

16 August 2024

Ms Natasha Stott Despoja AO  
Royal Commissioner  
Royal Commission into Domestic, Family and Sexual Violence  
GPO Box 464  
ADELAIDE SA 5001



By email: [royalcommissionDFSV@sa.gov.au](mailto:royalcommissionDFSV@sa.gov.au)

Dear Commissioner

### **Royal Commission into Domestic, Family and Sexual Violence**

1. I refer to your letter of 5 July 2024 advising of the commencement of the Royal Commission into Domestic, Family and Sexual Violence.
2. The objective of the Royal Commission is to examine existing policies, legislation, administrative arrangements, system structures and funding levers and to develop recommendations to bring an end to domestic, family and sexual violence in the community and improve existing systems. As you note, the Issues Paper addresses four key areas, namely prevention, early intervention, response, and recovery and healing.
3. The Terms of Reference ask the Royal Commission to have particular regard to the views and experiences of the legal sector, including those involved in court administration and victim support, as well as Aboriginal people, their communities and their organisations.
4. The Society supports the intent of the Royal Commission to consider these important issues and appreciates the opportunity to contribute its views.
5. Members of the Society's Aboriginal Issues, Criminal Law and Family Law Committees have considered the Issues Paper and inform the below response, which provides the unique insights of legal practitioners who act for clients with lived experience of domestic, family and sexual violence.

### **Prevention**

6. Domestic, family and sexual violence is a complex issue with myriad causes and drivers which may include gender inequality, discrimination including racism, power imbalances, generational trauma, parenting approaches and role modelling. The nature and complexity of the issue necessitates a systemic and multi-faceted approach to prevention.
7. Early identification of perpetrators or people at risk of perpetrating domestic, family and sexual violence is an important aspect of prevention and intervention. Identification relies on an awareness of the behaviours that constitute or can lead to domestic, family and sexual violence and relies on initiatives such as community education, including in schools and for parents who may need assistance in addressing negative or harmful intergenerational parenting behaviours.
8. As noted in the Issues Paper, the Royal Commission will examine the effectiveness of existing initiatives aimed at addressing the attitudes and systems that drive domestic, family and sexual

violence. The Society's Family Law Committee has identified the following as existing initiatives successfully contributing to this cause:

- 8.1. the Legal Services Commission's 'See the Signs - Coercive Control Campaign';
- 8.2. the Legal Services Commission's Community Legal Education Sessions;
- 8.3. the White Ribbon Australia Campaign; and
- 8.4. Our Watch initiatives.

### ***Prevention in Aboriginal families and communities***

9. The causes of domestic, family and sexual violence in Aboriginal families and communities can generally be more complex. It is important they be understood by reference to the experiences and viewpoints of Aboriginal people and with regard to Aboriginal people's unique history, community systems and dynamics, and law and culture.
10. Members of the Society's Aboriginal Issues Committee have experience representing Aboriginal people across South Australia via employment with the Aboriginal Legal Rights Movement ("ALRM"). For the purposes of its response, the Society's Aboriginal Issues Committee draws upon a response prepared by the ALRM which relates to the issues the Royal Commission is considering. The Society understands the ALRM is otherwise contributing its views to the Royal Commission in its own right and notes there will likely be some commonality between the ALRM's response and the issues raised below.
11. Members of the Aboriginal Issues Committee note Wiyi Yani U Thangani's First Nations Women's Safety Policy Forum Outcomes Report which highlights the historical traumas that continue to perpetuate issues and cycles of harm in Aboriginal communities. They include the ongoing impacts of "*dispossession of land, separation of families and communities, ongoing marginalisation from racism and discrimination and in particular the forcible removal of children.*"<sup>1</sup> The impacts of alcohol and drugs, disability and gender inequality are also causally linked to family violence.
12. Preventing domestic, family and sexual violence in Aboriginal families and communities requires a dedicated approach because mechanisms aimed at non-Aboriginal cohorts may not effectively address the unique drivers of the behaviours of Aboriginal people or adequately respond to the specific needs of Aboriginal victim-survivors.
13. Members of the Aboriginal Issues Committee advocate for solutions to domestic, family and sexual violence in Aboriginal families and communities that are place based and Aboriginal led and driven. They should account for the broad spectrum of violence in Aboriginal communities, including violence perpetrated by women,<sup>2</sup> the overconsumption of alcohol, the impact of drugs and poor housing conditions. They should include features common to Aboriginal led family violence initiatives, which were summarised by Australia's National Research Organisation for Women's Safety ("ANROWS") in its Final Report on Innovative models in addressing violence against Indigenous women, as all including:
  - 13.1. a commitment to Indigenous leadership;
  - 13.2. adoption of a holistic, place based and healing focussed approach;

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<sup>1</sup> Wiyi Yani U Thangani, *First Nations Women's Safety Policy Forum* (Outcomes Report, November 2022) 26.

<sup>2</sup> Harry Blag et al, *Innovative models in addressing violence against Indigenous women* (Final Report, January 2018) 20.

- 13.3. the offering of interconnected services that simultaneously address family violence and other causal factors such as alcohol use, overcrowded housing, cognitive disabilities and mental health issues; and
- 13.4. addressing violence both domestic and non-domestic in nature.

## **Early Intervention**

### Early access to information and support services

14. As noted in the Issues Paper, effective intervention relies on the identification of people who are at risk of experiencing or perpetrating family violence. The following systems may routinely receive information of this nature:
  - 14.1. Federal Circuit and Family Court of Australia;
  - 14.2. Magistrates Court of South Australia;
  - 14.3. South Australia Police;
  - 14.4. South Australian Ambulance Service
  - 14.5. hospitals;
  - 14.6. general Medical Practitioners;
  - 14.7. schools
  - 14.8. kindergartens;
  - 14.9. childcare facilities;
  - 14.10. social workers;
  - 14.11. Department of Child Protection;
  - 14.12. private and public sector workplaces;
  - 14.13. psychologists;
  - 14.14. psychiatrists;
  - 14.15. paediatricians;
  - 14.16. counsellors;
  - 14.17. private and public sector solicitors;
  - 14.18. mediation services;
  - 14.19. domestic violence support workers and shelters;
  - 14.20. homelessness shelters;
  - 14.21. community service agencies such as Centacare, Anglicare and Uniting Communities;
  - 14.22. relationships Australia;

- 14.23. churches and religious leaders; and
- 14.24. supervised Children Contact Services.
15. Information sharing and disclosure legislation may however be a barrier to the use of this information for the purposes of preventing or intervening in cases of domestic, family and sexual violence. Where that is the case, legislative reform may be required to permit information sharing and disclosure in certain circumstances. The merits and specific details of any such reform would need to be thoroughly scrutinised and balanced against the objectives of existing protections such as the Information Privacy Principles or any future privacy protection legislation in South Australia.
16. Alternatively, an independent body tasked with receiving reports or information about these behaviours could be established and funded to instigate interventionist or preventative action. A review of the existing mandatory reporting obligations of these organisations and their employees may be complementary.
17. Once a person at risk of experiencing or perpetrating family violence has been identified, interventionist strategies may be deployed with a view to preventing occurrence or reoccurrence. Due to the complex nature of domestic, family and sexual violence and the myriad ways in which it manifests, a range of services must be available to the community.
18. In the case of a person at risk of experiencing family violence, risk could be managed through check in services, regular contact with social or support workers who can provide general support and assistance in engaging services, and readily available domestic violence accommodation to enable victim-survivors to remove themselves from households.
19. Persons at risk of perpetrating family violence may benefit from interventions such as regular contact with a support or social worker, education about violent behaviours, drug and alcohol screenings and rehabilitation services, placement in temporary accommodation facilities, and family violence or anger management courses and counselling. In some cases, it may be appropriate that these interventions are mandated.

#### Initial criminal justice response

20. In addition, the Criminal Law Committee suggests a review of South Australia Police's approach to the use of intervention orders.
21. By way of background, section 6 of the *Intervention Orders (Prevention of Abuse) Act 2009 (SA)* ("the Intervention Orders Act") provides that an intervention order may be issued against a person if it is reasonable to suspect that they will, without intervention, commit an act of abuse against another person and the issuing of an order is appropriate in the circumstances. The definition of "abuse" for the purposes of the Intervention Orders Act is non-exhaustive but may include physical, sexual, emotional, psychological or economic abuse. Any of these acts constitute an "act of abuse" if they result in or are intended to result in physical injury, emotional or psychological harm, property damage or denial of financial, social or personal autonomy.
22. Anecdotally, members of the Criminal Law Committee note that intervention orders are most commonly issued where physical violence has occurred. They are less commonly issued in relation to other behaviours which constitute or, without intervention, may lead to acts which constitute acts of abuse. In some situations, the issuing of an intervention order with simple terms that prevent the defendant from assaulting, intimidating or harassing the protected person may be a sufficient intervention to address the risk or escalation of domestic, family and sexual violence.
23. In this regard, the Society's submissions in relation to the issue of criminalising coercive control in South Australia are instructive. In these various submissions, the Society has emphasised the efficient nature of the Intervention Orders Act as a mechanism to prevent or address domestic violence behaviours before they escalate. Conversely, criminal offences such as those proposed for coercive control are reactive and only enlivened after unhealthy relationship patterns can be

firmly established. The Society most recently raised these issues in the context of the State Government's draft Criminal Law Consolidation (Coercive Control) Amendment Bill 2023 in October 2023. Copies of the Society's submission, as well as earlier submissions on the topic of criminalising coercive control are **enclosed** for your reference.

## **Response**

24. As noted in the Issues Paper, the Royal Commission will consider best practices for responding to domestic, family and sexual violence.
25. Effective responses will rely on the overcoming of barriers to reporting to police or seeking support from relevant services. Such barriers can include:
  - 25.1. Financial barriers such as a lack of financial autonomy and the absence of alternate stable living accommodation. In the longer term, the ability to obtain a rental property or income to survive, particularly with children, can also disincentivise reporting.
  - 25.2. Psychological barriers such as depression or other mental health issues, trauma, fear of escalation or of the perpetrator generally, concerns about not being believed, and a lack of psychological or other support.
  - 25.3. Fears about or perceptions of, or negative interactions with, the judicial or child protection systems or the police.
  - 25.4. Cultural and complex family and community expectations.
26. Responses to domestic, family and sexual violence typically involve services and supports in the crisis, health, police and justice systems.
27. Best practice crisis responses should be trauma informed, culturally appropriate and considerate of victim survivors who speak English as a second language.
28. Responses by police should ideally be conducted directly by the Family and Domestic Violence Unit but otherwise by police officers and other staff trained in family violence. They should be informed of the support services to which a victim-survivor might require referral. It may also be necessary to allow for a victim-survivor to communicate with police officers of their preferred gender.
29. The Society's Family Law Committee submits that justice system responses should, as appropriate, encourage or mandate attendance at anger management counselling with subsequent reporting from an expert counsellor, random supervised alcohol and drug testing and alcohol and drug rehabilitation services. The Family Violence list in the Magistrates Court and the Legal Services Commission's free duty lawyer service for victim-survivors and perpetrators to obtain legal advice at hearings should continue to be adequately funded and operational.

### Current criminal justice approach

30. This is to be contrasted with the current situation arising in response to allegations of domestic violence.
31. Members of the Criminal Law Committee report that police typically attend the scene of an incident, charge the alleged perpetrator and ask the alleged victim a series of questions. In the professional experience of Members of the Criminal Law Committee in many cases both parties do not want the intervention of the justice system after an initial report is made and, in many cases, the relevant charges are withdrawn.
32. Whether an alleged offender will be remanded in custody will depend on the particular charge. Circumstances are particularly problematic where there is a presumption against bail, such as in

the case of the strangulation offence.<sup>3</sup> This was relevantly illustrated in the Society's submission in response to changes proposed to the strangulation offence in 2023, where it was noted the offence would give rise to a major indictable matter carrying a presumption against bail. Accordingly, an alleged offender, if charged with the offence would likely be remanded in custody for 18 to 24 months while awaiting trial in the District Court. A copy of the Society's submission is **enclosed** for your reference.

33. While it is essential that alleged offenders are dealt with by means proportionate to the risk they pose, members of the Criminal Law Committee suggest legislative amendment to enable police and the courts to apply a graduated scale for assessing bail, in place of the current approach in which some offences attract a blanket presumption against bail. For example, where an accused person has no prior convictions and another place to live and does not pose a risk to either the alleged victim or community generally, members of the Criminal Law Committee consider they should be granted police bail. A presumption against bail has broader repercussions, such as the loss of employment and for financial livelihood, which is often not only an issue for themselves but also the entire family unit. In some circumstances, the fear of such repercussions may disincentivise reporting. Accordingly, some regard should be given to the implications of an approach of simply attaching a presumption against bail to a greater list of offences into the future.
34. Noting the observations of the Criminal Law Committee above, the Society underscores the suggestion at paragraph 20 above to review the current approach to issuing Intervention Orders in South Australia.

### ***Responses in Aboriginal families and communities***

35. The Society highlights the particular perspective of Aboriginal people in navigating systems to address domestic, family and sexual violence in Aboriginal families and communities. These issues were considered in depth in a recent submission (**enclosed**) from the Society to the Law Council of Australia in response to an Inquiry into family violence orders in the family law system conducted by the Commonwealth Parliament's House of Representatives Standing Committee on Social Policy and Legal Affairs. The observations at paragraphs 24 to 29 and 32 to 34 are particularly pertinent.
36. Consistent with recommendation 96 of the Royal Commission into Aboriginal Deaths in Custody, the Aboriginal Issues Committee considers ongoing professional development for judicial officers should be mandated in the areas of cultural competence and unconscious bias, including systemic and institutional racism and intergenerational disadvantage of Aboriginal people.
37. The Aboriginal Issues Committee further emphasises the importance of the availability of interpreting services in justice system responses, ideally considerate of cultural safety and obligations. This may require the availability of interpreters of all genders and separate interpreters for each party.
38. Responses for perpetrators should ideally incorporate culturally appropriate healing programs, as distinct from behavioural change programs, and address issues such as perpetrator trauma, neurological and mental health conditions and drug and alcohol use or dependence. The Aboriginal Issues Committee highlights a program operated by the NPY Women's Council which uses monitoring, modelling and support as a method of preventing violence, as well as an operative example of best practice.

### **Recovery and Healing**

39. The Issues Paper sets out that the Royal Commission seeks to understand what victim-survivors need to recover and heal from domestic, family and sexual violence, and how those needs should be met. While every victim-survivor has different needs based on their unique circumstances,

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<sup>3</sup> *Criminal Law Consolidation Act 1935 (SA)* s 20A.

services such as counselling, legal advice, safe accommodation and financial assistance are likely to be of universal benefit.

I trust these comments are of assistance to the Royal Commission and would be pleased to provide any further information or insights as may be useful or required.

Yours sincerely



**Alex Lazarevich**  
President

**Encl:** Letter from the Law Society of South Australia to the Hon Kyam Maher MLC, Attorney-General re Criminal Law Consolidation (Coercive Control) Amendment Bill 2023, 10 October 2023.

Letter from the Law Society of South Australia to the Hon Kyam Maher MLC, Attorney-General re coercive control (enclosing various submissions), 25 July 2022.

Letter from the Law Society of South Australia to the Hon Kyam Maher MLC, Attorney-General re Criminal Law Consolidation (Section 20A) Amendment Bill 2023, 25 September 2023.

Letter form the Law Society of South Australia to the Law Council of Australia re Family Violence Orders, 8 July 2024.



Ref: 1458944

10 October 2023

The Hon Kyam Maher MLC  
Attorney-General  
GPO Box 464  
ADELAIDE SA 5001

By email: [REDACTED]

Dear Mr Attorney

### **Criminal Law Consolidation (Coercive Control) Amendment Bill 2023**

1. I refer to your letter of 30 August 2023 which enclosed a copy of and sought the Society's views on the above Bill. As you note, the Bill contemplates amendments to the *Criminal Law Consolidation Act 1935* (SA) ("the Act") to provide for a new offence of coercive control in intimate relationships, with a maximum penalty of 7 years imprisonment.
2. The Society has noted an interest for some time in the development of a coercive control offence and has provided a series of submissions relating to this issue, including in response to the Criminal Law Consolidation (Abusive Behaviour) Amendment Bill 2021 ("the 2021 Bill"), which was drafted by the former Government. As you will be aware, my predecessor, Mr Justin Stewart-Rattray, wrote to you in July 2022 enclosing copies of the Society's submissions. A copy of that correspondence is **enclosed** for your reference.
3. The problem of domestic violence requires a multi-faceted response. The Society sees significant merit in legislation being part of that response. However, as the Society has reiterated on many occasions, any legislative approach to the issue of coercive control must be carefully considered. To this end, the public consultation you are undertaking on the Bill, as well as the range of useful explanatory materials prepared to assist in consideration, is appreciated.
4. The Society's Criminal Law, Family Law and Animal Law Committees have considered your letter, explanatory materials and the Bill itself and those Committees inform the Society's response.

### **Overview**

5. The Society's past submissions have reflected on the merit of seeking to address the scourge of domestic violence but have noted the risk in such legislative responses of unintended consequences such as inappropriate criminalising of some relationship behaviours. I highlight only some of the common themes from the Society's past submissions:
  - 5.1. the operation of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) which, as a legislative framework, provides for a preventative and efficient means to address coercive control and related domestic violence relationship behaviours before they spiral out of control, noting the offence of coercive control is reactive and is only enlivened after such relationship patterns can be established;

- 5.2. ensuring the offence does not operate retrospectively and does not attract a presumption against bail;
  - 5.3. the importance of a carefully considered approach and the preconditions for legislating to criminalise coercive control in South Australia, including bolstering community education about such patterns of behaviour;
  - 5.4. anticipated difficulties with the offence being effectively prosecuted and the potential for protracted and complex matters arising from such an offence; and
  - 5.5. the intersection between animal abuse and domestic violence.
6. In its consideration of the current Bill, the Society's Family Law Committee acknowledged the importance of holding perpetrators of all forms of family and domestic violence accountable for their actions. Criminalising behaviours that constitute coercive control will assist victim survivors to ensure that the exposure to this pervasive form of family violence is appropriately taken into account in proceedings in the Federal Circuit and Family Court of Australia. The Committee recognised that the criminalisation of coercive control may prevent abuse being perpetuated throughout the family law system where vexatious litigants repeatedly initiate proceedings, refuse to provide disclosure, refuse to mediate or frustrate ongoing proceedings in an attempt to control their former spouse or cause them to incur excessive legal fees. Against this background, the Committee advocated for a few amendments to the Bill to acknowledge the implications of coercive control family domestic violence behaviours for matters before the Federal Circuit and Family Court of Australia.
  7. The Animal Law Committee considered the extent to which pets are weaponised in domestic family violence situations and the link between domestic violence and animal abuse. The Committee similarly advocated for minor amendments to the Bill to reflect this, with the Committee's overarching commentary on such matters being set out further below.
  8. The Criminal Law Committee reiterated its ongoing concerns about the likely difficulty in prosecuting coercive control offences, and the potential for unintended consequences where relevant behaviours are defined in a broad and/or ambiguous manner.
  9. In any event, the Society acknowledges that education of the legal profession and the community needs to be improved in order to identify appropriately and address circumstances of coercive control, particularly where they arise in relation to family law matters. Any legislative approaches to addressing coercive control should be accompanied by educational resources being made available to the community. The Society's past submissions have extensively focused on the educational aspect.
  10. The Society recognises that your Government made an election commitment to criminalise coercive control and that Parliament may wish to pass legislation to give effect to that commitment. criminalise coercive control, noting it is a commitment of the State Government. With that in mind and against the backdrop of the concerns described above, set out below is the Society's specific feedback on the Bill.

**Proposed section 20B – Interpretation**

11. The Society's Animal Law Committee was pleased to note the inclusion of animals within the definition of "controlling behaviour" in proposed section 20B(2)(e)(iii). There is further recognition in proposed section 20B(3)(e) that "harming an animal" may constitute "behaviour that has a controlling impact".
12. The Committee suggested that clarifying that *threatening* to harm an animal, as well as actually harming an animal is an act of control, noting the existing reference to "engaging in conduct that is violent, threatening, demeaning or intimidating" in proposed section 20B(3)(b). The Committee suggested proposed section 20B(3)(e) should be revised as follows:

***“harming, or threatening to harm, an animal”***

13. The Society’s Family Law Committee noted the definition of *“in a relationship”* set out in proposed section 20B and queried whether it could be amended to make reference to the definition of de facto relationship set out in section 4AA of the *Family Law Act 1975* (Cth) (“the Family Law Act”).
14. The Family Law Committee further noted the more general definition in proposed section 20B(1)(c) which provides as follows:
 

*“they are in some other form of intimate personal relationship in which their lives are interrelated and the actions of 1 affects the other.”*
15. The Committee queried whether proposed section 20B(1) should be amended to encompass people who were previously married to each other or previously in a de facto relationship, noting that they may otherwise no longer meet the definition.
16. A related issue, is that the Society’s Criminal Law Committee has in the past advocated for a time limit to apply in the context of a coercive control offence and queried the utility in prosecuting coercive control offences at any point in time, long after the alleged abuse has occurred, where more preventative means to address such behaviours exist in the current law.
17. Noting the content of section 20B(2), which assists in defining *“controlling impact”*, the Family Law Committee queried whether it ought to make reference to the other person’s ability to pursue their rights or entitlements under the Family Law Act.

***Required number of acts***

18. As your correspondence notes, the 2021 Bill required three or more *“acts of abuse”* (as defined) to have occurred for the proposed offence to be enlivened. The current Bill deviates from this approach by setting no minimum number of required incidents and instead criminalising a *“course of conduct”* that has had a controlling impact. The explanatory materials note that stakeholder feedback addressing domestic violence as discrete incidents rather than a course of conduct, can conceal the effects of subtle and ongoing patterns of behaviour.
19. While the insidious nature of coercive control is recognised, particularly as a precursor to more significant violence, the Society emphasises the notable difficulty in *“course of conduct”* offences being prosecuted effectively.
20. Members of the Society’s Criminal Law Committee drew comparisons between the amendments proposed and the existing strangulation offence in section 20A of the Act, the subject of a recent consultation by your Department.
21. Accordingly, the Society queries whether there is potential for a multitude of charges being laid pursuant to proposed section 20C of the Act, with few of those charges reaching finalisation, owing to practical difficulties in the offence being prosecuted effectively. This may arise as a result of it being a *“course of conduct”* offence as above, as well as the remaining ambiguity as to the factual circumstances in which the proposed offence would be enlivened, as set out further below.

***Proposed section 20B(4) – examples***

22. As a general observation, the Society notes the current Bill is far more prescriptive in characterising the relationship behaviours understood to constitute coercive control by comparison to the 2021 Bill.
23. We note there are 14 distinct behaviours prescribed from proposed section 20B(4) subparagraphs (a) to (n) within the Bill.

24. The prescriptive approach in the Bill appears intended to provide clarity as to the circumstances within which the coercive control offence may be enlivened. However, Members of the Society's Criminal Law Committee identified potential difficulties with the interpretation of the 14 behaviours arising from the specific drafting used. Each of the 14 sub-paragraphs is potentially open to many varied interpretations. The operation of each must be considered potentially in combination with the alternative mental element set out in proposed section 20C(1)(c)(i) being that the person intends by the course of conduct to "*have a controlling impact on the other person*". There is a concern that the multiplicity of interpretations coupled with this widely expressed mental element leads to a potential for an unduly broad practical application of the offence.

25. By way of example, Members of the Criminal Law Committee made the following brief observations.

25.1. **20B(4)(a)**

This specifies the circumstance that a person may "*directly restrict another person's freedom of movement by locking the other person in a room or building.*" There may be examples where such actions are reasonable in the circumstances, such as a person whose domestic partner is suffering from delirium or is hallucinating during a drug-induced episode or a mental health event and is locked in a room for their own safety while medical assistance is sought.

25.2. **20B(4)(d)**

This specifies the circumstance that a person may "*indirectly restrict another person's freedom of action by causing a child of the other person to feel disappointed or upset with a view to influence the other person to take a certain action*", is vague in drafting and may have an unduly broad practical application.

25.3. **20B(4)(f)**

This specifies the circumstance that a person "*may indirectly restrict another person's ability to engage in social, political, religious, cultural or economic activities by threatening to harm a third party if the other person were to have contact with the third party.*"

The making of a threat that is (in simplistic terms) not justified is of itself a criminal act by operation of section 19 of the Act.

The question arises as to whether the threats envisaged by this provision are those that fall short of constituting a breach of section 19. There may be many circumstances in the course of an argument where a conditional threat is made. Such threats might well fall outside of public approval, but it is not necessarily the case that they would rise to being worthy of a criminal sanction to the extent proposed by the Bill.

25.4. **20B(4)(k)**

This specifies the circumstance that a person "*may directly restrict another person's ability to access support services by hiding the other person's keys to a motor vehicle or otherwise intervening in the other person's ability to utilise transport*". There are some cases where taking someone's keys away from them would be generally considered to be reasonable, such as where a person intends to drive under the influence of alcohol or drugs.

26. Some of the concerns as to broad and largely uncertain interpretations are somewhat mitigated by the application of proposed section 20C(1)(d) and proposed section 20C(3). However, the Society would appreciate clarification on the examples set out in proposed section 20B(4) and why they had been selected, noting the remaining ambiguities with their current drafting, as illustrated by the above examples.

27. The Society notes some concern that the current examples set out in these provisions may give rise to interpretations of the offence which may not accord with the Government's intent in responding to coercive control.
28. The Family Law Committee suggested that the circumstances specified in section 20B(4) should be expanded to include reference to restricting directly or indirectly a person's ability to pursue their entitlements and rights under the Family Law Act. By way of example:
- 28.1. refusing to engage with pre-action procedures such as attending mediation;
  - 28.2. refusing to comply with their obligation to provide full and frank disclosure pursuant to their obligations under Rule 6.01 of the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021*;
  - 28.3. engaging in behaviour that is economically or financially abusive towards the other person;
  - 28.4. degrading or humiliating the other person;
  - 28.5. making numerous unmeritorious applications to the Court in an attempt to frustrate the progression of proceedings or cause the other party to incur unnecessary legal costs; or
  - 28.6. doing any other act or thing that a reasonable person would consider to directly or indirectly restrict the other person's ability to pursue their entitlements under the provisions of the FLA.
29. The Animal Law Committee noted that there is no mention of animals throughout these various examples and therefore suggested the following inclusion based on the *Family Violence Protection Act 2008* (Vic):

*"A person may indirectly restrict another person's freedom of movement by causing or threatening to cause the death of, or injury to, an animal (Regardless of who owns the animal) so as to control dominate or coerce the person."*<sup>1</sup>

***Proposed section 20C – Coercive Control Offence***

30. The Society notes proposed section 20C provides for the offence of coercive control itself, with a maximum penalty of seven years imprisonment.
31. From the outset, Members of the Criminal Law Committee highlighted the maximum penalty of seven years imprisonment, noting the 2021 Bill fixed a maximum penalty of five years for a basic offence and seven years for offences where abusive behaviour is directed at, makes use of or was witnessed by, a child. Noting the prescribed penalty, the Criminal Law Committee stressed the importance of any new offence being within the jurisdiction of the Magistrates Court of South Australia so as to avoid the delays associated with the higher Courts for all parties.
32. The Society notes proposed section 20C(9), which provides that a defendant can be charged and convicted under the proposed coercive control offence, as well as another offence, provided that the Court must take into account any other sentence that has been imposed in respect of the same behaviour at the time of sentencing. The Animal Law Committee was supportive of this provision, noting the context of animal harm offences in domestic violence relationships which may give rise to simultaneous charges under the new offence, as well as the *Animal Welfare Act 1985* (SA), arising out of the same conduct.

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<sup>1</sup> *Family Violence Protection Act 2008* (Vic) s 20B(4)(o).

33. There is a specific example included to establish clearly that an offence against an animal during the course of a domestic violence offence can also give rise to a criminal charge in its own right under animal cruelty legislation. The Animal Law Committee supported this clarification.

### **Miscellaneous comments**

#### Nexus between animal abuse and domestic violence

34. The Animal Law Committee reflected that domestic violence, which encompasses physical, emotional, psychological and financial abuse can extend to pets as tools of control and intimidation.<sup>2</sup> Abusers may harm or threaten the pets to exert power and maintain fear over their victims. This form of abuse creates an environment of perpetual fear and vulnerability for both survivor and their pets.<sup>3</sup>
35. For many survivors, the bond with their pets can be deep and genuine, with the pet being an extension of their family. The Animal Law Committee understands the concern for the safety and well-being of their animals can be a significant barrier for a person in leaving an abusive situation, fear of retaliation against pets or the financial burden of caring for them outside of the abusive home can deter survivors from seeking help. Addressing the safety of both survivor and their pets can be an essential aspect in breaking free from a cycle of abuse.
36. Recognising this connection, the Animal Law Committee understands that various organisations and shelters are evolving to create safe spaces for pets of domestic violence survivors. Offering temporary fostering or partnering with local animal shelters, these initiatives provide a crucial service – ensuring the safety and well-being of pets while their owners rebuild their lives. By removing the pet from an abusive environment, survivors can focus on their recovery without the burden of worrying about their pets.<sup>4</sup>
37. The connection between animal abuse and domestic violence is a complex and concerning issue. Research has shown a strong correlation between the two, with abusers often displaying violent tendencies towards both humans and animals.<sup>5</sup> Animal abuse can serve as a warning sign for potential domestic violence, prompting the need for early intervention and prevention efforts.
38. There is a well-established connection between domestic violence and the mistreatment of animals. Such studies demonstrate that 53% of women fleeing domestic violence report harm to their pets, and 35% admit to delaying seeking help due to concerns about their pets' safety.<sup>6</sup> The Animal Law Committee also noted the 2016 Royal Commission into Family Violence which outlined the distressing evidence from survivors about the manipulation and control exerted through the abuse of animals.
39. In light of these revelations, specific objectives outlined in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) made reference to the intersection between animal abuse and domestic violence. Despite this, references elsewhere within the Act were conditional on harm being caused to an animal.<sup>7</sup>
40. The *Family Violence Protection Act 2008* (Cth) takes a different approach, advocating for a more expansive approach to encompass various forms of animal abuse within the relevant legal framework. We note the example in the definition of “family violence” set out in that Act is as follows:

<sup>2</sup> *Royal Commission into Family Violence* (Final Report, March 2016).

<sup>3</sup> Jane Kotzmann, Mirko Bagaric, Gabrielle Wolf and Morgan Stonebridge ‘Addressing the impact of animal abuse: the need for legal recognition of abused pets as sentient victims of domestic violence in Australia’, (2022) 45(1) *University of New South Wales Law Journal* 184-208.

<sup>4</sup> *Safe Pets Safe Families* (Web Page) <<https://safepetssafefamilies.org.au>>.

<sup>5</sup> See Royal Commission into Family Violence (n 3).

<sup>6</sup> ‘Is there a link between domestic violence and animal abuse?’, *RSPCA knowledgebase* (Web Page) <<https://kb.rspca.org.au/knowledge-base/is-there-a-link-between-domestic-violence-and-animal-abuse/>>.

<sup>7</sup> See *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 7; s 36.

*“causing or threatening to cause the death of, or injury to, an animal, whether or not the animal belongs to the family member to whom the behaviour is directed so as to control, dominate or coerce the family member.”<sup>8</sup>*

41. As such and as expressed at paragraph 12 above, the Animal Law Committee advocated for the existing definition to be expanded to cover situations where threats of animal abuse are used to control or manipulate another person, provided there is a reasonable possibility that the threat could be carried out.
42. Supporting victims through shelters and accommodation that can lodge pets, provide counselling services and specific legal aid funding and programs will assist in disrupting the barriers survivors face when attempting to leave an abusive relationship. A trauma-informed approach, which comprehends the far-reaching impacts of violence, is vital in providing effective assistance to survivors. To this end, programs of this nature could be effectively adapted, with minimal adjustments, to integrate such services within the capabilities of legal aid organisations. For instance, the Animal Law Committee understood that the Women’s Domestic Violence Court Assistance Services within the Legal Services Commission already employs social workers who can cater to the requirements of clients and their animals.
43. Finally, the Society queries whether the introduction of a coercive control offence may give rise to an increase in the application and issuing of intervention orders. It is important that Police and domestic violence legal services are properly funded to perform their important functions and deal with any projected increase.

If you have any queries, please do not hesitate to contact me.

Yours sincerely

James Marsh  
**PRESIDENT**

T:  
E:

cc: The Hon Katrina Hildyard MP, Minister for Women and the Prevention of Domestic and Family Violence

Encl: Letter from the Law Society to the Hon Kyam Maher MLC, Attorney-General, re coercive control, 25 July 2022.

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<sup>8</sup> Family Violence Protection Act 2008 (Vic) s 5(2)(e).



Ref: 1022801

25 July 2022

The Hon Kyam Maher MLC  
Attorney-General  
GPO Box 464  
ADELAIDE SA 5001

By email: [REDACTED]

Dear Mr Attorney

### Coercive Control

I write to seek an update as to the issue of criminalising coercive control in South Australia.

We note your predecessor had consulted the Society and a range of other stakeholders in the development of the Criminal Law Consolidation (Abusive Behaviour) Amendment Bill 2021, which was introduced into the 54<sup>th</sup> Parliament, however did not progress beyond second reading stage. Prior to this, we also note the Hon Katrine Hildyard MP had introduced the Criminal Law Consolidation (Coercive Control) Amendment Bill 2020 in the House of Assembly on 2 December 2020. Both Bills sought to criminalise relationship behaviours commonly known as 'coercive control' in South Australia.

The Society has been actively involved in advocacy in relation to this issue, underlining the views of its Criminal Law, Women Lawyers', Family Law and Human Rights Committees in several submissions. The Society remains strongly of the view that there are a multitude of complex factors to be considered for the law to intervene in this area without unintended consequences, underlining the importance of robust consultation with stakeholders and a proper implementation process for any potential offence.

Copies of the Society's submissions of the preceding two years in relation to this issue are **enclosed** for your reference and consideration.

We would be grateful if you could provide the Society with an update as to how this significant reform might be approached by your Department in the near future.

Yours sincerely

[REDACTED]  
Justin Stewart-Ratray

**PRESIDENT**

T: [REDACTED]  
[REDACTED]

Cc: The Hon Katrine Hildyard MP, Minister for Women and the Prevention of Domestic and Family Violence.

Encl: Letter from the Law Society of South Australia to the Hon Vickie Chapman MP re Coercive Control, 15 February 2021.

Letter from the Law Society of South Australia to the Hon Vickie Chapman MP re Consultation on the draft Criminal Law Consolidation (Abusive Behaviour) Amendment Bill 2021, 30 September 2021.

Letter from the Law Society of South Australia to the Hon Vickie Chapman MP re Criminal Law Consolidation (Abusive Behaviour) Amendment Bill 2021, 12 November 2021.

Letter from the Law Society of South Australia to Ms Caroline Meador, Chief Executive, Attorney-General's Department re Discussion Paper: Implementation considerations should coercive control be criminalised in South Australia, 1 April 2022.



Ref: 1083760

15 February 2021

The Hon Vickie Chapman MP  
Attorney-General  
GPO Box 464  
ADELAIDE SA 5001

By email: [REDACTED]

Dear Ms Attorney

### Coercive Control

1. I refer to the letter received on 7 December from your Department, the Hon Michelle Lensink MLC and the Hon Carolyn Power MP in relation to the issue of coercive control.
2. You advise officers in your Department are considering the NSW Department of Communities and Justice's Discussion Paper on the issue.<sup>1</sup> As you note, the NSW Parliament has established a Joint Select Committee on the issue. The Society is aware that the Law Council of Australia has made a submission to the Committee and also awaits the NSW Parliament's report and recommendations. The results of the review will be informative and useful for South Australia's consideration of the issue.
3. Shadow Minister Hon Katrine Hildyard MP introduced the *Criminal Law Consolidation (Coercive Control) Amendment Bill 2020* into the House of Assembly on 2 December 2020. Through amendments to the *Criminal Law Consolidation Act 1935 (SA)*, the Bill proposes new offences of coercive control and aggravated coercive control with maximum terms of imprisonment of seven and 15 years respectively. The Society takes an interest in Parliament's consideration of that Bill.
4. We understand the nature of your consultation is in relation to the issue of coercive control more generally and the State Government's consideration of potential reform in the area, rather than consideration of the above Bill in particular. Accordingly, the Society, on the information of its Criminal Law Committee, makes comments about the broader topic of criminalising coercive control, as set out below.
5. The Society condemns domestic violence and is extremely concerned at the incidence and effect of domestic violence in our community. We, along with many others, consider coercive control can often be a precursor to or significant predictor of domestic violence, in particular intimate partner homicide. The Society considers there to be significant merit in any proposal, legislative or otherwise, to address serious domestic violence and commends your Department for considering this issue. The scourge of domestic violence is a complex, multi-faceted issue which requires a comprehensive response, of which the criminal justice system is just one aspect.

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<sup>1</sup> NSW Government, 'Coercive Control' (Discussion Paper, October 2020).

6. We note question 3 of the discussion paper queries, albeit in a New South Wales context, whether the existing criminal and civil law provides the police and courts with sufficient power to address domestic violence, including non-physical and physical forms of abuse.<sup>2</sup> In this respect, the Society notes that there are existing laws in the criminal and civil jurisdictions which are capable of addressing, and do address, behaviour which would constitute coercive control.
7. It is the Society's view that existing laws could, and should, be properly utilised to address coercive behaviours. For example, the Society's Criminal Law Committee has made the observation that police rarely apply intervention orders in relation to behaviour that is not physically violent in nature, even though the law explicitly allows intervention orders to be invoked for all types of non-violent coercive behaviours. The Society is not privy to the reasons why such intervention orders are not often invoked, but suggests that greater utilisation of intervention orders to address coercive control would be far more effective than introducing a new offence of coercive control, as intervention orders by their nature are designed to disrupt abusive or coercive behaviours before they escalate.

### ***Scope of the Intervention Orders (Prevention of Abuse) Act 2009 (SA)***

8. The Society expresses the view that the intervention orders scheme, if used effectively in its current iteration, captures and therefore has the ability to prevent, much of the conduct and behaviour a proposal to criminalise coercive control aims to address. We suggest the ability of the existing intervention orders scheme to address coercive control should be considered as a priority over any proposal to create new offences.
9. Part 3, Division 1 of the *Intervention Orders (Prevention of Abuse) Act 2009 (SA)* ("the Act") sets out the basis for the intervention orders scheme in South Australia. Sections 6 and 7 set out the grounds for issuing intervention orders, and establish the persons for whose protection they may be issued.
10. Section 6 provides the grounds for the issuing of an intervention order, as follows:
  - 10.1. "it is reasonable to suspect that the defendant will, without intervention, commit an act of abuse against a person; and
  - 10.2. the issuing of the order is appropriate in the circumstances."
11. Section 7 sets out the persons for whose protection such orders may be issued, with part 7(1)(a) establishing the qualifier "*any person against whom it is suspected the defendant will commit an act of abuse.*"<sup>3</sup> We note the term "*abuse*" is subsequently broadly defined in section 8, giving the intervention orders scheme in South Australia considerable scope to address a range of abusive and, most relevantly coercive, behaviour. In particular, section 8(2) of the Act defines an "*an act of abuse*" as behaviour resulting in or intending to result in:
  - 11.1. physical injury; or
  - 11.2. emotional or physical harm; or
  - 11.3. an unreasonable and non-consensual denial of financial, social or personal autonomy; or
  - 11.4. damage to the property in the ownership or possession of the person or used or otherwise enjoyed by the person.

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<sup>2</sup> Ibid 13.

<sup>3</sup> Emphasis added.

12. We note that subsections (3) to (5) of section 8 subsequently provide further definitions to the behaviour described in points 10.2 and 10.3 above. We note the wide variety of behaviours as defined in section 8 of the Act sufficiently capture coercive control (as you have explained it in your media release dated 6 November 2020) and include, but are not limited to:

12.1 *“unlawfully depriving the person of his or her liberty”;*<sup>4</sup>

12.2 *“keeping the person under surveillance”;*<sup>5</sup>

12.3 *“denying the person the financial autonomy that the person would have had but for the act of abuse”;*<sup>6</sup>

12.4 *“causing the person through coercion or deception to relinquish control over assets or income”;*<sup>7</sup>

12.5 *“preventing the person from making or keeping connections with the person’s family, friends or cultural group, from participating in cultural or spiritual ceremonies or practices, or from expressing the person’s cultural identity”;*<sup>8</sup> and

12.6 *“exercising an unreasonable level of control and domination over the daily life of the person.”*<sup>9</sup>

### ***Effectiveness of the intervention orders scheme***

13. The Society considers the issuing, and to the extent required, enforcement, of Intervention Orders under the Act has the potential to be an effective and efficient response to coercive control, and that an increased awareness of their availability and use will assist in prevention of the offending.

14. Of relevance is the distinction between *“domestic abuse”* and *“non-domestic abuse”* as set out in sections 8 and 9 of the Act. We note both forms of abuse are distinctly defined in section 8, with section 9 subsequently providing that, where practicable, proceedings relating to interventions against domestic abuse are to be dealt with as a matter of priority.

15. We note the penalties for contravening an intervention order, as set out in section 31 of the Act, are considerable. Further, the special police powers set out in Part 5, Division 2, particularly sections 35 and 36, delegate significant power to South Australia Police with respect to the enforcement of such orders. Further, we note the *Bail Act 1985* (SA) prescribes a presumption against bail in cases where a person has contravened an intervention order where the act or omission alleged to constitute the breach involved either physical violence or a threat of physical violence.<sup>10</sup>

16. The Society considers the intervention orders scheme provides an effective response to concerns arising from coercive control, given that intervention orders can also be used as a preventative measure, with serious consequences for those who breach such orders. Please note, however, that the Society is not aware of the view of South Australia Police as to whether the current scheme provides Police with the requisite power to issue and enforce intervention orders in those circumstances.

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<sup>4</sup> *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s8(4)(b).

<sup>5</sup> *Ibid* s8(4)(k).

<sup>6</sup> *Ibid* s8(5)(a).

<sup>7</sup> *Ibid* s8(5)(e)(i).

<sup>8</sup> *Ibid* s8(5)(h).

<sup>9</sup> *Ibid* s8(5)(i).

<sup>10</sup> *Bail Act 1985* (SA) s10A(2)(ba).

17. The Society's Criminal Law Committee noted that the use of intervention orders would have a more immediate effect than the delayed response a proposed offence of coercive control would be likely to have. If a victim of coercive control understands the behaviour they were subjected to is criminal (in the context of the Act as described above), they are already able to take swift action by way of going to the police and (presumably) obtaining an intervention order.
18. The Criminal Law Committee also noted a victim may not be likely to consider the behaviour they have been subjected to as criminal at the time, and the Committee expressed concern that should a new offence of coercive control be introduced, offenders could possibly be charged years after the offending when they are no longer in the relationship in which they allegedly demonstrated coercive control. If, as seems likely, the impetus for an offence of coercive control is for SAPOL to intervene and prosecute early indicators of domestic violence, it seems counterintuitive that people are only likely to be prosecuted long after the offending has ceased. In this respect, the Criminal Law Committee considered if an offence were to be introduced, a time limit in which to bring proceedings would be necessary.
19. The likelihood of charges proceeding to trial was also considered by the Criminal Law Committee, which suggested a significant number of charges would inevitably be laid but not proceed to trial. The difficulty in resolving charges was considered in the context of the offence effectively being the criminalisation of a course of conduct. In relation to the conduct which may likely constitute an offence, the Committee further suggested people may be unlikely to lodge police reports for matters such as their finances being controlled.
20. The Society suggests the intervention orders scheme can be effective in its own right in addressing coercive control, and emphasises the potential unintended implications of creating an offence of coercive control to complement the current intervention orders scheme. This is particularly so in the event that a proposed offence may attract a presumption against bail and, as demonstrated in the Bill currently before the Parliament, takes the form of an indictable offence.<sup>11</sup> The preventative effect of the intervention orders scheme is considered to have greater utility than the delayed response and potentially unintended outcome a charge under a proposed offence may have.

### ***Other offences***

21. Beyond their consideration of the intervention orders scheme, the Society's Criminal Law Committee suggested other offences capture behaviour constituting coercive control, noting that threats<sup>12</sup> and surveillance<sup>13</sup> are already offences.

### ***Implications of an offence of coercive control***

22. The Society's Women Lawyers' Committee expressed there is merit in consideration of an offence of coercive control but noted it would give rise to a lot of issues both positive and negative, creating a necessity to tread delicately to ensure the best options are available for victims.
23. In particular, the Women Lawyers' Committee noted an offence of coercive control may potentially harm the victims it aims to protect. The Society considers this issue in the context of women who have little support, whether that be family or community based, who may be generally reluctant to speak to police for fear of being cut off entirely or further abused. The prosecution of such an offence is likely to require the full cooperation of a victim who, in some circumstances, may not even realise that they

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<sup>11</sup> *Criminal Law Consolidation (Coercive Control) Amendment Bill 2020*, cl 14F.

<sup>12</sup> *Criminal Law Consolidation Act 1935 (SA)* s 19.

<sup>13</sup> *Criminal Law Consolidation Act 1935 (SA)* s 19AA.

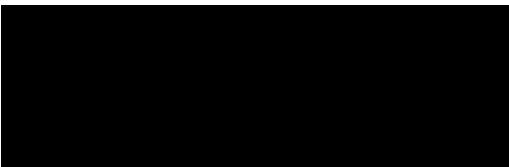
have been subjected to coercive control. It would be necessary to carefully consider the effect of any proposed offence on all sectors of the community.

24. In light of the above, the Society considers the broader issue which needs to be addressed (regardless of any proposed offence) is further education for women and families, about abuse via coercive control, and services available to those who experience this type of abuse. This should include education as to the protections available under the intervention orders regime and greater availability of Diversion programs in both the community and prison. However, the key priority is to drive cultural change in order to stop such abuse from occurring in relationships in the first place.
25. We also note the likely difficulty in creating an appropriate offence which is necessarily fluid to account for the intricacies of domestic relationships, which are often complex and vary widely from one to the other. Of relevance are issues raised in the aforementioned discussion paper about the risk of inadvertently criminalising behaviour within relationships considered to be socially acceptable, or that behaviour that is considered acceptable in the context one relationship may not be considered so in the context of another.<sup>14</sup> Further issues raised such as the impact on vulnerable cohorts by the “*over-criminalisation*” of relationship behaviours should also be closely considered if a proposal for criminalising coercive control is to be furthered.<sup>15</sup>

#### ***Miscellaneous comments***

26. The Society considered the criminal justice process in the context of domestic violence in a submission to you in relation to the *Statutes Amendment (Domestic Violence) Bill 2020* which is **enclosed** for your reference.
27. We take the opportunity to restate our views that the criminal justice process is just one aspect of an integrated response to domestic violence. In such situations, service responses in the form of counselling and housing as well as policies and programs to address the factors leading to domestic violence are important in addition to criminal justice responses.
28. The Society awaits the final report of the NSW Joint Select Committee and reiterates its view that the content and recommendations of that report will usefully inform the decision as to what might be of assistance in the South Australian context. The Society would be pleased to be further consulted should any proposal be developed, including any draft Bill that may result.

Yours sincerely



Rebecca Sandford

**PRESIDENT**

T: [REDACTED]



Encl: Letter from the Law Society of South Australia to Hon Vickie Chapman re Statutes Amendment (Domestic Violence) Bill 2018, 31 August 2018.

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<sup>14</sup> NSW Government (n1), 24-25.

<sup>15</sup> Ibid 25.





Ref: 1162988

30 September 2021

The Hon Vickie Chapman MP  
Attorney-General  
GPO Box 464  
ADELAIDE SA 5001

By email: [REDACTED]

Dear Ms Attorney

**Consultation on the draft Criminal Law Consolidation (Abusive Behaviour) Amendment Bill 2021**

1. I refer to your correspondence of 9 September 2021, requesting the Society's views on the above Bill which creates new offences to criminalise coercive control domestic and family violence behaviours.
2. Practically, we note the Bill amends the *Criminal Law Consolidation Act 1935* (SA) to provide for four new offences which have the common features of a "relationship" and "abusive behaviour". Related amendments are made to the *Bail Act 1985* (SA) to provide for a presumption against bail and the *Evidence Act 1929* (SA) to include new offences within that Act's definition of "serious offence against the person."
3. As you note, the levels of offence within the Bill vary between whether or not children were involved in the offending and the intention the offender had at the time of the behaviour. As you advise, the Bill renders a broad range of behaviours as abusive, including traditionally isolating behaviours, as well as controlling behaviours.
4. The Society abhors the scourge of domestic violence and takes a keen interest in any legislative proposal directed to addressing it. There is significant merit in a legislative proposal directed to addressing all forms of domestic violence, and the task of developing an appropriate legislative response to form part of a greater comprehensive response is a significant one, but one we are pleased to see is being carefully undertaken. As you will know, the Society responded to you, as well as the Hon Carolyn Power MP and Hon Michelle Lensink MLC in February to express its views about coercive control legislation more broadly. At that stage, the Society advised its views about the ability of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) to act as an efficient and effective preventative measure, however also noted the Society was awaiting the release of the Final Report of the New South Wales Joint Select Committee into the issue. That earlier correspondence is **enclosed** for your reference. The Society notes the current community consultation and is pleased to also consider and provide a response on this very significant Bill.
5. The Society understands this issue was also recently considered by Embolden SA in its Position Paper on Coercive Control,<sup>1</sup> which made a number of recommendations. The Society is also aware of the *Powerful Interventions* research project currently being undertaken in collaboration between Uniting

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<sup>1</sup> Embolden SA, Position Paper on Coercive Control and the Law in South Australia (September 2021).

Communities and the University of South Australia. This research project seeks to identify options for practical reforms, as well as consider the scope and operation of the South Australian Intervention Orders Regime and what those with lived experience of domestic and family violence consider to be practical barriers to its effectiveness.

6. I advise the Society's Criminal Law, Human Rights, Animal Law, Women Lawyers' and Children and the Law Committees inform the Society's response below.

***Importance of a carefully considered approach***

7. The Society's Human Rights Committee noted the depth and complexity of domestic violence related offending, and the likely exacerbating impact of the current COVID-19 pandemic through the isolating effect of various restrictions and lockdowns. The task of examining the effectiveness of legal tools designed to protect against and prevent family and domestic violence in South Australia is a critical and urgent one.
8. However, without discounting that urgency, the Society's Human Rights Committee noted that it is of utmost importance that legislators do not equate the urgent need to take appropriate action with a need to enact new criminal laws quickly and without first obtaining a clearer understanding of the complexities of the experiences of survivors of coercive control in South Australia.
9. In this regard, the Society's Human Rights Committee pointed to the abovementioned *Powerful Interventions* research project into the Intervention Orders regime in South Australia and suggested the South Australian Government await the outcome of this research, prior to the Bill's introduction to Parliament. Further, the Society's Human Rights Committee endorsed the Position Paper on Coercive Control Laws in South Australia, also referenced above.
10. In light of the complexity of this issue and the concurrent projects which are investigating it, the Society's Human Rights Committee suggested legislative reform should be preceded by the identification of a solid evidential basis for that reform which articulates
  - 10.1 the nature of the problem to be addressed by the draft Bill;
  - 10.2 the gaps in the current legal frameworks that have been designed to address domestic and family violence and abuse;
  - 10.3 the full range of legal and non-legal barriers preventing women from accessing the justice system in South Australia; and
  - 10.4 the lived experience of survivors of domestic violence and relevant support services.
11. In consideration of the complexity of domestic violence related offending, and in particular, the implications for children who are at close proximity to the offending, the Society's Children and the Law Committee was pleased with the references to children within the proposed offences. However, the Committee did query whether the Bill as presently drafted could potentially capture children as offenders, rather than victims of abuse, and suggests this be carefully considered.

***Preconditions for legislating to criminalise coercive control in South Australia***

12. The Society's Human Rights Committee further highlighted the work of Australia's National Research Organisation for Women's Safety Ltd (ANROWS) which has suggested a range of pre-conditions need to be in place before consideration should be given to imposing serious criminal penalties for coercive

control.<sup>2</sup> This is not because the harm caused by coercive control is not serious or does not deserve the attention of legislators, but rather, because without other structural and cultural changes, criminalising controlling behaviours and abuse may lead to a range of unintended consequences, some of which could be detrimental to survivors of domestic and family violence.

13. We note in this respect that ANROWS identified three key considerations which arose from current debates on the topic of coercive control, being the need to:

13.1 *harmonise definitions of domestic and family violence and its relationship to coercive control;*

13.2 *build the evidence base on the effectiveness of criminalisation and other responses to coercive control; and*

13.3 *reform the culture of response to domestic and family violence in and around the legal system.*<sup>3</sup>

14. Without such preconditions in place, the Society's Human Rights Committee suggested the effectiveness of any coercive control laws is likely to be severely undermined and the provisions themselves likely to be under enforced or unlikely to lead to convictions. This appears to be the experience in Tasmania and in England and Wales.<sup>4</sup>

15. The Society's Human Rights Committee also noted Embolden SA, in its recent position paper set out three "*priority action areas*" that it considered needed to be addressed before introducing a new criminal offence for coercive control, being

15.1 *Recommendations under Priority Action Area 1*

15.1.1 *Establish a national definition for family and domestic violence*

15.1.2 *Establish a national definition for sexual assault*

15.1.3 *Community education and awareness of coercive control*

15.2 *Recommendations under Priority Action Area 2*

15.2.1 *Ensure best practice justice system responses to and prevention of coercive control*

15.2.2 *South Australian Law Reform institute (SALRI) to consider the matter of placement of coercive control in criminal and/or civil law in South Australia*

15.3 *Recommendations under Priority Action Area 3*

15.3.1 *Invest in evidence-based responses, interventions and programs which support women and children's safety and freedom from abuse*

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<sup>2</sup> ANROWS 2021 Australia's National Research Organisation for Women's Safety (ANROWS) 2021, Defining and responding to coercive control: Policy brief (ANROWS Insights, 01/2021), ANROWS, Sydney, available at: <https://www.anrows.org.au/publication/defining-andresponding-to-coercive-control/>.

<sup>3</sup> Ibid page 9.

<sup>4</sup> ANROWS, n 2.

15.3.2 *Whole-of-system training and awareness to recognise and respond to domestic violence and sexual assault, and particularly to recognise and respond to coercive control.*<sup>5</sup>

16. The Society's Human Rights Committee further advised that the Embolden SA Position Paper also notes that Tasmania is currently the only Australian State with legislation that criminalises non-violent behaviours and that since its implementation in 2004, there have only been eight convictions for emotional abuse.<sup>6</sup> Research undertaken by ANROWS identifies that this low conviction rate is despite there being 68 prosecutions between 2004 and 2017.<sup>7</sup> This suggests that economic abuse may be difficult to prosecute with respect to proving intent to cause harm, and that proving a course of conduct for economic abuse may be also be difficult.<sup>8</sup> ANROWS has also identified the "*unreasonableness*" test that features within the offences as potentially problematic as it implies that there are some elements of coercive control that are acceptable.<sup>9</sup>
17. In the view of the Society's Human Rights Committee, the work of the Australian Women Against Violence Alliance in this area is also instructive.<sup>10</sup> The Alliance explains that while it can be generally agreed that "*coercive control does belong in law*", there is debate among experts and those with lived experience as to "*where in the law it should be situated.*"<sup>11</sup> The Alliance also emphasises that "*coercive control constitutes domestic and family violence and needs to be understood as part of a pattern of violence*" and that it demands a nationally consistent approach as well as "[e]ffective education and training for police and justice system officials."<sup>12</sup>
18. The Society's Human Rights Committee suggested such recommendations underscore the need for careful, evidence-based approaches to legislative change in this complex area, and the importance of drawing upon experiences in other jurisdictions where coercive control has already been criminalised and where the impact on preventing or deterring gender-based violence has not been as strong as proponents had hoped.
19. In considering other measures to accompany an offence of coercive control to form part of a broader, comprehensive approach, the Society's Women Lawyers' Committee noted other services were required. Namely, the Committee noted services such as counselling, or a dedicated SAPOL Domestic Violence officer assigned to assess the voluntariness of any "*consent*" to behaviour captured by the proposed offence.

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<sup>5</sup> Embolden SA , Position Paper on Coercive Control and the Law in South Australia (September 2021) available at [Policies, positions and submissions - Embolden](#).

<sup>6</sup> McGorrery P & McMahon M 2019, 'Prosecuting controlling or coercive behaviour in England and Wales: Media reports of a novel offence', *Criminology & Criminal Justice*, October 2019.

<sup>7</sup> ANROWS 2021 Australia's National Research Organisation for Women's Safety (ANROWS) 2021, *Defining and responding to coercive control: Policy brief* (ANROWS Insights, 01/2021), ANROWS, Sydney, available at: <https://www.anrows.org.au/publication/defining-andresponding-to-coercive-control/>.

<sup>8</sup> Embolden SA , Position Paper on Coercive Control and the Law in South Australia (September 2021) available at [Policies, positions and submissions - Embolden](#).

<sup>9</sup> ANROWS 2021 Australia's National Research Organisation for Women's Safety (ANROWS) 2021, *Defining and responding to coercive control: Policy brief* (ANROWS Insights, 01/2021), ANROWS, Sydney, available at: <https://www.anrows.org.au/publication/defining-andresponding-to-coercive-control/>.

<sup>10</sup> Australian Women Against Violence Alliance (AWAVA) 2021, 'Criminalisation of Coercive Control', Issues Paper, AWAVA, Canberra.

<sup>11</sup> Australian Women Against Violence Alliance (AWAVA) 2021, 'Criminalisation of Coercive Control', Issues Paper, AWAVA, Canberra.

<sup>12</sup> Australian Women Against Violence Alliance (AWAVA) 2021, 'Criminalisation of Coercive Control', Issues Paper, AWAVA, Canberra.

### ***Complexity and likelihood of litigation***

20. On reviewing the draft Bill, the Society's Criminal Law Committee maintained previously expressed concerns about the potential difficulty for prosecution in being able to demonstrate a person is actively exercising coercive control. In particular, the difficulty lies in adequately capturing certain behaviour or a course of behaviour within the definition of the term "*abuse*" for the proposed offences. The Society's Women Lawyers' Committee also maintained its concerns in this respect, namely as to the potential for the proposed offence to harm survivors of domestic violence it aims to protect.
21. From a practical point of view, Members of the Society's Criminal Law Committee queried whether the proposed offence may be likely to require courts and parties to be involved in protracted and complex litigation for many years, and noted a risk that the proposed offence may ultimately lead to lengthy trials involving complex and detailed examinations of personal relationships - a particularly pertinent concern in light of already congested court lists.
22. Further, Members of the Society's Criminal Law Committee queried the likelihood of defendants pleading not guilty in all but the most "*clear-cut*" cases of abuse, especially given the much-discussed fluid nature of conduct which can (and often does) constitute coercive control, and we note this may compound those practical risks.
23. Further concerns about complexity were expressed in relation to the defence set out in proposed section 20B(5), which provides as follows:
  - (5) *In proceedings for an offence against this section, it is a defence for the defendant to prove that the abusive behaviour to which the offence relates –*
    - (a) *was engaged in with the lawful consent of the other person; or*
    - (b) *was reasonable in the particular circumstances.*
24. Members of the Society's Criminal Law Committee noted the above invites the defendant to conduct a forensic cross-examination of the complainant, in addition to leading potentially significant volumes of evidence as to the true nature of the relationship. Such evidence may be from friends, other family members, financial documents and social media, and could involve private and personal information. There are also questions as to whether an accused might be able to lead expert psychological or psychiatric evidence with respect to the dynamics of familial relationships in particular cases to establish this defence, and concerns arise about the practical impacts of that prospect.
25. We note the above defence incorporating consent gives rise to questions as to how this may be treated in practice, and potential concerns about difficulties if matters proceed to legal action as to how to demonstrate there was consent, including the possibility of lengthy technical arguments on that point. The Society's Women Lawyers' Committee noted the presence of the defence of consent alleviated some of the Committee's initial concerns, but noted the nature of this defence, as drafted, may result in further acts of coercive control where a perpetrator may try to influence the victim to agree that the abusive behaviour was consented to. Similarly, Members of the Society's Animal Law Committee were concerned at the prospect of victims of abusive behaviour being easily manipulated into agreeing they consented to the ill treatment of an animal, thereby thwarting the objective of the Bill to create new offences to criminalise coercive control.

### ***Preventative features of the offence***

26. The Society maintains its views as to the *Intervention Orders (Prevention of Abuse) Act 2009 (SA)* being a readily-available preventative mechanism to address coercive and controlling behaviours before they spiral out of control. The Society's Human Rights Committee also cited the importance of recalling the scope of the term "abuse" within that Act, particularly noting its similarities with the definition of "abusive behaviour" as proposed in section 20B(12) of the Bill. Of relevance is the recent passage of the Statutes Amendment (Intervention Orders and Penalties) Bill 2021 in September 2021, which imposes higher penalties for those who breach intervention orders.
27. The Society's Human Rights Committee in this respect again referred to the views of Embolden SA in its recent position paper. That paper noted the *Intervention Orders (Prevention of Abuse) Act 2009 (SA)* demonstrated that there is already recognition and scope within South Australia's existing legislative framework for the criminalisation of coercive control.<sup>13</sup>
28. This perspective, and in particular the need to focus on addressing non-legislative factors when seeking to improve the effectiveness of responses to domestic violence, is shared by a number of scholars. The Society's Human Rights Committee highlighted the view of Walklate and Fitz-Gibbon, who caution against criminalising coercive control without also addressing the causes of gender-based violence in the community and other practical barriers that prevent women from accessing the justice system.<sup>14</sup>
29. The Society's Animal Law Committee noted two desirable features of the *Intervention Orders (Prevention of Abuse) Act 2009 (SA)*, to which it is suggested consideration could be given to replicating in the *Criminal Law Consolidation Act 1935 (SA)* in the context of the proposed offence. The Animal Law Committee noted the absence of provisions to cater for rehabilitation and locating a defendant and suggested
- 29.1 the inclusion of a provision to the effect of existing section 13 of the *Intervention Orders (Prevention of Abuse) Act 2009 (SA)* which details an intervention program specifically tailored to defendants and the prevention of further abuse and harm; and
- 29.2 a further provision enabling a public sector agency to release information which may lead to the discovery of a defendant in circumstances where a defendant is difficult to locate, similar to existing section 38 of the *Intervention Orders (Prevention of Abuse) Act 2009 (SA)*.
30. Members of the Society's Criminal Law Committee continued to express concern as to whether the charge of coercive control will be able to be proven in circumstances where it is really needed. In this respect queries were raised about whether prosecuting someone several years after a relationship has ended and long after the abuse has occurred could tend to defeat the purpose of legislation which is primarily directed to addressing behaviour before it spirals out of control and becomes violent.
31. The fluid nature of the behaviour constituting "abuse" under the Act was also raised as a further issue in the context of potential difficulties with proof of the potential offence. Firstly, situations can occur where such behaviour is utilised to deliberately control someone's life to the extent that they have no freedom of choice; where such behaviour occurs, legislation should rightfully intervene. Secondly,

<sup>13</sup> Embolden SA, Position Paper on Coercive Control and the Law in South Australia (September 2021).

<sup>14</sup> Walklate, S. . ., & Fitz-Gibbon, K. (2021). Why Criminalise Coercive Control? The Complicity of the Criminal Law in Punishing Women Through Furthering the Power of the State. *International Journal for Crime, Justice and Social Democracy*, 9(4). <https://doi.org/10.5204/ijcjsd.1829>. See also Fitz-Gibbon, K, Walklate, S, Meyer, S 2020a, 'Australia is not ready to criminalise coercive control – here's why', The Conversation [website], available at: <https://theconversation.com/australia-is-not-ready-to-criminalise-coercive-controlheres-why-146929>. Fitz-Gibbon, K, Walklate, S, Meyer, S 2020b, Criminalisation of Coercive Control - Research Brief, Monash University, available at: <https://doi.org/10.26180/5f72806cd6ab2>.

there may be circumstances where an individual unknowingly exercises controlling behaviours which may come within the definition of "abuse", without knowing that they are doing so. Members of the Society's Criminal Law Committee were concerned at the prospect of individuals involved in the second set of circumstances above being improperly prosecuted.

32. The Society's Children and the Law Committee noted that an offence of coercive control in circumstances where the abusive behaviour occurs in front of a child, would result in intervention only after the damage has been done. Therefore, it is important to have support services available for the child should they be impacted by the conduct that constituted the offending.
33. We note Schedule 1 clause 1 of the Bill amends section 10A(2)(d) of the *Bail Act 1985* (SA) to list section 20B as a "*prescribed offence*", ensuring the new offence attracts a presumption against Bail. The Society's Criminal Law Committee indicated concern at this proposal, noting the broad range of offences which constitute "*abuse*" under the Act and that not all of those are necessarily violent in nature. Importantly, the Court currently has the ability to refuse Bail in appropriate circumstances including if there is no suitable address which is geographically away from the victim and, in that regard, the justification for providing a presumption against bail in all cases was queried. Practically, Members of the Society's Criminal Law Committee observed that police would in any event likely issue an Intervention Order, which would require the defendant to vacate any shared residential premises and not allow contact between the defendant and complainant.

#### ***Intersection between Animal Abuse and Domestic Violence***

34. The Society's Animal Law Committee suggested the link between domestic violence and animal abuse is well known, identifying studies which show 53% of women escaping domestic violence report their pets were harmed and 35% state they delayed seeking refuge out of concern for the welfare of their pet.<sup>15</sup>
35. The Committee further noted the Royal Commission into Family Violence in 2016 heard evidence from numerous victims illustrating how animals are often used in coercive control, noting some examples below:
- 35.1 "*Once he cut the head off my mother's pet to 'teach her a lesson'*"
- 35.2 "*He regularly beat – and I mean beat – the shit out of our dogs'*"
- 35.3 "*He killed my animals'*"
36. In light of the above, the Society's Animal Law Committee noted one of the stated objectives of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW), being

*In enacting this Bill, Parliament recognises the intersection between animal abuse and domestic violence.*<sup>16</sup>

37. The Society's Animal Law Committee noted proposed section 20B(12)(d) which provides that animal abuse in certain circumstances is within the ambit of "*abusive behaviours*" for the purposes of the proposed offence, as follows

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<sup>15</sup> Is there a link between Domestic Violence and animal abuse? RSPCA 8.10.2019, <https://kb.rspca.org.au/knowledge-base/is-there-a-link-between-domestic-violence-and-animal-abuse/>.

<sup>16</sup> *Crimes (Domestic and personal Violence) Act 2007* (NSW) s 9(3)(f2).

*“causing death or injury to an animal (whether or not the animal belongs to the person).”*

38. Noting that the above, as currently drafted, is conditional on either death or injury occurring to the animal, the Society’s Animal Law Committee suggested there may be scope to expand this definition. As an example, the Committee noted the drafting of section 5(2)(e) of the *Family Violence Protection Act 2008* (Vic), which provides as follows

*“Causing or threatening to cause the death of, or injury to, an animal whether or not the animal belongs to the person to whom the behaviour is directed so as to control, dominate or coerce the person.”*

39. We suggest it would be desirable for this definition to be extended in order to capture threats of abuse against an animal in circumstances where the threat is made for the purpose of coercing or controlling another person and it is reasonably possible that the threat could be carried out.
40. The Society’s Animal Law committee further noted the protection in proposed section 20B(6) against being convicted of an act of abuse, where that act of abuse was part of the abusive behaviour which gave rise to an offence against section 20B of which the accused was ultimately convicted or acquitted. Members of the Society’s Animal Law Committee were concerned that the current drafting of this section would appear to preclude all other charges relating to violence against animals.
41. As a practical example the Committee was concerned that an alleged perpetrator could be acquitted due to a lack of evidence that the animal violence was done with the intention of causing harm to the other person, as per proposed section 20B(8)(b), and that subsequently the police and RSPCA would be statute barred from charging the alleged perpetrator with animal cruelty offences.

### ***Facilitating community education***

42. The Society notes the fine balancing act required in this context, with particular reference to a finding contained in the Final Report of the NSW Joint Select Committee on Coercive Control (“the Final Report”) being:

*It is not the role of government to intervene in the daily lives of ordinary, consensual, healthy domestic relationships.*

*However it is incumbent on government, police, frontline devices, family law and the criminal justice system to intervene where criminal behaviour exists that breaches human rights and is known to be a factor in potentially preventable domestic abuse related domestic abuse related homicide deaths.<sup>17</sup>*

43. The Society maintains its view that the most critical aspect of the response to domestic violence remains the steps which must be taken to drive cultural change and community education. If the Bill is passed, the Society anticipates it would be a feature of a broader comprehensive State Government response to domestic violence.
44. Further, we expect the State Government has given consideration to further funding of other domestic-violence support resources in the future to accompany the new offence. Of particular note are the funding considerations outlined in recommendation 1-3 and 9-19 of the Final Report.

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<sup>17</sup> Royal Commission into Family Violence – Final report (March 2016), [http://rcfv.archive.royalcommission.vic.gov.au/MediaLibraries/RCFamilyViolence/Reports/RCFV\\_Full\\_Report\\_Interactive.pdf](http://rcfv.archive.royalcommission.vic.gov.au/MediaLibraries/RCFamilyViolence/Reports/RCFV_Full_Report_Interactive.pdf).

45. The Society believes the proposed offence should be accompanied with a range of other measures, directed to responding to domestic violence in a preventative way, such as (by way of non-exhaustive example):
- 45.1 Removing the requirement to pay filing fees for private Intervention Orders (currently at \$297.00 with option for hardship waiver).
  - 45.2 Enabling the online lodgement of applications for court issued Intervention Orders, and online lodgement of related documents including affidavits, applications to vary/revoke orders etc (as opposed to self-represented applicants having to attend court in person to file documents and make applications). We do note that the upcoming introduction of the Electronic Case Management System for the criminal jurisdiction in South Australia may also assist in this respect.
  - 45.3 Providing additional and sustained funding for the Legal Services Commission Women's Safety Service, Women's Legal Service and other service providers that support survivors of domestic violence to understand and safely access legal processes and tools relating to domestic violence.
  - 45.4 Ensure timely access to professional interpreters for applicants, protected persons and defendants from non-English speaking backgrounds – both for court proceedings and to obtain legal advice.
46. The Society would question the introduction of such an offence if it were unaccompanied by other measures and funding that will allow the issue of domestic violence to be addressed in a comprehensive and effective way.

If you have any queries, please do not hesitate to contact me.

Yours sincerely



Rebecca Sandford

**PRESIDENT**



Encl: Letter from the Law Society to the Attorney-General, Hon Vickie Chapman MP re Coercive Control, 15 February 2021.



Ref: 1186135

12 November 2021

The Hon Vickie Chapman MP  
Attorney General  
GPO Box 464  
ADELAIDE SA 5001

By email: [REDACTED]

Dear Ms Attorney

**Criminal Law Consolidation (Abusive Behaviour) Amendment Bill 2021**

1. I refer to your email correspondence of 26 October 2021 to stakeholders in relation to an updated draft of the above Bill.
2. In that correspondence, you foreshadowed the introduction of the above Bill and noted that a range of amendments were made to the initial draft, providing a helpful summary of those changes. Subsequently, we note you introduced the Bill into the House of Assembly on 27 October 2021.
3. As you will be aware, the Society wrote to you on 30 September 2021, contributing to the consultation you mentioned. That response was informed by its Criminal Law, Human Rights, Animal Law, Women Lawyers' and Children and the Law Committees and followed an earlier submission in February 2021 as to the Society's views on criminalising coercive control generally.
4. The Society remains of the view that there is significant merit in legislative proposals directed to addressing the scourge of domestic violence, but continues to also note the importance of addressing the issue in a comprehensive way which seeks to avoid unintended consequences.
5. Since the last correspondence as to this Bill, the Society wrote to you on 3 November in relation to the commencement of the *Statutes Amendment (Intervention Orders and Penalties) Act 2021 (SA)*. As you would recall, the Society reiterated the views of its Aboriginal Issues Committee that the commencement of that Act should be delayed into the new year, noting the significantly increased penalties it provides for. Much of the Society's advocacy as to legislating for coercive control has considered the concurrent operation of the intervention orders scheme, and the Society continues to take an interest in how that Act and the proposed offence of coercive control will co-exist and interrelate.
6. In this time, the Society has also published and distributed its Key Election Issues for the 2022 State Election. This document notes the impending coercive control offence in South Australia and suggests it is imperative that it is accompanied by a range of other measures to address domestic violence in the community. The Society is calling for a commitment to immediate steps to improve and support the legal processes designed to address domestic violence in South Australia, by

- 6.1 *providing additional and sustained funding for the Legal Services Commission Women’s Safety Service, Women’s Legal Service and other service providers that support survivors of domestic violence to understand and safely access legal practitioners and tools relating to domestic violence; and*
- 6.2 *ensuring timely access to professional interpreters for intervention order applicants, protected persons and defendants from non-English speaking backgrounds – both for court proceedings and for legal advice.*
7. In light of this, we are pleased to note the reference within your email correspondence to the implementation strategy to be executed prior to the offence commencing. We note it foreshadows the release of a discussion paper on the implementation strategy at the end of the year, to which the Society would be interested to contribute. The Society maintains its view that the task of developing an appropriate legislative response to coercive control (as part of a greater comprehensive response) is a significant task that must be undertaken carefully.
8. I advise the Society referred your most recent correspondence and a copy of the Bill, as introduced, to Committees to consider with a view to providing this further submission in relation to the Bill prior to the next Parliamentary sitting week. The Society’s Women Lawyers’, Criminal Law and Animal Law Committees inform the Society’s views on the Bill as introduced as follows.

***Removing presumption against Bail.***

9. The Society is pleased to see that the presumption against bail, as proposed in the earlier draft of this Bill, has been removed.
10. The previous draft of the Bill amended section 10A(2) of the *Bail Act 1985* (SA) to list proposed section 20B as a “*prescribed offence*”, therefore attracting a presumption against bail. In previous correspondence, the Society noted the significant concern held by Members of its Criminal Law Committee at this proposal, particularly noting the broad range of offences which constitute “*abuse*” for the purposes of the offence.
11. Judicial discretion is important in all proceedings, and particularly those with complex and significantly varying factual circumstances. An arbitrary approach of providing a presumption against bail in all circumstances was too rigid to cater for such a broad offence and decisions as to bail, as always, are best left in the hands of the Court.

***Amendments to the definition of “Act of Abuse”***

12. We note the most recent draft of the Bill contains a range of amendments to the definition of “*Act of Abuse*” as provided for in proposed section 20B(11) and, practically, these affect the scope of the offence. There are some additions to this definition, as well as some amendments to existing aspects of this definition which are significant in nature.
13. The Society’s Criminal Law Committee noted the addition of subsection (c), being
- “loitering outside the place of residence of the person or some other place frequented by the person”*
14. Two existing subsections of this definition which have been amended in this subsequent Bill were also identified by the Society’s Criminal Law Committee, being (i) and (o) which now provide (respectively)

*“making unreasonable demands on how the person exercises their personal, social or financial autonomy (being a demand linked to a threat of negative consequences for a refusal or failure to comply with the demand);”*

*“preventing, or threatening to prevent, the person from having access to their financial assets (including financial assets held jointly with the defendant or another person),”*

15. Noting the fluid nature of the conduct which can fall under the above definitions, the Society’s Criminal Law Committee expressed concern that such behaviours, which were noted as being unpleasant and unacceptable, could now be criminalised. The Society’s Women Lawyers’ Committee suggested proposed subsection (o) set out above may be too broad and in this regard also noted amended subsection (n) which now provides

*“withholding or threatening to withhold, financial support necessary for meeting the reasonable living expenses of the person (or any other person living with, or dependent on, the person) in circumstances in which the person is dependent on the financial support to meet those living expenses;”*

16. In this context, the Society’s Women Lawyers’ Committee queried what is to be considered *“reasonable living expenses”* for the purposes of this definition. The Committee further noted, in relation to both proposed subsection (n) and (o), that they do not take into account potential cultural factors which may underpin certain types of relationships, that are not (or should not be) necessarily criminal.
17. The Society’s Criminal Law Committee noted the interaction between this Bill and the nature of evidence given in intervention orders proceedings, or proceedings in the Federal Circuit and Family Court of Australia. The Committee noted in particular that there exists the potential for individuals giving evidence under oath in such proceedings to incriminate themselves in relation to this proposed offence, noting the broad nature of the above inclusions to the definition of *“act of abuse”*. Committee Members also suggested that it may be useful to have express confirmation that evidence in intervention orders proceedings should be inadmissible in future criminal proceedings, notwithstanding the application of the Harman undertaking in this context.<sup>1</sup>
18. Considering the definition of *“act of abuse”* more generally, the Society’s Women Lawyers’ Committee noted that a national definition of abuse may be more useful in any event in educating people on domestic violence issues, rather than focussing on criminalising certain behaviours within a relationship. In this regard, there is a continued risk that this legislation intervenes too far into the daily lives and relationships of people.
19. We otherwise note proposed section 11(f), which was amended as per the previous suggestion of the Society’s Animal Law Committee, as follows

*“causing death or injury to an animal ~~(whether, or not the~~ threatening to do so (whether or not the animal belongs to the person);”*

20. The Society’s Animal Law Committee welcomes this amendment, noting its concern that the provision, as originally drafted, was conditional on either death or injury occurring to the animal and suggesting the approach taken by section 5(2)(e) of the *Family Violence Protection Act 2008* (Vic) as a model.

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<sup>1</sup> *Harman v Secretary of State for the Home Department* [1983] 1 AC 280.

### ***Retrospectivity***

21. Noting the likelihood that this legislation will eventually, in some form, be passed, the Society's Criminal Law Committee seeks clarification on whether it is intended that this proposed offence will operate retrospectively.
22. As you would likely be aware, the Society as a matter of principle opposes the retrospective operation of criminal laws in most circumstances. The Society's Criminal Law Committee noted that whilst there are clearly some instances where retrospectively applying criminal offences is indeed necessary, reasonable and proportionate, it should be the extreme exception and not the norm. While coercive control is insidious and needs to be addressed, the Society maintains that the prospect of this offence operating retrospectively is concerning.
23. The Society's Women Lawyers' Committee considered the drafting of section 20B(1), which appears to be unchanged from the previous draft of the Bill, and noted that the offence extends to a person who "has been" in a relationship with another person. In light of this, the Women Lawyers' Committee concluded that there is a risk that matters can be prosecuted at any point in time and long after the abuse has occurred. In this context, the Committee queried what South Australia Police's response would be to prosecuting old coercive control cases, when the relationship has ended and there is no immediate threat of harm.
24. In light of the above, the Society would appreciate advice from your Office as to whether it is proposed that the offence will apply retrospectively.

### ***Miscellaneous comments***

25. The Society's Animal Law Committee noted proposed section 20B(8) of the current Bill, which is the amended equivalent of section 20B(6) of the previous Bill. The Committee was previously concerned that section 20B(6) of the earlier draft may have had the consequence that an alleged perpetrator acquitted of an act of abuse involving an animal (due to a lack of evidence that it was committed in order to threaten a victim) would be protected from a further charge relating specifically to the animal abuse. The Committee welcomed proposed section 20B(8) of the Bill, which in the view of the Committee, appeared to have the effect that an act of abuse precluded from further prosecution must be in relation to the same victim. In the context of the example above, the Committee observed that a further animal cruelty charge would appear to be possible in such circumstances.
26. The Society's Animal Law Committee further noted, with interest and approval, the comments in your correspondence regarding the need for counselling and treatment services for perpetrators and support services for victims of coercive control.
27. The Society's Women Lawyers' Committee queried whether proposed section 20B(1), which appears to be unchanged from the previous draft, runs the risk of being used against a victim of domestic violence. As an example, the Committee cited circumstances where a victim has retaliated in defence to abusive behaviour, or a child in the presence of abusive behaviour who witnesses this abuse. The Committee suggested such circumstances may inadvertently fall within the scope of proposed section 20B(1) and render the victim a potential perpetrator. The Committee further observed the reference to three or more acts of abuse to constitute where a person "engages in abusive behaviour" as provided for in proposed section 20B(3). Noting that this has been increased from two, the Committee noted this may still be an arbitrary number in the legislation, if one or two instances abuse are seemingly significant enough for prosecution.

28. Overall, the Society's Women Lawyers Committee noted the amendments are sound and make the proposed legislation more cohesive, but the issues outlined above still remain. The Committee maintains its view that a range of other measures must accompany the proposed offence if it is to be furthered and effective in its aims.

29. Generally, the Society's Women Lawyers' and Criminal Law Committees were undeterred in their shared view that the *Intervention Orders (Prevention of Abuse) Act 2009 (SA)* remains appropriate legislation to swiftly and appropriately deal with immediate domestic violence concerns.

The Society anticipates Parliamentary debate on the Bill, as well as the release of the proposed discussion paper later in the year, with great interest.

If you have any queries, please do not hesitate to contact me.

Yours sincerely



Rebecca Sandford

**PRESIDENT**

T: [REDACTED]





Ref: 1216710

1 April 2022

Ms Caroline Mealor  
Chief Executive  
Attorney-General's Department  
GPO Box 464  
ADELAIDE SA 5001

By email: [REDACTED]

Dear Ms Mealor

**Discussion Paper: Implementation considerations should coercive control be criminalised in South Australia**

1. I refer to the above Discussion Paper ("the Discussion Paper") which is the most recent stage of the consultation on a proposed offence of coercive control in South Australia.
2. As you may be aware, the Society has taken a keen interest in this proposal, providing three submissions to former Attorney-General the Hon Vickie Chapman MP which are **enclosed** for your reference, being
  - 2.1 on 15 February 2021 in relation to the topic of criminalising coercive control generally;
  - 2.2 on 30 September 2021 providing the Society's views on a draft of the Criminal Law Consolidation (Abusive Behaviour) Amendment Bill 2021; and
  - 2.3 on 12 November 2021 in relation to an updated draft of the Criminal Law Consolidation (Abusive Behaviour) Amendment Bill 2021.
3. The Society notes the Criminal Law Consolidation (Abusive Behaviour) Amendment Bill 2021 was introduced in the 54<sup>th</sup> Parliament by the former Attorney-General however did not progress beyond the second reading debate. We are not aware what is proposed for this Bill in the 55<sup>th</sup> Parliament; whether it may be re-introduced, substantially amended or abandoned completely.
4. The development of the above Bill was the subject of considerable consultation with stakeholders, with amendments subsequently made on the basis of stakeholder input. We note the consultation that has taken place so far in relation to considering an offence of coercive control in South Australia has been commendable.
5. The Society now writes in the context of the most recent Discussion Paper, taking this opportunity to reiterate previously expressed views about the implications that may arise as a result of the introduction of a potential offence of coercive control in South Australia. The Society's Women Lawyers', Criminal Law, Family Law and Human Rights Committees have contributed the Society's response to this most recent consultation, as follows.

## Overview

6. The Society considers there are complex factors to be considered if new laws that intervene in this area are to contribute to addressing coercive control in a meaningful and effective way, without unintended consequences.
7. The Society's Criminal Law Committee:
  - 7.1 remains strongly opposed to the introduction of an offence of coercive control in South Australia;
  - 7.2 is of the view that the emphasis should be on adequately resourcing existing schemes that address domestic violence and that the potential for unintended consequences to arise from a coercive control offence outweigh any potential benefit from such an offence;
  - 7.3 is strongly of the view that the legislative response to domestic violence must be a preventive one and, in that regard, the effectiveness of a coercive control offence would be eclipsed by solutions which are already a feature of South Australian law; and
  - 7.4 anticipates difficulties in prosecutors successfully establishing an offence of coercive control, for reasons set out further below.
8. The Society's Women Lawyers' Committee:
  - 8.1 underscored the need to ensure that victims of domestic violence are safe and any legislation that aims to protect victims should be supported; but
  - 8.2 noted that legislation should not be enacted without proper research and consultation as to its implications (of which we note this current consultation forms a part). Accordingly, a whole of State Government approach to domestic violence is needed utilising specialist organisations and individuals.
9. In considering the Discussion Paper, the Society's Human Rights Committee highlighted the current *Powerful Interventions* project presently underway, noting the Research Report is to be publicly released in June 2022. The project is being conducted by UniSA in partnership with Uniting Communities and is funded by the Law Foundation of South Australia. It is examining the lived experience of the use and enforcement of Intervention Orders in South Australia in detail. The information that will result from the project, in the view of the Human Rights Committee, will greatly assist the work of assessing the potential for the implementation of an offence of coercive control in South Australia.
10. We note the *Intervention Orders (Prevention of Abuse) Act 2009 (SA)* ("the Intervention Orders Act"), as referred to the Society in previous submissions,<sup>1</sup> remains an appropriate and effective legislative mechanism to address coercive and controlling relationship behaviours. The broad definition of "abuse" as set out in the Intervention Orders Act is adequately flexible to contemplate behaviours that would constitute coercive control, including denial of financial autonomy, denial of freedom of movement, isolation from friends, threats to pets etc.
11. Further to the broad course of conduct captured by the Intervention Orders Act is the relative pace at which it can provide a response to domestic violence situations before they spiral out of control, often with tragic consequences. In this regard, the Society acknowledges and highlights the lower standard of proof required for the confirmation of an intervention order, being on the balance of probabilities. If this is successfully proved, the intervention order can then take effect and promptly separate the parties. Conversely, a

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<sup>1</sup> The effectiveness of the Intervention Orders Act in responding to domestic violence situations was considered in detail in the Society's submission of 15 February 2021 listed at point 2.1 and *enclosed*.

proposed offence of coercive control presents a less rapid response, with a higher threshold to establish the offence, as well as anticipated difficulties in successful prosecution, as set out further below.

12. We acknowledge a significant positive implication of an offence of coercive control being debated in South Australia over the preceding year is the increased awareness of the prevalence of domestic and family violence in the community.
13. There are a range of issues the Society suggests must be carefully considered, such as
  - 13.1 the perceived difficulty of establishing an offence of coercive control;
  - 13.2 potential implications which may result from a criminal offence of coercive control, such as for matters in the family law jurisdiction; and
  - 13.3 engagement and training with the judiciary, legal profession and law enforcement agencies.

#### ***Difficulty in establishing an offence of coercive control***

14. The Society's Criminal Law Committee has raised concerns about the difficulty of the offence being prosecuted successfully, likening it to other "*course of conduct*" offences,<sup>2</sup> which are difficult to adequately particularise (in the professional experience of its Members).
15. Anecdotally, Members of the Criminal Law Committee have noted some difficulty experienced by prosecutors in successfully establishing offences under section 20A of the *Criminal Law Consolidation Act 1935* (SA). This offence was introduced in 2018 and is enlivened where a person is in a relationship with another and either chokes, suffocates or strangles the other person without consent.
16. While the choking offence was introduced to try to increase prosecutions, Members of the Criminal Law Committee advised of difficulties experienced by prosecutors in proving the offence. This results in a high number of people being charged with the offence remaining in custody (owing to the offence attracting a presumption against bail) who are subsequently acquitted. The Society anticipates writing to the Minister for Police, Emergency Services and Correctional Services, the Hon Joe Szakacs MP to seek some detail as to the number of people charged with and the number of people subsequently convicted of, that offence.
17. Members of the Criminal Law Committee anticipate similar problems being encountered with the charging and subsequent prosecution of an offence of coercive control, regardless of how the legislation is framed. Therefore, whilst noting the importance of the issue it would seek to address, the Criminal Law Committee is of the view that an offence of coercive control is likely to be ineffective. Further, the potential ineffectiveness of the offence may have implications for victims who will presumably be required to give evidence in relation to distressing matters, with the possibility of a meaningful result being slim.
18. In light of the above, the Society was pleased to see that the initial proposal that an offence of coercive control attract a presumption against bail, was abandoned. The Society urges Parliament to ensure any type of coercive control offence does not attract a presumption against bail.

#### ***Retrospectivity and concurrent Family Court proceedings***

19. If it is the will of Parliament to pass legislation which provides for an offence of coercive control, the Society would underscore the importance of that offence not being retrospective in nature. Noting the broad range of conduct that constitutes coercive control, varying familial dynamics and cultural considerations, the

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<sup>2</sup> An example being section 50 of the *Criminal Law Consolidation Act 1935* (SA) "*Unlawful sexual relationship with a child.*"

proposal that any such offence would be retrospective is concerning (and more concerning if it concurrently attracted a presumption against bail).

20. The Society's Criminal Law Committee has also noted concern at the potential for a retrospective offence to be weaponised in the context of family law matters before the Federal Circuit and Family Court of Australia.
21. The Society's Family Law Committee considered the relevance of a proposed coercive control offence from a family law perspective, firstly noting the definition of "*coercive control*" as outlined on page 3 of the Discussion Paper, as follows

*"an insidious form of DFV that involves tactics of emotional and mental abuse which undermines the victim's autonomy and sense of identity [...it may include] isolating a person from their friends and family, controlling finances, controlling what a person can or can't say, controlling what a person can wear, when they can sleep, what they can eat and when they can leave the house."*

22. The Family Law Committee noted the definition of "*Family Violence*" in section 4AB of the *Family Law Act 1975 (Cth)* covers many of the examples outlined in the Discussion Paper's definition, but specifically references behaviour by a person that "*coerces or controls a member of the person's family or causes the family member to be fearful.*" From a practical perspective, the Family Law Committee observed that a Judicial Officer of the Federal Circuit and Family Court of Australia already has the capacity to make a finding as to the existence of coercive control in a relationship in the absence of a stand-alone criminal offence being created in South Australia.
23. Should legislation be passed to criminalise coercive control as a retrospective stand-alone offence, the existence of such charges would invariably provide weight to corresponding allegations that have been made in the family law jurisdiction.
24. The Family Law Committee subsequently returned to the concern raised by the Criminal Law Committee, being that the criminalisation of coercive control as a retrospective stand-alone offence could result in allegations of this nature being made vexatiously in the context of Family Court proceedings. From a family law perspective, this concern is not without merit.
25. However, given the insidious nature of this type of offending, often parties are not empowered to address the existence of this type of family violence until the parties have separated, which will usually coincide with the commencement of the Federal Circuit and Family Court of Australia proceedings. Ascertaining whether the complaint is legitimate or vexatious in those circumstances may never be possible.
26. The Family Law Committee emphasised that it abhors any form of family violence and strongly supports legislative change to address the prevalence of violence of all kinds. However, in light of the concern raised by the Criminal Law Committee it suggests that legislative change should not be made hastily and without consideration of submissions of all key stakeholders.

### **Case studies**

27. The Society's Women Lawyers' Committee noted the case studies set out in the Discussion Paper. In the experience of Committee Members who practise in family law, coercive control can be a feature in many relationships which end up that jurisdiction. In such cases, the victims are so intimidated by the control that they feel compelled to remain in the relationship for many years. Some features of such control noted by Committee Members included limiting contact with the victim's friends and family, limiting control over money and employment and controlling the victim's spare time.
28. The Society understands the difficulty for many who suffer from coercive control is that they have been led to believe the conduct they are being subjected to is normal. This social isolation means that there is no

opportunity for the victim to get help and, often if help is sought, the victim and often children of the relationship have had to put up with the conduct for many years.

### ***Engagement with the judiciary***

29. Coercive control will, if enacted as a crime, concern State courts and not the Federal system. Family Law matters often contain allegations of such control and an awareness at the Federal Level of changes to the State criminal law would be essential. In this regard, we note some of the potential implications for matters before the Family and Federal Circuit Court identified by the Criminal Law Committee and subsequently considered by the Family Law Committee, from paragraph 19 onwards above.
30. The Women Lawyers' Committee suggested domestic violence training be included in judicial training. In this context, it is noted that Magistrates have quarterly training, as well as the presentation by Jess Hill in relation to her work – *See What You Made Me Do*.

### ***Training for the legal profession***

31. The Society notes, as stated above, that the issue of coercive control comes up in family law matters usually in the history given to a solicitor by a client. Without training in coercive control it is likely that some solicitors might miss the seriousness of the conduct, might not understand how to obtain the instructions identifying the conduct in the first place (noting that many victims have normalised the conduct in their own lives) and might not know if they can advise clients to obtain police assistance.
32. In this regard, members of the legal profession who need to have the required knowledge would not just be the obvious examples such as family law and criminal law practitioners. Coercive control can occur in relation to wills and estates, personal injury matters (where a victim has a right to sue) and criminal injuries compensation.
33. The Women Lawyers' Committee was of the view that domestic violence training (not just confined to coercive control) ought to be compulsory for all DPP prosecutors and police prosecutors.

### ***Training for law enforcement agencies***

34. The Women Lawyers' Committee noted that in some parts of South Australia there are specialist family violence units within police stations. It is the experience of some lawyers working with victims that not all victims have the chance to experience police officers with appropriate training and it seems sometimes to be a lack of services in all police environments. The Women Lawyers' Committee considers current initiatives around police training (as set out in the Discussion Paper) may not be sufficient.
35. In this regard, the Women Lawyers' Committee drew upon the Australian Institute of Criminology's Report titled *Police Domestic violence – A Review of the Evidence*,<sup>3</sup> which considered training police in relation to domestic violence. The Report included in its definition of domestic violence the type of conduct which might be said to be coercive control. The findings in relation to investigation by police of actual violence was wanting.<sup>4</sup>

### ***Reporting conduct***

36. The Society considers that domestic violence is under reported and notes that the withdrawal of charges once a report has been made is also common.

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<sup>3</sup> Executive Summary IX <https://apo.org.au/sites/default/files/resource-files/2018-11/apo-nid204986.pdf> (last accessed 29 March 2022).

<sup>4</sup> Ibid p 15.

37. The need to identify ways to increase the number or reports of coercive control if it is made an offence will require steps to be taken across all of the domestic violence charges. It is of note the Discussion Paper states that in the years coercive control was an offence in Tasmania (12 years) there have been only 73 charges laid and only 40 convictions (3.5 per year). The Women Lawyers' Committee noted there is little benefit to coercive control as a criminal offence if victims will not be reporting the conduct.
38. The Women Lawyers' committee suggested the reasons for criminalising such conduct would be:
- 38.1 to ensure that the offending is seen as serious and to highlight to the South Australian community that the conduct is so reprehensible that it is now a crime;
  - 38.2 to prevent the perpetrator from continuing the conduct;
  - 38.3 to reform the perpetrator; and
  - 38.4 to punish the conduct.
39. The Women Lawyers' Committee understands that the reasons victims of domestic violence do not report the conduct include:
- 39.1 the conduct is seen as too trivial to warrant calling police;
  - 39.2 shame;
  - 39.3 embarrassment;
  - 39.4 fear;
  - 39.5 financial implications of ending a relationship; and
  - 39.6 sometimes, previous police attitude can also be a disincentive.
40. The 2006 Report titled *Family Violence Amongst Aboriginal and Torres Strait Islander People*,<sup>5</sup> concludes the high rates of violence experienced by many Aboriginal and Torres Strait Islander victims was significantly under reported. The Women Lawyers' Committee also noted that recently, prominent Aboriginal and Torres Strait Islander women have called for a separate plan for the Indigenous communities to deal with domestic violence.<sup>6</sup>
41. In light of the above, the Society's Women Lawyers' Committee suggested a plan for Indigenous communities needs to be developed in South Australia - not only in relation to the consideration of a new offence – but to domestic violence generally.

#### **Consultation and training in other areas of service provision**

42. The Society notes that health and welfare agencies may often see a victim for all forms of domestic violence including conduct amounting to coercive control. Developing strategies to ensure that such service providers are made aware of the sorts of conduct caught by any offence of coercive control is essential. An extensive consultation and implementation program must be undertaken before consideration is given to enacting any criminal offences and must involve representatives from those agencies.

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<sup>5</sup> <https://www.aihw.gov.au/getmedia/34fea687-d980-4e54-8826-256b6acfd0f/fvaatsip.pdf.aspx?inline=true> (last accessed 30 March 2022).

<sup>6</sup> See <https://www.smh.com.au/politics/federal/nobody-listens-to-us-indigenous-women-call-for-separate-domestic-violence-plan-20210906-p58p97.html> (last accessed 30 March 2022).

**Services and gaps**

43. The Society notes the Legal Services Commission of South Australia and other SA Community legal services are significantly underfunded, and understands the Legal Services Commission of South Australia provides limited funding to survivors of domestic violence. In this regard, the Society has advocated for increased funding to the Legal Services Commission on many occasions, most recently in the context of the 2022 State Election, highlighting the importance of the Commission in facilitating access to justice generally.
44. The Society's Women Lawyers' Committee understands there have been cuts to services in the last two years for victims of domestic violence, noting victims in rural and remote areas have particularly poor access to services.
45. Finally, we note programs to assist victims and perpetrators ought to be prioritised in this context also.

In closing, Society confirms the pressing need to address all other necessary changes in the community directed to reducing the scourge of family violence, rather than risking enacting another offence which is likely to remain under reported and be misunderstood, and most importantly, not have any positive implications for victims.

Yours sincerely

  
Justin Stewart-Rattray

**PRESIDENT**

T:   


Encl: Letter from the Law Society of South Australia to the Hon Vickie Chapman MP, Attorney-General re Coercive Control, 15 February 2021.

Letter from the Law Society of South Australia to the Hon Vickie Chapman MP, Attorney-General re Consultation on the draft Criminal Law Consolidation (Abusive Behaviour) Amendment Bill 2021, 30 September 2021.

Letter from the Law Society of South Australia to the Hon Vickie Chapman MP, Attorney-General re Criminal Law Consolidation (Abusive Behaviour) Amendment Bill 2021, 12 November 2021.



Ref: 1452542

25 September 2023

The Hon Kyam Maher MLC  
Attorney-General  
GPO Box 464  
ADELAIDE SA 5001

By email: [REDACTED]

Dear Mr Attorney

### **Criminal Law Consolidation (Section 20A) Amendment Bill 2023**

1. I refer to your letter dated 14 August 2023 enclosing a copy of and seeking the Society's views on the above Bill.
2. As you note, the Bill amends the *Criminal Law Consolidation Act 1935 (SA)* ("the Act") to alter elements relating to the offence of choking, suffocation or strangulation in a domestic setting in section 20A of the Act ("the strangulation offence"). The amendments are directed to clarifying that the elements of the offence are not limited to proof of restriction of breath, following a review recently undertaken by the Government on the effectiveness of the offence since it commenced in 2019 ("the 2023 Review"). The Society appreciates receiving a copy of the Bill to consider and the substantial timeframe within which to provide its views.
3. The Bill makes a simple amendment via the inclusion of proposed section 20A(3a) to clarify that:
  - 3.1. "*choking or strangling*" a person includes a reference to "*applying pressure, to any extent, to the person's neck*"; and
  - 3.2. "*suffocating*" a person includes reference to:
    - 3.2.1. *obstructing, to any extent, any part of the person's respiratory system; or*
    - 3.2.2. *interfering, to any extent, with the operation of a person's respiratory system; or*
    - 3.2.3. *impeding to, any extent, the person's respiration.*
4. The anticipated practical implications of the amendments are significant as to the circumstances in which the strangulation offence would be committed. The Society's Criminal Law Committee ("the Committee") has maintained a significant interest in the operation of this offence for some time and informs the Society's views as follows.

### **Overview and general comments**

5. The Society provided its views on the strangulation offence, at the time it was implemented by way of the *Statutes Amendment (Domestic Violence) Act 2018 (SA)*, by letter to the former Attorney-General on 31 August 2023. A copy of that submission is **enclosed** for your reference.

6. Subsequently, and as a result of concerns raised by Members of the Committee, the Society wrote to the Minister for Police, Emergency Services and Correctional Services, the Hon Joe Szakacs MP on 20 April 2022 (*enclosed*). The Society sought to obtain data from the Minister relating to the strangulation offence, including the number of individuals who had been charged with the offence since commencement and how many charged were subsequently convicted.
7. The Minister wrote in response to the Society's correspondence on 17 May 2022 and informed the Society that the issues should be taken up via a Freedom of Information application to South Australia Police ("SAPOL"). A subsequent application produced the response that:
  - 7.1. between 31 January 2019 and 21 June 2022 there had been 1,167 individuals charged with the offence;
  - 7.2. the further data the Society had requested was not provided because, SAPOL said, it did not collate or maintain data specific to that request in a "*readily available format*".
8. Earlier in the year, the Society noted with interest the Report you referred to in your letter, which provided more complete data as to the statistics with respect to the prosecution of the strangulation offence ("the 2023 Report").
9. At the time the offence was proposed, the Society had noted that the existing endangerment offences set out in section 29 of the Act already captured the same circumstances as the strangulation offence was intended to capture. At the same time, the Society noted that it appreciated the reasons for the creation of a stand-alone offence proffered by the former Government.
10. Members of the Committee have reported many anecdotal instances of difficulty with the strangulation offence being effectively prosecuted in the years after its commencement. These concerns were reinforced by the data set out in the 2023 Report.
11. The Society recognises the necessity of reviewing the offence and the subsequent contemplation of legislative reform. However, the Committee articulated concerns with the amendments proposed, the resulting breadth of the strangulation offence and the resulting practical implications.

***Interpretation and conflict with existing provisions of the Act***

12. The data in the 2023 Report appears to indicate that charges of the offence of strangulation have been preferred when another offence would better fit the facts of the case. This practice is sometimes referred to as "*over-charging*". The low rate of convictions for the strangulation charge appears to be relied upon as a reason to change the definition. Committee Members were of the view that the strangulation offence has a significant maximum penalty to reflect the true nature and gravity of an offence where an airway restriction has occurred.
13. The Committee's most prominent concern is that the proposed amendment specifically provides that a person applying "*pressure, to any extent, to the person's neck*" would commit the offence of choking or strangling. The Committee interpreted the amendment as requiring the prosecution only to prove that a person has touched the neck of another person to establish the offence. Merely touching someone's neck would typically be an assault per section 20 of the Act. That offence is dealt with in the Magistrates Court. The amendment turns the same conduct into a major indictable matter, with a presumption against bail. This ultimately requires a jury trial and the much longer process associated with such matters.
14. Members of the Committee report that an assault alleging any kind of deliberate contact with the neck of the alleged offender's partner, with nothing further in terms of force, will likely see the alleged offender remanded in custody for 18 to 24 months while awaiting trial in the District Court. The potential injustice to a person sitting on remand for this time is apparent. Further, the additional resources required to

imprison the person and then hold a trial could be disproportionate to the offending concerned, that is, if it is truly more appropriately characterised as an assault. There are several other offences within the Act to deal with a more serious assault, or actions such as threatening or attempting to kill a person.

15. The above concerns are not set out to gainsay the laudable aim of the offence; being specifically to discourage or prohibit a precursor behaviour to much more significant domestic violence patterns of behaviours which can ultimately lead to the killing of a partner in violent relationships. The reference to strangulation within the Act is supported as a recognition of this.
16. However, the approach taken by the Bill in providing an offence that by touching one area of the body over another drastically changes the nature of the charge and reverses the presumption of bail is not a sufficiently nuanced approach. The Bill as drafted may well: capture conduct that would not ordinarily be regarded as choking; subject the alleged offender to a more arbitrary regime; and, have implications for the Court's resources and efficiency.

***Suggested alternate approach***

17. The Society recognises the need to respond to the difficulties occasioned by the interpretation of the strangulation offence as it is currently drafted. One possible solution suggested by Members of the Committee was to add strangulation and suffocating as an aggravating feature to raise the maximum penalty of an assault to five years imprisonment, which is the same penalty as an assault causing harm with a weapon.
18. Importantly, this would ensure that the matter would remain within the jurisdiction of the Magistrates' Court, rather than in the District Court of South Australia. Even if the presumption against bail for such an offence were to be retained (which the Committee would not support), this approach would avoid the significant remanding of people charged with such an offence.
19. This would retain a recognition of strangulation as a specifically disapproved behaviour within the Act. Such an approach would also allay the interpretation difficulties associated with the offence as currently drafted and avoid the potential for the offence to operate arbitrarily as would be anticipated if the amendments as currently proposed were to be incorporated into the Act.

If you have any queries, please do not hesitate to contact me.

Yours sincerely

James Marsh

**PRESIDENT**

T:

E:

Encl: Letter from the Law Society of South Australia to the Hon Vickie Chapman MP re Statutes Amendment (Domestic Violence) Bill 2023, 21 August 2018.

Letter from the Law Society of South Australia to the Hon Joe Szakacs MP re Offence of choking, suffocation or strangulation in a domestic setting, 20 April 2022.

8 July 2024

Dr James Popple  
Chief Executive Officer  
Law Council of Australia



**The Law Society**  
OF SOUTH AUSTRALIA

By email: [REDACTED]

Dear Dr Popple

### **Inquiry into family violence orders**

1. I refer to your memorandum of 6 June 2024 which sought input for a Law Council submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs in relation to the above.
2. As you note, the Committee will consider matters relating to Family Violence Orders (“FVOs”) in the family law system and how they can be enforced effectively. The Inquiry is to consider matters such as the barriers for litigants in the family law system obtaining an enforcing an FVO, as well as how FVOs can be made more accessible to victims of violence in the family law system.
3. The Society considered the FVO framework’s enabling draft legislation in a submission to the Law Council of 9 June 2021, a copy of which is **enclosed** for your reference. Relevantly, the Society’s submission noted a series of anticipated challenges as to the inception of the framework, including:
  - 3.1. That in South Australia, Intervention Orders are subject to the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) (“the Intervention Orders Act”) and are ran and funded by SA Police and whether the introduction of a mechanism for proceedings under the *Family Law Act 1975* (Cth) (“the Family Law Act”) might give rise to a reluctance to issue Intervention Orders in relevant matters under the State mechanism, or the potential for family law proceedings to be prematurely commenced with a view to obtaining a Family Violence Order.
  - 3.2. Disparity between the options available to domestic violence victims who are married or have children who can access a Federal Family Violence Order, and those who do not are left reliant on the State mechanism only.
  - 3.3. The possibility of confusion and further court proceedings arising to determine the inconsistency between State and Territory family violence orders with a federal Family Violence Order.
4. I advise the Society’s Family Law, Aboriginal Issues, Children and the Law and Criminal Law Committees considered your memorandum and the Inquiry’s Terms of Reference.
5. The Criminal Law and Family Law Committees had considered the current practising experience of legal practitioners in South Australia in relation to FVOs, the latter providing a detailed overview of the experiences of family law practitioners in South Australia and the challenges with the issuing and enforcement of Family Violence Orders.

6. The Society's Aboriginal Issues and Children and the Law Committees include members with considerable practising experience acting for Aboriginal people across South Australia via employment with the Aboriginal Legal Rights Movement ("ALRM"). Both Committees separately consulted and received responses from ALRM on various matters relating to the Inquiry and adopted those responses as their input, and as a result aspects of those responses are canvassed in part below.
7. One initial reflection of the Aboriginal Issues Committee which broadly informs the Society's response below is that navigating the family law system can be an extremely dangerous time for victim survivors, particularly in matters characterised by domestic and family violence. Where children are involved, there are fundamental difficulties in having to concurrently deal with the State based family violence and child protection courts and the FCFCOA at Federal level. Access to and the subsequent enforcement of FVOs can be particularly difficult. In this regard, the provision of adequate legal advice for all people involved in these jurisdictions is essential. For Aboriginal people it is essential that this assistance is culturally appropriate, and trauma informed.
8. The Society's response below addresses the Inquiry's Terms of Reference individually. Notwithstanding the Inquiry's narrow focus, the Society outlines experiences below with difficulties in the enforcement of FVOs, including the ongoing cross-jurisdictional difficulties, the need to further build on wrap-around support services and, the experiences of Aboriginal people as reported to the Society's Aboriginal Issues and Children and the Law Committees largely by ALRM.

***The risk of an escalation in the aggressive and violent behaviour of the perpetrator and heightened risk to the partner and children during family court proceedings***

***Inherent nature of family court proceedings***

9. Members of the Society's Children and the Law Committee reflected on the inherent nature of family law proceedings and noted they can create a risk of escalation of violent or aggressive conduct. Alongside more readily recognised risks such as retaliation, proceedings in the Federal Circuit and Family Court of Australia ("FCFCOA") in the Committee's view do not create effective interventions that reduce the risk or deter violence. By way of example, if a parent acts in breach of an FVO or an Order of the FCFCOA there are limited options available to enforce proceedings or deter the other parties from continuing their conduct within the FCFCOA.
10. Further, the nature of family law proceedings requires lawyers to put forward their clients' cases at their highest level consistent with their instructions (subject to their obligations to the Court). This may result in the attempt to justify, minimise or mutualise violence with the consequence of providing an alternative narrative for perpetrators to justify their violence, rather than be held accountable. From a non-legal perspective, the Society's Children and the Law Committee advised an individual can only address the drivers of violence when they become accountable for their violence and admit what has occurred and that the current process can lead to an outcome that reduces the likelihood of accountability which, in turn, reduces the likelihood of any meaningful change to behaviour. This creates further risk for families given that the perpetrator, without admitting to and changing their behaviour, might feel justified in their position and continue to harm the victim survivor and their children.
11. The risks articulated above can, in the view of the Children and the Law Committee, be exacerbated by inadequate training or access to expertise for lawyers in relation to family violence. This means as a practice area there are challenges in how to identify, respond and address concerns in relation to family violence without impacting the client's case.

***Timeliness - considering urgent and interim orders***

12. The Society's Family Law Committee also noted the risk of escalation in aggressive and/or violent behaviour of an alleged perpetrator and heightened risk to the partner and children. Against this background, the Family Law Committee underscored the importance of timeliness in the issuing

of Family Violence Orders. The Lighthouse Project and Evatt List have been specifically designed to identify certain matters upon the filing of an Initiating Application, which are then sent on a pathway to deal with such issues. Practitioners in South Australia generally report that the changes to the listing and hearing of some family violence matters seems to be assisting in reducing the risk of escalating violence.

13. However, the Society's Family Law Committee considers the FCFCOA should consider urgent and interim orders that prioritise the safety of the alleged victim and children where these risks are first identified and until the allegations are tested. Greater resources should be given to the FCFCOA to ensure that there are consequences implemented for parties who engage in these behaviours after Orders are made. At present, Members of the Society's Family Law Committee report that alleged perpetrators often breach orders and there is little consequence as the alleged victims, on occasion, do not bring contravention or other applications for fear of reprisal.
14. As a result, the Family Law Committee reports the contravention application process is cumbersome, expensive, often lengthy and rarely leads to significant penalties being imposed.

***The current barriers for litigants in the family law system to obtain and enforce FVOs, including but not limited to:***

***(a) the additional difficulty for victims of violence in the family law system to attend multiple courts for the family law order proceedings and an FVO***

*Complications with enforcement and State and Federal Jurisdictions*

15. Despite the stated narrow focus of the review on only what can be done at Federal level, the concerns and observations of the Society's Family Law Committee about the enforcement approach in South Australia are set out below.
16. The Society understands that obtaining Orders in either the State or Federal jurisdiction and then getting those Orders enforced or recognised by other jurisdictions will be an ongoing problem. The concerns foreshadowed by the Society in its 2021 submission summarised at subparagraph 3.1 above have been partly realised, with the Family Law Committee noting the interaction between jurisdictions being the main barrier in ensuring the smooth operation of FVOs in the FCFCOA.
17. Members of the Family Law Committee report that improved information sharing with respect to current Orders is helping and, from a South Australian perspective, the embedded South Australia Police ("SAPOL") Information Officer in the Adelaide Registry is particularly helpful. SAPOL obtaining information from the FCFCOA as to current Orders and then actually assisting with the people and children behind those Orders is still an issue and the feedback from the profession is that they do not often act on this. There are reports of State and Territory Police Officers being reluctant to respond to parties complaining of family violence where there are FCFCOA proceedings on foot or legal representatives already involved as a result of a separation.
18. As to information sharing, the Aboriginal Issues Committee also highlighted the benefit of co-located child protection and police officers in the FCFOCA in facilitating the sharing of information in identifying a risk of family violence early in proceedings. Any means by which it can be made easier for victim survivors to obtain a family violence order should be considered, such as embedding additional co-located police officers in the Commonwealth Law Courts who can assist victim survivors with applications for an FVO and assist with the enforcement of breaches.
19. The Family Law Committee reports the enforcement of FVOs obtained from the FCFCOA is particularly problematic through the FCFCOA and Federal Police. SAPOL is often reluctant to do anything in relation to the enforcement of FCFCOA Orders. One solution proffered by the Family Law Committee would be that an FVO made in the FCFCOA should be able to be registered (or similar measure) in the local Magistrates Court and have the same legal effect as if it were an FVO issued by a State Court and thus enable SAPOL (or local state or territory police) to act on it. In the State jurisdiction, the ease of applying for an FVO is often variable, depending on the views

of the particular police officer dealing with the matter, however the enforcement of FVOs with SAPOL is far easier than through the FCFCOA. Members of the Family Law Committee report difficulties in obtaining an FVO through Police in circumstances where there is no physical family violence.

20. The Aboriginal Issues Committee noted co-location arrangements to permit an application to be heard in the same physical location where possible would minimise risk and trauma. The Family Law Committee noted such arrangements may make it easier to have matters dealt with in the same building but that would not deal with the other issues detailed above unless there is substantial change to jurisdictional boundaries. The suburban Magistrates courts also deal with a large number of FVOs and to ask the parties to travel to the Adelaide CBD for an FVO would seem unfair and unnecessarily burdensome. It may be of assistance if the co-located material is the primary documents held within SAPOL systems, rather than summary. Often there are inconsistencies between the co-located materials and primary documents.
21. The Family Law Committee further noted practitioners locally report the observation that there is a distinction between how the FCFCOA views a police application for a FVO as opposed to a privately obtained FVO. In this regard, the police FVOs are generally perceived as being more “*legitimate*”. Despite the possible merit in these views, legitimate legislative pathways and private FVOs exist concurrently because Police can sometimes make an error in determining not to pursue an FVO.
22. However, it should be recognised that there have been instances of parties applying for a private FVO after being unable to persuade police to apply for an FVO on occasions where the police are not satisfied (and properly so) that there are proper grounds to make the application. There have been instances of a party then successfully obtaining a private FVO, sometimes on spurious grounds, and then successfully excluding the other party from the family home. As a result, the importance of sufficient rigour attaching to proper applications was noted.
23. Generally, Members of the Society’s Criminal Law Committee considered the interaction between FVOs and the regime in South Australia under the Intervention Orders Act. Members commented their understanding that the interaction between State equivalent Orders and FVOs is a complex one, however suggested the enforcement ability in the Family Law jurisdiction is stronger than that in the State jurisdiction. Some experience was noted with parties problematically using an Order under the Intervention Orders Act in the State jurisdiction as a de facto parenting order,

#### Implications for Aboriginal people

24. Members of the Society’s Aboriginal Issues Committee noted the particular difficulty for Aboriginal people in navigating both the Commonwealth FCFCOA system and separate Magistrates Court system in each State. This is complex and adds to the systemic barriers Aboriginal people face in accessing justice.
25. When considering Family violence and Aboriginal people, the Aboriginal Issues Committee suggested it be borne in mind that Aboriginal people are navigating legal systems that were not designed with or for them and of which they are understandably deeply suspicious. In this regard, the following was noted:

*“Many Aboriginal and Torres Strait Islander people are suspicious when targeted by mainstream organisations, especially regarding family violence. This is because family violence often has a direct link to two critical areas of government policy, notably the criminalisation of the perpetrator, as opposed to the integration of the individual into the healing process; and the status of child safety, determined with prejudice and disconnected from the holistic approach to wellbeing. To put it simply, for Aboriginal and Torres Strait*

*Islander people, contact with a mainstream organisation regarding family violence can result in going to prison, and/or the removal of children.”<sup>1</sup>*

26. The Society’s Aboriginal Issues Committee highlighted the difficulty for Aboriginal people who have had negative experiences with police to report abuse and violence. When they do, police policies mean that people are referred to a community legal service or private lawyer if the issues reported seemingly do not meet the threshold for police to apply for a State-based intervention Order. This may mean that people simply cannot access assistance, and also that they need to repeat their story to multiple people.
27. Members of the Children and the Law Committee noted the ALRM’s emphasis on the difficulties for Aboriginal women in particular, where there are issues in relation to English as a second language. Those in rural and remote communities struggle to access court services and other services to understand and engage in the process meaningfully and safely. This is further exacerbated when working in traditional communities.
28. Where orders are made in small communities the victim survivor can be socially ostracised as a result of having an Order in place. This is particularly the case when the alleged perpetrator is moved out of the community if the victim survivor then chooses to drop charges or not pursue an FVO, the Department may be involved with the view they cannot demonstrate protective capacity.
29. The Aboriginal Issues Committee also noted the difficulties for an Aboriginal or Torres Strait Islander person living in remote areas firstly being able to obtain an FVO and, if one is obtained, experience difficulty remaining living in their particular community.

***(b) the intersection between FVOs and parenting orders, including that a family court parenting order may override an FVO***

30. In relation to the above point, the Children and the Law Committee noted the views proffered by ALRM that requiring the presentation of evidence within the FCFOFA setting can mean parenting Orders made can circumvent the effectiveness of an FVO. As explored further above, the effectiveness of an FVO can be largely dependent on the protected person’s capacity to enforce the order. The Children and the Law Committee understands that there is evidence, that certain communities with negative interactions with the police and system will have suspicions around enforcing Orders and trusting the system to protect them.

***(c) the availability of wrap-around support services and security for victims of violence***

31. From the outset, the Children and the Law Committee noted the view that the availability of structurally safe and appropriate services is limited, and minority communities experience ongoing discrimination and bias in their access to services. In the South Australian context there is also limited access to perpetrator services, or specific services such as adolescents who use violence or for LGBTQA+ victim survivors. Accordingly, the experiences of service engagement can be mixed and potentially harmful and can result in disconnected and ineffective outcomes.
32. For Aboriginal people, the Society’s Aboriginal Issues Committee noted the ALRM’s observation that the preferred court approach is often integrated and relationship based. In this regard, the following was noted:

*“Innovations in court practices also have relevance to family violence. Innovations designed to simplify proceedings and ensure victim safety are being trialled. The Integrated Domestic Violence Courts, which are “one family/one judge” courts that respond of the unique nature of domestic violence with one judge handling all criminal law violence cases and related family*

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<sup>1</sup> Distinguished Professor Bronwen Carlson, Madi Day and Dr Terri Farrelly, ‘What works? A qualitative exploration of Aboriginal and Torres Strait Islander healing programs that respond to family violence’ (Research Report No 02/2024, ANROWS), 31-32.

*issues, such as custody, visitation, civil protection orders, and matrimonial actions, offer some useful ideas. To be relevant to the bush these initiatives must be mobile and flexible.*

*Court innovations must also decolonise in two distinct ways: firstly, by ensuring they take into account international trauma and other catastrophes of colonisation as situating factors in family violence cases, and secondly, by being structured to incorporate Indigenous knowledge and culture in the process by sitting as Aboriginal courts, meaning that the court should be less formal and hierarchical than mainstream courts, have Indigenous artefacts prominently displayed, and have Elders flanking the magistrate. Aboriginal courts are sentencing courts not trials, and although magistrates listen closely to the views of Elders, they still sentence offenders alone.”<sup>2</sup>*

33. Members of the Aboriginal Issues Committee understand that the FCFCOA has implemented specialised Aboriginal and Torres Strait Islander lists across Australia, which was the result of the initiative of her Honour Judge Sexton. The pilot list commenced in Sydney, and later in Paramatta with Judge Sexton in or around 2016. ALRM collaborated with her Honour Judge Kelly to enact the second Aboriginal and Torres Strait Islander list in the Adelaide Registry in or around March 2018. These lists, where possible, intend to promote collective decision making. The Society’s Aboriginal Issues Committee and ALRM suggests these lists should be empowered and enabled to assist in the resolution of all issues between family members including any family violence orders where the families agree to this. Reference should be made to these lists within legislation and corresponding rules to entrench such a process within the legislative framework.
34. More generally, support systems for Aboriginal people involved in family violence must be Aboriginal designed and led on a local level and available to all Aboriginal people. The Aboriginal Issues Committee noted the ALRM observation that the models favoured generally take a healing and trauma aware approach. This approach emphasises that family violence is not acceptable and never has been but has been deeply impacted by colonialism and the violence Aboriginal people continue to suffer due to ongoing impacts of dispossession, stolen generation and current and past racist laws, policies and practices.

***How FVOs could be more accessible for victims of violence going through the family law system, including but not limited to:***

- (a) making it easier to apply to enforce an FVO;***
- (b) co-location arrangements that would allow an application or enforcement of an FVO to be heard the same physical location as the FCFCOA; and***
- (c) the legal and non-legal support services required to promote early identification of and response to family violence***

35. The Society notes the importance of family violence training for legal practitioners that is evidence-based and relevant to practice. Understanding violence but not knowing how to change practice or approaches to increase safety can undermine the purpose of the reforms.
36. In terms of current resourcing in South Australia, the Society’s Family Law Committee noted the FASS Service and Duty Solicitor Service provided by the Legal Services Commission of South Australia at the FCOCOA are able to assist in identifying and assisting victims of Family Violence when the matters get to Court and, in some instances, prior to that. The Legal Services Commission’s Free Legal Advice and Domestic Violence Services are also vital in assisting victims of Family Violence in South Australia. Increased funding to the Legal Services Commission for greater services in this regard would assist. Fact sheets of support services

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<sup>2</sup> Professor Harry Blagg, Associate Professor Emma Williams, Eileen Cummings, Professor Vickie Hovane, Michael Torres, Karen Nangala Woodley, ‘Innovative models in addressing violence against Indigenous women: Final Report (Research Report No 01/2018) 60-62.

available for victims in each state and territory listing key contacts for them at a state and national level should be readily available.

37. In addition, the FASS team has social workers who can assist both victims and alleged perpetrators to engage in appropriate services. Alleged perpetrators may be prevented from returning home by the FVO and this can lead to an escalation in violence and conflict. The social workers can assist them with finding emergency accommodation and refer them to appropriate support including counsellors. Additional reform would depend on the willingness of the State and Federal Governments in cooperating to a far greater extent in the granting and more importantly, readily enforcing, of FVOs.
38. The Aboriginal issues Committee noted that the access to trauma informed and culturally appropriate legal assistance is limited as a result of current funding restraints. Family Violence Legal Services are Aboriginal Controlled Community Organisations which provide wraparound legal and non-legal services to Aboriginal and Torres Strait Islander victim-survivors of family and sexual violence. They provide services in a culturally safe and trauma informed manner. However, in South Australia at least, the Family Violence Prevention Legal Service Aboriginal Corporation is funded to cover only part of the State, such that this specialised service is not available to Aboriginal and Torres Strait Islander people living in the metropolitan or South East areas of the State.
39. More generally, for Aboriginal people engaging the assistance of Indigenous Family Liaison Officers in the family law jurisdiction, and Aboriginal Justice Officers in the State Courts and ensuring other culturally appropriate supports are embedded in both the Commonwealth State Courts is important. As always, the adequate provision of interpreter services is essential.

#### Legal representation

40. On the issue of legal representation itself, Members of the Aboriginal Issues Committee noted that while some women are able to access assistance through the Women's Domestic Violence Court Assistance Scheme, a more generally community legal services may be able to assist with free or low-cost legal representation to those who meet the criteria of the services. However, for those who cannot access these services do not have the means to pay a private solicitor, such as to apply FVO or Intervention Order, assistance is limited. It is not acceptable that a person experiencing violence is expected to apply on their own behalf for an FVO without the benefit of representation. Generally, provision of access to legal advice and representation will assist in minimising the risk of FVOs.
41. From the perspective of acting for Aboriginal people, Members of the Society's Aboriginal Issues Committee noted the importance of ensuring that Aboriginal people involved in family violence and family law proceedings are enabled to be legally represented, with self-determination within their legal representation.
42. Members noted the insights of the ALRM which reflected on a successful model from Ceduna in South Australian in the early to mid 2000s whereby all victims of violence were represented in family violence, criminal law and restraining order proceeding by an Aboriginal Family Violence legal service. Where the accused was an Aboriginal person, that person was represented by the Aboriginal and Torres Strait Islander legal service. This ensured that both were properly represented and were given a voice in the criminal, civil and family proceedings. The Aboriginal Issues Committee underscored the importance of sufficient funding to ensure each Aboriginal person involved is legally represented.

#### ***Any other reform that would make it safer and fairer for victims of violence in the family law system who need the protection of FVOs***

43. The Society's Aboriginal Issues Committee noted the view of ALRM in calling for the State, Territory and Commonwealth Governments to work towards a national solution to enable courts to

provide remedies for both family law and family violence. In this regard, the First Nations Safety Policy Forum Outcomes Report of 2022 is instructive, which called for the promotion of:

*“..policy and legislative reforms across state, territory and Commonwealth governments reinforce and contribute to violence experienced by First Nations women, children, those with disability and LGBTQI+SB people. Of critical importance for attention is the criminal justice system, implementation of recommendations to harmonise family and domestic violence definitions and laws, child removal and child protection practices and incarceration of First Nations women.”<sup>3</sup>*

44. The Society understands the Commonwealth, States and Territories have successfully worked to refer powers in Family Law including their area of ex-nuptial children. It is expected the Commonwealth, States and Territories can ensure that both Commonwealth and State Courts can make Orders which are enforceable by State police and court through referral or complementary legislation.
45. In this context, the first three recommendations of the Australian Law Reform Commission report relating to closing the jurisdictional gap to enable the concurrent exercise of jurisdiction under Family Law Act and State and Territory child protection and family violence jurisdictions,<sup>4</sup> are particularly relevant.
46. Finally, the Aboriginal Issues Committee noted that Aboriginal women are hospitalised at a rate of 33 times more than non-Aboriginal women due to family violence and suggested the Aboriginal voices and suggestions are heard and enacted.

I trust these comments are of assistance in the development of the Law Council submission.

Yours sincerely



**Alex Lazarevich**  
President

Encl: Letter from the Law Society of South Australia to Law Council of Australia re Family Law Amendment (Federal Family Violence Orders) Bill 2021, 9 June 2021.

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<sup>3</sup> Wiyi Yani U Thangani First Nations Women's Safety Policy Forum Outcomes Report (Report, 2022), 43.

<sup>4</sup> Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System* (Report No 135, April 2019).

29 October 2024

Ms Natasha Stott Despoja AO  
Royal Commissioner  
Royal Commission into Domestic, Family and Sexual Violence  
GPO Box 464  
ADELAIDE SA 5001



By email: [RCDFSV@sa.gov.au](mailto:RCDFSV@sa.gov.au)

Dear Commissioner

### **Royal Commission into Family and Domestic Violence**

I refer to previous correspondence in relation to the Royal Commission into Family and Domestic Violence.

I note that written submissions to the Royal Commission have been sought in two phases. The first phase of consultation related to the Issues Paper and the second phase relates to any other matters relevant to the Royal Commission's Terms of Reference.

The Society made a submission in relation to the Issues Paper by letter of 16 August 2024, a copy of which is **enclosed**. The response below, informed by the Society's Criminal Law Committee, expands briefly upon the suggestions made in that letter insofar as they relate to criminal justice responses once a person has been charged in relation to domestic, family and/or sexual violence.

The Committee suggests consideration be given to further methods by which to increase participation in domestic violence related intervention programs. In the professional experience of committee members, there can be a significant resistance to participation where such programs are mandated for accused persons. This is often caused by the perception that participants are treated as offenders despite the allegations not yet having been tested, and concerns that anything discussed in a program session could be treated as an admission and used to harm a person's defence. As a result, the Committee is of the view the programs would be more meaningfully and better engaged with if there was a greater emphasis on voluntary participation and if such programs could be undertaken in a similar manner to the treatment intervention and drug court programs.

The Society appreciates the opportunity to contribute its views to the Royal Commission. Should you have any queries, please do not hesitate to contact me or the Society's Policy Manager, [REDACTED]

Yours sincerely

[REDACTED]  
**Alex Lazarevich**  
President

Encl Letter from the Law Society to the Royal Commission into Family and Domestic Violence, 16 August 2024