminal proceedings about the nature and effects of domestic and family violence including coercive control:

- *generally, on any person; and*
- *on a particular person who has been the subject of domestic and family violence.*

Recommendation 65:

The Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence immediately progress amendments to the Evidence Act 1977 modelled on sections 38, 39C-39F of the Evidence Act 1906 (WA) to provide for jury directions to be made in proceedings for domestic violence related offences and where domestic violence has been raised in evidence during a trial to address stereotypes and misconceptions about family violence.

This will enable juries to be better informed and able to consider the evidence that has been raised during the trial.

Recommendation 66:

The Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence immediately progress amendments to the Penalties and Sentences Act 1992 to require a court, when sentencing an offender to consider whether the impact of being a victim of domestic and family violence, including coercive control, on their offending behaviour is a mitigating factor.

Recommendation 67-68 relate to the updating of benchbooks on domestic and family abuse.

11. Implementing these recommendations focused on including social framework evidence is important to help build a greater understanding of domestic and family abuse (coercive control) including in the criminal legal system and an awareness and understanding of how women may be coerced into committing criminal offences in the context of domestic and family abuse.
12. We are pleased to note s38 of the *Evidence Act 1906 (WA)*, which the Queensland provision is modelled on, adopts a social entrapment framework, which recognises that gendered violence and abuse perpetrated by the individual combined with systems failings and structural inequalities entraps many victim-survivors.¹
13. We note these recommendations have since being incorporated in the [Domestic and Family Violence Protection \(Combating Coercive Control\) and Other Legislation Amendment Bill 2022 \(Qld\)](#). See Clause 64 (p52-54), clause 67 (p55-61), clause 80 (p66-67). These provisions are included in **Appendix A**. We recommend similar provisions be implemented in NSW.
14. We also support **Recommendations 67-68** which relate to the updating of benchbooks on domestic and family abuse.
15. It is vital these reforms are accompanied with substantial and ongoing training, including with police, judicial officers and the legal profession about the nature and dynamics of domestic and family abuse (coercive control), perpetrator's use of such violence and abuse, accurately identifying the person most in need of protection, conscious and unconscious bias as well as significant cultural and systems reform discussed further below.

¹ Tarrant, S., Tolmie, J., & Giudice, G. (2019). [Transforming legal understandings of intimate partner violence](#) (Research report 03/2019). Sydney, NSW: ANROWS p17-22 (21-26)

Better recognition of coercive control in apprehended violence order proceedings

16. Coercive control is not limited to being relevant in criminal proceedings, including for fraud. It is relevant in apprehended violence order proceedings, including to ensure the person most in need of protection has been accurately identified.
17. We raise this issue as a whole of systems response is required to effectively respond to coercive control. We need more than piecemeal reform.
18. The Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Bill 2022 (Qld) also implements Recommendation 53 and 56 focused on ensuring a contextual definition of domestic and family violence and abuse, legislative guidance to identify the person most in need of protection in protection order proceedings and safeguards limiting circumstances for cross protection order applications. These safeguards are important to help build understanding in identifying coercive control and to guard against misidentification of the predominant aggressor which can be a pathway to criminalisation of many women, particularly First Nations women and culturally and linguistically diverse women.
19. We strongly urge adoption of similar legislative guidance in NSW. See Appendix B.

Cultural and systems reform

20. Whilst important, these legislative provisions on their own are insufficient to better recognise and respond to coercive control.
21. They must also be accompanied by significant cultural and systems reform across all systems, including the criminal legal system, such as:
 - 21.1 accountability frameworks to effectively respond to systemic racism, sexism and other forms of discrimination;
 - 21.2 accountability frameworks to ensure the accurate identification of the person most in need of protection. We refer to 16 proposed action to address systemic misidentification in [Monitoring Victoria's Family Violence Reforms: Accurate identification of the predominant aggressor](#) (2021) tabled in the recent NSW Legislative Council Standing Committee on Social Issues inquiry on the Crimes Legislation Amendment (Coercive Control) Bill 2022.
 - 21.3 regular independent auditing of policing of sexual, domestic and family abuse and the publishing of such reports to help promote continuous improvement and build public confidence in policing of sexual, domestic and family abuse;
 - 21.4 co-responder model with police responding with specialist domestic and family abuse workers and funding to ensure the availability of specialist sexual, domestic and family abuse community-based workers outside business hours and including more than one specialist domestic and family abuse worker at each of the pilot sites. There must also be funding for evaluation and subject to positive evaluation funding to expand across NSW
 - 21.5 an effective, multi-agency screening and risk assessment framework and associated tools;
 - 21.6 significant workforce development;

21.7 significant improvements to the criminal legal system;

21.8 whole of systems response.

These issues have been repeatedly raised by the specialist sexual, domestic and family abuse sector throughout the consultation processes on the Crimes Legislation Amendment (Coercive Control) Bill 2022. They are an essential part of any response to coercive control.

If you would like to discuss any aspect of this submission, please contact [REDACTED].

Yours faithfully,

1. Women's Legal Service NSW
2. Fighters Against Child Abuse Australia
3. Full Stop Australia
4. Hunter Community Legal Centre
5. Immigrant Women's SpeakOut NSW Inc
6. Older Women's Network NSW
7. People with Disability Australia
8. Seniors Rights Service
9. Shoalcoast Community Legal Centre Inc.
10. South West Sydney Legal Centre
11. The Salvation Army Trafficking and Slavery Safe House
12. Western NSW Community Legal Centre
13. Western Sydney University Justice Clinic
14. Wirringa Baiya Aboriginal Women's Legal Centre
15. Women's Justice Network
16. Yfoundations
17. Youth Law Australia

Appendix A

Proposed amendments to the *Evidence Act 1977 (Qld)* through the Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Bill 2022 (Qld).

Insert new Division 1A Evidence of domestic violence

103CA What may constitute evidence of domestic violence

(1) For this part, evidence of domestic violence may include, but is not limited to, evidence of any of the following matters—

- (a) the history of the domestic relationship between a person and an intimate partner or family member of the person, including—
 - (i) domestic violence committed by the intimate partner or family member against the person; or
 - (ii) domestic violence committed by the person against the intimate partner or family member;
- (b) the cumulative effect of domestic violence, including the psychological effect, on a person or an intimate partner or family member of the person affected by the violence;
- (c) social, cultural or economic factors that affect a person, or an intimate partner or family member of the person, who has been affected by domestic violence;
- (d) responses by relatives, the community or agencies to domestic violence, including further violence that may be used by an intimate partner or family member to prevent, or in retaliation for, any help-seeking behaviour or use of safety options by a person;
- (e) ways in which social, cultural or economic factors have affected any help-seeking behaviour undertaken by a person, or the safety options realistically available to the person, in response to domestic violence;
- (f) ways in which domestic violence by an intimate partner or family member towards a person, or the lack of safety options, was exacerbated by inequities experienced by the person, including, for example, inequities associated with race, poverty, gender identity or expression, sex characteristics, disability or age;
- (g) the general nature and dynamics of relationships affected by domestic violence, including the possible consequences of separation from a person who commits domestic violence;
- (h) the psychological effect of domestic violence on people who are or have been in a relationship affected by domestic violence;
- (i) social or economic factors that affect people who are or have been in a relationship affected by domestic violence.

(2) This section does not limit the *Domestic and Family Violence Protection Act 2012*, section 8(3).

103CB Evidence of domestic violence

(1) Relevant evidence of domestic violence is admissible as evidence in a criminal proceeding.

(2) Without limiting subsection (1), the evidence of domestic violence may relate to—

- (a) the defendant; or
- (b) the person against whom the offence was committed; or
- (c) another person connected with the proceeding.

103CC Expert evidence of domestic violence

- (1) Expert evidence about domestic violence is admissible in a criminal proceeding.
- (2) Evidence given by an expert may include—
 - (a) evidence about the nature and effects of domestic violence on persons generally; and
 - (b) evidence about the effect of domestic violence on a particular person who has been subjected to domestic violence.
- (3) For this section, an expert on the subject of domestic violence includes a person who can demonstrate specialised knowledge, gained by training, study or experience, of a matter that may constitute evidence of domestic violence.

103CD Ultimate issue and common knowledge rules abrogated

Evidence of an expert's opinion given under section 103CC is not inadmissible only because the opinion is about—

- (a) a fact in issue or an ultimate issue; or
- (b) a matter of common knowledge.

Insert— Division 3 Jury directions related to domestic violence

Subdivision 1 General matters

103T Request for direction to jury about domestic violence

- (1) This section applies in relation to a criminal proceeding that is a trial by jury if domestic violence is an issue in the proceeding.
- (2) The prosecution or defence may, at any time during the proceeding, ask the judge to direct the jury about domestic violence generally by informing the jury about all or some of the matters mentioned in subdivision 2, other than section 103ZA.
- (3) The judge may give the jury the requested direction unless there are good reasons for not doing so.

103V Judge may direct jury about domestic violence on own initiative

- (1) This section applies in relation to a criminal proceeding that is a trial by jury if domestic violence is an issue in the proceeding.
- (2) The judge may, on the judge's own initiative and in the interests of justice, inform the jury about—
 - (a) if self-defence in response to domestic violence is an issue in the proceeding—the matters mentioned in section 103ZA; or
 - (b) all or some of the other matters about domestic violence mentioned in subdivision 2.

103W Direction may be given before evidence is adduced and may be repeated

- (1) A judge may give a direction under section 103T, 103U or 103V before any evidence is adduced in a proceeding.
- (2) The judge may also repeat the direction at any time during the proceeding.

103X Application of subdivision 2 to trial by judge or magistrate sitting alone

- (1) This section applies to a criminal proceeding that is a trial by a judge or magistrate sitting alone.
- (2) The court's reasoning with respect to any matter mentioned in subdivision 2 must, to the extent the court thinks fit, be consistent with how a jury would be directed about the matter under subdivision 2 in the particular case.

103Y No limit of court's duty to direct jury

This division does not limit the matters the court may direct the jury about, including in relation to evidence given by an expert witness.

Subdivision 2 Content of jury directions about domestic violence

103Z Content of general direction about domestic violence

(1) The judge in a criminal proceeding who is directing the jury about domestic violence generally may, if relevant, inform the jury that domestic violence—

- (a) is not limited to physical abuse and may, for example, include sexual abuse, psychological abuse or financial abuse; and
- (b) may amount to violence against a person even though it is immediately directed at another person; and
- (c) may consist of a single act; and
- (d) may consist of separate acts that form part of a pattern of behaviour that can amount to abuse even though some or all of those acts may, when viewed in isolation, appear to be minor or trivial.

(2) If relevant, the judge may also inform the jury that experience shows that—

- (a) people may react differently to domestic violence and there is no typical response to domestic violence; and
- (b) it is not uncommon for a person who has been subjected to domestic violence to stay with an abusive partner after the domestic violence, or to leave and then return to the partner; and
- (c) it is not uncommon for a person who has been subjected to domestic violence not to report domestic violence to police or seek assistance to stop domestic violence; and
- (d) decisions made by a person subjected to domestic violence about how to address, respond to or avoid domestic violence may be influenced by a variety of factors; and

Note—

See also section 103ZC in relation to the judge informing the jury about factors that may influence a person's decision-making about how to address, respond to or avoid domestic violence.

- (e) it is not uncommon for a decision to leave an intimate partner who is abusive, or to seek assistance, to increase apprehension about, or the actual risk of, harm.

103ZB Examples of behaviour, or patterns of behaviour, that may constitute domestic violence

The judge in a criminal proceeding who is directing the jury about domestic violence generally may also inform the jury that behaviour, or patterns of behaviour, that may constitute domestic violence include, but are not limited to, the following—

- (a) placing or keeping a person in a dependent or subordinate relationship;
- (b) isolating a person from family, friends or other sources of support;
- (c) controlling, regulating or monitoring a person's day-to-day activities;
- (d) depriving a person of, or restricting a person's, freedom of movement or action;
- (e) restricting a person's ability to resist violence;
- (f) frightening, humiliating, degrading or punishing a person, including punishing a person for resisting violence;
- (g) compelling a person to engage in unlawful or harmful behaviour.

103ZC Factors that may influence how a person addresses, responds to or avoids domestic violence

(1) This section applies if the judge in a criminal proceeding who is directing the jury about domestic violence generally informs the jury about the matters mentioned in section 103Z(2)(d).

(2) The judge may also inform the jury that decisions made by a person subjected to domestic violence, about how to address, respond to or avoid domestic violence, may be influenced by matters including, for example—

- (a) the domestic violence itself; or
- (b) social, cultural, economic or personal factors, or inequities experienced by the person, including, for example, inequities associated with race, poverty, gender, disability or age; or
- (c) responses by family, the community or agencies to the domestic violence or to any help-seeking behaviour or use of safety options by the person; or
- (d) the provision of, or failure in the provision of, safety options that might realistically have provided ongoing safety to the person, and the person's perceptions of how effective those safety options might have been to prevent further harm; or
- (e) further violence, or the threat of further violence, used by a family member to prevent, or in retaliation for, any help-seeking behaviour or use of safety options by the person.

Proposed amendments to the Penalties and Sentences Act 1992 through the Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Bill 2022 (Qld).

Amendment of s 9 (Sentencing guidelines)

(1) Section 9(2)—

insert—

(gb) without limiting paragraph (g), the following—

- (i) whether the offender is a victim of domestic violence;
- (ii) (ii) whether the commission of the offence is wholly or partly attributable to the effect of the domestic violence on the offender; and

(2) Section 9—

insert—

(10B) In determining the appropriate sentence for an offender who is a victim of domestic violence, the court must treat as a mitigating factor—

- (a) the effect of the domestic violence on the offender, unless the court considers it is not reasonable to do so because of the exceptional circumstances of the case; and
- (b) if the commission of the offence is wholly or partly attributable to the effect of the domestic violence on the offender—the extent to which the commission of the offence is attributable to the effect of the violence.

(3) Section 9(12)—

(4) insert—

domestic violence see the Domestic and Family Violence Protection Act 2012, section 8.

Appendix B

Proposed Amendments of *Domestic and Family Violence Act 2012* through the Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Bill 2022 (Qld)

Contextualising domestic and family abuse

Section 8

Insert—

(1A) Behaviour, or a pattern of behaviour, mentioned in subsection (1) (c) is to be considered in the context of the relationship between the first person and the second person as a whole.

Legislative guidance on who is the person most in need of protection in a relevant relationship

Insertion of new s22A

Insert —

22A Who is the person most in need of protection in a relevant relationship

(1) A person (the **first person**), who is in a relevant relationship [In NSW context this is “*domestic relationship*”] with another person (the *second person*), is the **person most in need of protection** in the relationship if, when the behaviour of each of the persons is considered in the context of their relationship as a whole—

- (a) the behaviour of the second person towards the first person is, more likely than not—
 - (i) abusive, threatening or coercive; or
 - (ii) controlling or dominating of the first person and causing the first person to fear for the safety or wellbeing of the first person, a child of the first person, another person or an animal (including a pet); or
- (b) the first person’s behaviour towards the second person is, more likely than not—
 - (i) for the first person’s self-protection or the protection of a child of the first person, another person or an animal (including a pet); or
 - (ii) in retaliation to the second person’s behaviour towards the first person, a child of the first person, another person or an animal (including a pet); or
 - (iii) attributable to the cumulative effect of the second person’s domestic violence towards the first person.

(2) In deciding which person in a relevant relationship is the person most in need of protection, a court must consider—

- (a) the history of the relevant relationship, and of domestic violence, between the persons; and
- (b) the nature and severity of the harm caused to each person by the behaviour of the other person; and
- (c) the level of fear experienced by each person because of the behaviour of the other person; and
- (d) which person has the capacity—
 - (i) to seriously harm the other person; or
 - (ii) to control or dominate the other person and cause the other person to fear for the safety or wellbeing of the first person, a child of the first person, another person or an animal (including a pet); and
- (e) whether the persons have characteristics that may make them particularly vulnerable to domestic violence. Examples of people who may be particularly vulnerable to domestic violence—
 - women
 - children
 - Aboriginal peoples and Torres Strait Islander peoples
 - people from a culturally or linguistically diverse background
 - people with disability
 - people who are lesbian, gay, bisexual, transgender or intersex
 - elderly people

Minimising multiple protection orders against both parties in existence at once

Principles of Act

Amendment of s 4(2)(e)

Insert

self-protection—

- (i) the person who is most in need of protection in the relationship should be identified; and
- (ii) only 1 domestic violence order protecting that person should be in force unless, in exceptional circumstances, there is clear evidence that each of the persons in the relationship is in need of protection from the other;

Amendment of s 41C (Hearing of applications—cross applications before same court)

(1) Section 41C(2)(a) and (b)—

omit, insert—

- (a) hear the applications together; and
- (b) in hearing the applications, consider—
 - (i) the principle mentioned in section 4(2)(e); and
 - (ii) whether it is necessary to make arrangements for the safety, protection or wellbeing of the person most in need of protection in the relevant relationship that exists between the persons who are the aggrieveds and respondents to the applications.

(2) Section 41C(3)— omit.

(3) Section 41C(4)— renumber as section 41C(3).

Amendment of s 41D (Hearing of applications—cross applications before different courts)

(1) Section 41D(3) and (4)—

omit, insert—

- (3) If the court hears the applications, the court must consider—
 - (a) the principle mentioned in section 4(2)(e); and
 - (b) whether it is necessary to make arrangements for the safety, protection or wellbeing of the person most in need of protection in the relevant relationship that exists between the persons who are the aggrieveds and respondents to the applications.
- (2) Section 41D(5)— renumber as section 41D(4).

Insertion of new s 41G

After section 41F—

insert—

41G Deciding cross applications

(1) This section applies to a court hearing the following applications together under section 41C, 41D or 41E—

- (a) the original application and cross application;
- (b) the variation application and cross application.

(2) The court must decide—

- (a) which of the parties to the relevant relationship is the person most in need of protection in the relationship; and
- (b) the application that makes, or varies, the protection order that is necessary or desirable to protect the person most in need of protection from domestic violence; and
- (c) if the other application is an application for a protection order—to dismiss the other application; and
- (d) if the other application is an application for the variation of a protection order—to vary the order by reducing its duration so that the order ends.

- (3) Despite subsection (2), the court may make, or vary, a protection order under both applications if the court is satisfied that, in exceptional circumstances—
- (a) there is clear evidence that each of the parties to the relevant relationship is in need of protection from the other party; and
 - (b) it is not possible to decide whether 1 party's need for protection is greater than the other party's need for protection.
- (4) The relevant relationship mentioned in subsection (2) and (3) is the relevant relationship that exists between the persons who are the aggrieved and the respondent to—
- (a) the original application and the cross application mentioned in section 41A(1); or
 - (b) the first protection order and second protection order mentioned in section 41A(2); or
 - (c) the original protection order and the cross application mentioned in section 41A(3).