



Options for legislating against coercive control and the creation of a standalone domestic violence offence

**Submission by
Queensland Advocacy Incorporated**

Women's Safety and Justice Taskforce

July 2021

About Queensland Advocacy Incorporated

Queensland Advocacy Incorporated (**QAI**) is an independent, community-based advocacy organisation and community legal service that provides individual and systems advocacy for people with disability. Our mission is to advocate for the protection and advancement of the fundamental needs, rights and lives of the most vulnerable people with disability in Queensland. QAI's board is comprised of a majority of persons with disability, whose wisdom and lived experience of disability is our foundation and guide.

QAI has been engaged in systems advocacy for over thirty years, advocating for change through campaigns directed at attitudinal, law and policy reform. QAI has also supported the development of a range of advocacy initiatives in this state. For over a decade, QAI has provided highly in-demand individual advocacy services: the Human Rights Legal Service, the Mental Health Legal Service and Justice Support Program and more recently, the National Disability Insurance Scheme Appeals Support Program, Decision Support Pilot Program, Disability Royal Commission Advocacy Program, Education Advocacy Program and Social Work Service. Our individual advocacy experience informs our understanding and prioritisation of systemic advocacy issues.

The individual advocacy services most relevant to this submission are the MHLS and JSP. MHLS provides advice and legal representation before the Mental Health Review Tribunal, including for Forensic Orders and Fitness for Trial Reviews. JSP provides non-legal advocacy for vulnerable people with impaired capacity who have come into contact with the criminal justice system. The client is provided information regarding the system and accessing legal advice and representation. JSP also advocates for access to appropriate and responsive supports to address underlying issues and prevent further involvement with the criminal justice system.

QAI's recommendations

QAI recommends:

1. Coercive control in an institutional or commercial care setting should be considered in any efforts to address coercive control.
2. Greater use of diversion from police to disability support services where a person is known to have a disability, or displays clear symptoms of disability, and there is no likely increase in safety in charging a person. Accountability measures that ensure adherence to relevant guidelines are necessary.
3. Sustainable and ongoing funding for therapeutic interventions to reduce and prevent coercive control for people with disabilities including funding independent disability advocates and support persons, appropriate accommodation, and health and allied health services, to ensure that appropriate early and holistic support is provided.
4. Funding for legal representation in guardianship matters where coercive control is a risk.
5. Statutory entitlement to supported decision making tools and support services like communication assistants and court-appointed support persons throughout the domestic violence complaint process for perpetrators and victims of coercive control who have disability.
6. Immediately evaluate options for addressing coercive control against people with disability with the sole criteria of proven effectiveness in stopping coercive control.

Introduction

QAI welcomes the opportunity to comment on the discussion paper *'Options for legislating against coercive control and the creation of a standalone domestic violence offence'*. QAI is deeply concerned about the disproportionate rates of violence and abuse affecting people with a disability, including acts and patterns of behaviour that could be described as coercive control. We believe this to be a salient issue of our time and our response as a community is a measure of our commitment to core human rights values. With the enactment of the *Human Rights Act 2019* (Qld), there has never been a more relevant time to frame Queensland's response to domestic and family violence in human rights principles. That is, to position the community's response in a way that upholds the human rights of society's most vulnerable citizens, too often neglected through institutional and legislative responses to critical social issues.

QAI calls for a thorough consideration of evidence-based solutions that effectively stop violence against people with a disability. QAI is not aware of any evidence that criminalising coercive control will achieve this objective and considers that the risks associated with this step outweigh potential benefits. We need a paradigm shift away from what makes headlines towards what works. Criminalisation is an easy way to count outcomes. England, Ireland, and Scotland all collate and report on the number of prosecutions, convictions, and imprisonments under their coercive control laws. However, there is a lack of reporting regarding whether this means coercive control is reduced in the community, as it is based upon an assumption that more prosecutions equates to greater safety. This is not always the case in practice and is of little use when considering the intricacies of coercive control against people with disabilities.

QAI's submission is therefore focused on three issues:

1. The different and disproportionate way people with a disability experience violence, including coercive control, and the inadequacy of current responses.
2. The over-representation of people with a disability in the criminal justice system and the dangers of further potential criminalisation.
3. The need for evidenced-based solutions to address the problem of coercive control against people with a disability.

The submission does not individually address the questions in the discussion paper and believes the focus on legislative solutions at the expense of more effective alternatives is misplaced. Such a blinkered approach can limit the capacity to find evidence-based solutions that will effectively protect all Queenslanders, including Queenslanders with a disability, from domestic and family violence. Our submission draws upon QAI's extensive experience advocating for people with disability in the criminal justice system and the first-hand experiences of our clients.

Coercive control, violence and people with disabilities

The Disability Royal Commission has highlighted that people with disability are more likely to experience all types of violence compared to people without disability. A recent research report found that 65% of people with disability report physical violence, sexual violence, intimate partner violence, emotional abuse and/or

stalking by any perpetrator compared to 45% of people without disability.¹ Moreover, women with disability are three times more likely to experience domestic violence, sexual violence, and coercive control.² There are also variations in the types and patterns of violence experienced by people with disability. For example, 25% of young people with disability reported violence in the last year compared to 11% of those aged 45-65 with disability. In the last year, people with cognitive and psychological impairments reported higher rates of all types of violence compared to people with other types of impairments.³ Furthermore, approximately 90% of Australian women with intellectual disability have experienced sexual abuse, of which 68% will experience that abuse before they reach 18 years of age, typically perpetrated by a carer.⁴

Statistics also show that domestic violence is a common cause of disability. Intimate partner violence causes more illness, disability and deaths than any other risk factor for women aged 25 to 44.⁵ All of these shocking statistics reveal not only the vulnerability of people with disability to violence, but its prevalence in the community considering that one in five Australians live with disability.⁶ With regards to coercive control more specifically, women and girls with disability are more likely to experience 'coercive medical interventions to control their fertility, and...significantly more restrictions, negative treatment, and particularly egregious violations of their sexual and reproductive rights'.⁷ Further, women with disability and older women with cognitive disabilities are more likely to experience specific forms of emotional abuse, such as neglect of care (food, medical care) as a form of punishment.⁸

Violence and coercive control thus have unique manifestations for people with disability, and this must be understood and integrated into policy responses designed to address the growing pandemic of domestic violence in Australian society. Applying the definition of coercive control provided by the New South Wales's Joint Select Committee on Coercive Control, it becomes clear why people with disability are at increased risk of experiencing this kind of abuse:

"Coercive control is a form of domestic abuse. Perpetrators aim to take away their partner's autonomy and freedom. They do this by using a gradual escalation of tactics like isolating their partner from their family and friends, humiliating them and putting them down, controlling and tracking their movements, and taking away their ability to make decisions about things like what they wear and how they spend their money".⁹

People with disability often have reduced autonomy, for example if they are reliant upon a perpetrator for assistance to complete their activities of daily living. People with disability are often already isolated, perhaps due to inaccessible transport or requiring the assistance of a perpetrator to access the community. People with disability might experience humiliation from a perpetrator due to stigma, prejudicial attitudes and stereotypes that exist in the community regarding disability. People with disability easily have their movements tracked by others, perhaps due to the heavy presence of support services in their lives and the loss of privacy that this entails or relying upon a perpetrator for mobility assistance. People with disability

¹ Disability Royal Commission (March 2021) 'Nature and extent of violence, abuse, neglect and exploitation against people with disability in Australia'.

² Ibid

³ Ibid

⁴ Australian Human Rights Commission (March 2020) 'People with Disability and the Criminal Justice System'

⁵ NSW Bureau of Crime Statistics and Research, 'Data to December 2020, Domestic Violence-related Murder in NSW',

⁶ Australian Network on Disability, 'Disability Statistics', <https://www.and.org.au/pages/disability-statistics.html>

⁷ Our Watch (January 2021) 'Submission to the NSW Joint Select Committee on Coercive Control', p11

⁸ Ibid, p 10

⁹ NSW Joint Select Committee on Coercive Control (June 2021) 'Coercive control in domestic relationships'

often have their legal capacity denied, for example their impairment may impact their decision-making or a perpetrator may assume that a person's ability to make decisions is impaired because of their disability and use this as justification for exerting control in this way. These factors make it easier for a perpetrator to exert coercive control over a person with disability and go some way to explain why one person with disability is killed by their carer almost every three months in Australia.¹⁰

Violence and coercive control against people with disability is also apparent in institutional and commercial residential settings, where coercive control is exerted by paid carers, support workers or co-residents. Some of these arrangements are contractual and voluntary whilst others are the result of substituted decision-making and forensic orders. Institutional and commercial residential settings are not covered by existing domestic and family violence protections but nevertheless reflect the same risks and complexities as other domestic settings. Coercive control in an institutional or commercial arrangement is comparative to harm perpetuated by unpaid carers or relatives and should not be considered outside of scope when considering ways to address coercive control more broadly. Indeed in many ways, coercive control within these settings is more dangerous, as many institutions mirror the characteristics of a controlling relationship, such as controlling a person's finances, controlling when they can access family or social contacts, or controlling movement outside of the home, and yet are never held to account. Greater awareness of this kind of abuse must therefore be incorporated into measures that seek to address coercive control.

Recognising and responding to behaviours of coercive control through the criminal justice system is incredibly difficult. Power dynamics inherent in abusive relationships are heightened when a person with disability is reliant upon a perpetrator for care and support, and yet without a detailed understanding of coercive control and how this might manifest for people with disability, subtle and insidious controlling behaviour is masked by a person's need for assistance. In England there is a defence for carers accused of coercive control if they believed they were acting in their partner's best interest and their behaviour was reasonable. That this is legislated demonstrates the challenges incurred by people with disability seeking to prove coercive control at the hands of their carer.

People with disability also experience coercive control through existing legal mechanisms, such as guardianship and administration arrangements as highlighted by the following case study.

Case study 1

Wendy* is a 55-year-old woman who lives in regional Queensland. Unfortunately, Wendy suddenly lost her life-long partner and became unwell and was admitted as an inpatient to a mental health unit. During this time, Wendy's two brothers made applications for an interim and substantive order seeking to appoint them both as Wendy's guardians and administrators under the *Guardianship and Administration Act 2000* (Qld). Wendy's brothers did this without consulting her. In accordance with these applications, the Queensland Civil and Administrative Tribunal made an order appointing her brothers as her guardians for most personal matters and administrators all financial matters.

Wendy and her brothers had an amicable relationship prior to this order, however, after the order was made, Wendy began to feel as though her brothers were controlling all aspects of her life and not consulting with her prior to doing so. Because her brothers were appointed as guardian for the personal matter about who Wendy could contact, her brothers became controlling over who Wendy could contact and made

¹⁰ Dingle, S. (June 2018) 'When carers kill', ABC News, <https://www.abc.net.au/news/2018-06-23/when-carers-kill/9894514?nw=0>

attempts to prevent Wendy contacting her new partner. Wendy was also denied access to her savings account and had noticed money was being spent from her accounts by her brothers without any communication or justification of the expenses. This level of control left Wendy feeling incredibly anxious and upset and as though her relationship with her family had significantly changed. To remove herself from this level of control by her brothers, Wendy made an application to remove them as her guardians and administrators and was ultimately successful.

**Name and details have changed.*

QAI notes that only 3% of guardianship and administration matters have legal representation. This means that the majority of individuals seeking to defend their legal capacity and right to equality before the law, (many of whom are people with a disability) do so without the benefit of legal expertise to navigate what is a very complex and widely misunderstood area of law. Increasing funding for legal representation in these matters would help to reduce controlling behaviour such as that experienced by Wendy. QAI is also aware that many of our clients are reluctant to report violence and abuse to the police. Many people with disability are distrustful of police, believing they will not help. For example, police who respond to calls about suspected domestic violence often talk to a carer rather than a person with disability and presume people with intellectual or cognitive disabilities to be unreliable witnesses. Their fear of being further criminalised if they report an incident to police is not irrational, given the extent to which people with disability are criminalised and over-represented in the criminal justice system.

Criminalisation of disability

When considering whether to legislate against coercive control, it is imperative to consider the over-representation of people with disability in the criminal justice system and how such a step will further entrench the criminalisation of people with disability. As recognised by the Disability Royal Commission, people with disability are over-represented in the criminal justice system.¹¹ Despite increasing commitment by governments to address and uphold the rights of people with disabilities, over-representation is reportedly *increasing*.¹² Although this can be attributed to greater recognition and reporting of disability,¹³ it remains a concerning fact. An explanation for over-representation is that people with disability disproportionately experience a range of other psychological and socio-economic disadvantages that increase their likelihood of interacting with the criminal justice system.¹⁴ Adopting this perspective, Aboriginal and Torres Strait Islander people experience compounding disadvantageous circumstances arising from intergenerational trauma and grief, systematic discrimination and oppression, and a lack of culturally appropriate support services.¹⁵

¹¹ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Overview of responses to the Criminal Justice System Issues paper* (Issues Paper, December 2020) 2-3.

¹² Ruth McCausland and Eileen Baldry, “‘I feel like I failed him by ringing the police’”: Criminalising disability in Australia’ (2017) 19(3) *Punishment & Society* 290, 291.

¹³ *Ibid*

¹⁴ Kelly Richards and Kathy Ellem, ‘Young people with cognitive disabilities and overrepresentation in the criminal justice system: service provider perspectives on policing’ (2019) 20(2) *Police Practice and Research* 156, 165-6

¹⁵ Eileen Baldry et al, “‘It’s just a big vicious cycle that swallows them up’”: Indigenous People with Mental and Cognitive Disabilities in the Criminal Justice System’ (2016) 8(22) *Indigenous Law Bulletin* 10, 10-12;

There is no causal link between disability and the commission of crime.¹⁶ However, a strong causal link between disability and *incarceration* has been identified by disability advocates and researchers,¹⁷ where people with cognitive disability are substantially overrepresented in the criminal justice system. Concerningly, this reflects an ongoing practice of ‘managing’ people with disability through the criminal justice system. The criminal justice system thus becomes a tool to manage characteristics of disability and responses to the disadvantageous life circumstances of people with disability. This approach is informed by various misconceptions, including ignorance of disability, the belief that criminal law is an effective tool for intervention for a person with disability, or the belief that disability should not be an ‘excuse’ for socially unacceptable behaviour.¹⁸ Management through the criminal justice system is also justified due to a lack of viable secure community support options,¹⁹ though this is a legitimate concern that requires urgent action by governments.

Cognitive Disability

People with cognitive disability can become enmeshed in the criminal justice system from their first contact, either as young people or as adults facing serious mental ill-health or a breakdown in social connections.²⁰ Unfortunately, people with cognitive disability are more likely to establish this contact due to the nature and manifestations of their disability. For example, they may have difficulties with comprehension and communication, are more likely to have their intentions misunderstood, and are more susceptible to peer influence or blame by co-offenders.²¹ Structural issues like higher levels of homelessness and inadequate familial and social support also increase their visibility and vulnerability to police intervention.²² Once a person with cognitive disability is charged with and convicted of an offence, the destabilising nature of this process renders them susceptible to re-arrest and imprisonment. Disruption of social connections and any existing support services increasingly alienates the individual, and it becomes more probable that a period of imprisonment will be imposed for further offending.²³ Prisons themselves are ill-equipped to support the complex needs of people with cognitive disability, and any treatment that had begun in this period is often not continued upon release. Either the person faces constant changes in their environment and support, or they become locked into serious institutionalisation.

The following case study illustrates the criminalisation of disability in the context of domestic and family violence:

¹⁶ Chris Cunneen et al, *Penal Culture and Hyper-incarceration: The Revival of the Prison* (Ashgate Publishing, 2013)

¹⁷ McCausland, Ruth and Eileen Baldry, “‘I feel like I failed him by ringing the police’: Criminalising disability in Australia’ (2017) 19(3) *Punishment & Society* 290

¹⁸ Ibid

¹⁹ Ibid

²⁰ Baldry, E (2014) ‘Disability at the margins: limits of the law’ 23(3) *Griffith Law Review* 370

²¹ McCausland, Ruth and Eileen Baldry, “‘I feel like I failed him by ringing the police’: Criminalising disability in Australia’ (2017) 19(3) *Punishment & Society* 290.

²² Ibid

²³ Ibid

Case study 2

Barry* is a young adult with an intellectual impairment and a mental health condition. He lived at home with his parents who were his carers. Their neighbours called the police after hearing Barry and his father yelling at each other. The police attended and a DVO was lodged requiring Barry to refrain from acts of DV against his father. The police were called again after the neighbours heard yelling at a later date, and Barry was charged with breaching the DVO. To prevent further inevitable breaches, Barry had to leave his family home to live in a boarding house, where he was miserable and became suicidal. Following another incident after his father took him home for his birthday, Barry was charged with a further breach. At the next mention for the DVO application the Magistrate dismissed the application, commenting that he didn't see the point of making a DVO if Barry was charged with breaching the Order whenever he had a mental health episode."

**Name and details have changed.*

A key issue that contributes to the criminalisation of disability is the lack, or perceived lack, of critical support services in the community. Courts and prisons are not therapeutic places where people with disability should or can be 'managed'; holistic community-based support is necessary to ensure there are genuine alternatives to criminalisation. Critical support services required to deliver access to justice are:²⁴

- Independent disability advocates or support persons, who support people with cognitive disability through the criminal justice system, such as QAI's JSP. The New South Wales government's recent injection of \$28 million in funding for the Justice Advocacy Service (JAS) demonstrates the level of commitment and resourcing required to ensure essential support for people with cognitive impairment navigating the criminal justice system, and this must be replicated in Queensland.
- Appropriate housing and non-custodial accommodation for people found unfit to stand trial and forensic patients. Accessible bail hotels with requisite resources to support people with cognitive disability is necessary to ensure people do not instead spend lengthy periods in prison on remand.
- Health and allied health services that operate as early intervention strategies for people with cognitive disability.

Critical support services with the requisite training, knowledge and experience that can support people with cognitive disability, are essential. Such services must also be gender and culturally sensitive,²⁵ centring self-determination and acknowledging the specific disadvantage of women and Aboriginal and Torres Strait Islander people. Police are not social workers, however equipping them with information regarding these services will allow them to effectively divert people with cognitive disability to receive the required support. Police guidelines must allow for sufficient early diversion from the criminal justice system. Police training must ensure that prosecutorial discretion is not only available, but actively and appropriately utilised. This would ensure non-prosecution where the person has a disability and there is no likely increase in community safety in charging them. Consideration of processes whereby police identify that a person may have a disability and refer them to disability support services to obtain the requisite support should be explored as an alternative.

²⁴ Law Council of Australia, *The Justice Project: People with Disability* (Final Report Part 1, August 2018)

²⁵ Mental Health Commission of NSW, *Towards a just system: mental illness and cognitive impairment in the criminal justice system* (Report, July 2017)

This would require in-depth training into the recognition of cognitive disability and impaired capacity, as well as of accountability of the referral system itself.

Aboriginal and Torres Strait Islander people are also more likely to become enmeshed in this cycle of criminalisation through earlier and more frequent contact with the criminal justice system. Over-representation is evident within QAI's clientele; Aboriginal and Torres Strait Islander clients constituted 12.15% of clients of all services whereas they constitute 3.3% of the total Australian population.²⁶ This over-representation is normalised in relevant government agencies who continue to adopt an assimilationist approach in responding to Aboriginal and Torres Strait Islander people with disability.²⁷

The risk of further criminalising people with disability, including First Nations people with disability, through legislating against coercive control is extremely serious. The epidemic of violence experienced by people with disability, First Nations communities and other at-risk cohorts requires urgent and concerted action at the policy level to tackle the underlying causes of their experiences and over-criminalisation, rather than creating more opportunities for it to occur. Without addressing the structural causes behind the criminalisation of people with disability and other at-risk populations, legislating against coercive control will only exacerbate current inequality within the community. QAI considers that focus should instead be placed upon implementing evidence-based solutions that effectively address the root causes of domestic violence and coercive control.

Evidence based solutions

Interventions that are targeted at addressing coercive control and which can be shown to reduce domestic and family violence should be considered and prioritised. Interventions such as building therapeutic communities, providing disability supports and addressing underlying issues such as substance abuse and cultural attitudes that devalue women, are effective in alleviating the causes of domestic violence. In 2018, KPMG conducted a review of the Maranguka Justice Reinvestment Project in Bourke, finding a 23 per cent reduction in police recorded incidence of domestic violence over a 12-month period.²⁸ This project redirected funding from crisis responses and detention centres to preventative, diversionary and community development initiatives that sought to address the underlying causes of crime.²⁹ These are the kind of successes that should be replicated.

For example, in relation to Case study 2, Barry would have benefited from being diverted away from the criminal justice system and linked in with appropriate community supports who could assess what was happening in the home. There could be many possible reasons why Barry and his father were yelling at each other. For example, family conflict, carer stress due to a lack of community services, financial pressure, substance use, or someone in the home experiencing an episode of mental illness. Any or all of these stressors could lie behind the verbal altercation and would be more appropriately addressed with psychosocial support that would facilitate Barry and his family accessing the services and assistance that they need.

²⁶ Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians* (Catalogue No 3238.0.55.001, 31 August 2018) <<https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/estimates-aboriginal-and-torres-strait-islander-australians/latest-release>>.

²⁷ McCausland, Ruth and Eileen Baldry, "I feel like I failed him by ringing the police": Criminalising disability in Australia' (2017) 19(3) *Punishment & Society* 290.

²⁸ KPMG (2018) Maranguka Justice Reinvestment Project, Impact Assessment, p22

²⁹ *Ibid* p6

Measures that target the overrepresentation of people with disability in the criminal justice system as discussed above, will similarly help to address levels of domestic violence by increasing the confidence of people with disability to use existing legal avenues and improving the accuracy of the police response by equipping them with the skills and knowledge to understand the power dynamics involved in carer/care recipient relationships, and in ensuring they identify the correct perpetrators to hold to account.

Conclusion

QAI thanks the Women's Safety and Justice Taskforce for opportunity to contribute to this inquiry. We are happy to provide further information or clarification of any of the matters raised in this submission upon request.