

**Submission
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COERCIVE CONTROL IN DOMESTIC RELATIONSHIPS

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Response to the NSW Government Consultation on Coercive Control by Evan Stark (Rutgers University, US) and Cassandra Wiener (University of Sussex, UK)

Introduction

We have read the discussion paper on Coercive Control prepared by the NSW government in October 2020, and have responded here in particular to questions 1, 7, 8, 9 and 15, considering what lessons can be learned for New South Wales from the new offences in England and Scotland. We indicate our preference for the general approach taken in Scotland, which incorporates the elements of coercive control into a ‘bespoke’ offence, and allows for victimless prosecution by identifying the perpetrator’s intent with their behavior. We do not rule out the English approach, which is to rely on a victim’s testimony to demonstrate the gravity of the offence, providing appropriate protections are in place for victims.

We want to reiterate our view that the success of any new legislation will depend less on the wording of new law than related factors that make it likely to be implemented in ways that are consistent with the definition of coercive control as a ‘liberty’ crime and its underlying value commitments to the equality, autonomy and dignity of persons. What we refer to as the ‘coercive control framework’ also includes a coherent national strategic plan for implementing the new law, the inclusion of victim advocates in the planning and implementation process and an acknowledgement of the challenges posed to police and prosecutors because coercive control is ‘ongoing,’ includes multiple forms of harm and crosses social space, both literally, because offenders move often to avoid detection and capture, and figuratively, via cyber technology. From this perspective, we point to Scotland’s example of taking two years to prepare its justice system for the new offence under specialised guidance of the Crown Prosecution Service and the judiciary.

Part One: Why Do It?

In this section we respond to question 7 – which asks about the advantages/disadvantages of creating an offence of coercive control.

The advantages to creating a serious offence of coercive control are both normative and practical. From a normative perspective an offence of coercive control takes the powerful step of acknowledging the wrong of domination in personal life for the first time in the criminal law, by designating as criminal a class of acts that violate personal rights and liberties alongside physical and psychological harms.

It identifies ‘woman abuse’ with a class of harms we associate with crimes against liberty, such as kidnapping, rather than as a violence crime, thus acknowledging that protection from abuse derives from a person’s rights to equality, dignity and autonomy as well as to physical safety and psychological integrity. It recognises a widely documented reality about abuse, that its most devastating presentation is as a continuing offence or ‘course of conduct’ rather than a discrete act, and that crimes such as harassment, stalking, threats and surveillance constitute a more serious and continuing offence when they occur in the context of coercive control than when they occur separately. It sends a clear message that

coercive control is a crime that will not be tolerated. Finally, it validates victims' experiences of abuse, which, in the context of an offence that destroys the victim's very notion of self, is especially significant. Survivors tell us that being able to frame what has happened to them as a serious crime is an essential factor in their recovery process.

Practically, creating an offence of coercive control offers solutions to police and prosecutors. Firstly, it enables the police to take action in the face of serious harm (such as psychological abuse and control) that have not hitherto been actionable. Secondly, it allows police to treat repeated offenses against a victim as a serious crime even when the individual acts themselves may not appear serious. Police and prosecutors respond positively to the opportunity to take the chronic offenders in their caseloads off the streets. As well as enabling prosecution, creating an offence makes the investigation and prosecution of existing crimes (such as stalking or sexual assault) easier by identifying a common context for these criminal acts and brings them under the umbrella of a single serious offence. Prosecution is also facilitated by the creation of a class of new evidence (such as diaries, cell calls, photos, personal notes and statements) which also validate victim experiences of coping with coercive control.

As well as facilitating prosecution, prosecuting coercive control allows for better safeguarding practice. It enables the separation of a class of serious offenders on the basis of factors shown to predict the worst outcomes, providing a basis for designating a class of offenders as less serious for triage into community management, thus encouraging better and more reliable risk assessment practice by the police.

Part Two: Crafting the New Law

In this section we respond to the questions focused on how to structure a coercive control law, in particular question 1 (what would be an appropriate definition?), and question 9 (how should the scope of the offence be defined, what behaviours should it include and what other factors should be taken into account?). We think that the key questions for the Committee to decide centre around (1) to whom the offence should apply, (2) what behaviours should be included, (3) whether there should be a perpetrator or victim focus and (4) sentencing thresholds. We will look at these areas in turn.

Who does it cover?

The question of 'who should be covered?' entails determining the status of the intimate relationships included in the law, whether protection should be extended to children and whether primary relationships in families other than partners should be covered.

Background

The coercive control framework broadened the concept of partner abuse to encompass the frequency and ongoing nature of violence in many abusive relationships; harmful tactics other than or in addition to violence that are deployed in abuse; and intimate relationships other than male/female partnerships in which abuse has been shown to be commonplace. Evidence from a variety of sources indicates that coercive control is more common among unmarried than married couples; more common against women who are single, separated

and divorced than against married women¹; common in same sex relationships as well as heterosexual relationships²; and is commonplace against persons who identify as 'transgendered' as well as persons who identify as either male or female.³ When children have been identified as victims of coercive control, their victimisation is usually secondary to the victimisation of their mother or another primary parent.⁴ Nevertheless, children are direct targets of coercive control or are harmed indirectly in an estimated 40% of abusive relationships⁵.

England/Wales and Scotland

The new definition of domestic abuse in England and Wales coming into force this year (Domestic Violence and Abuse Act 2020) defines 'domestic abuse' as abuse between intimate partners, ex intimate partners and family members (note this is a definition only, it does not create a crime). Section 76 of the Serious Crime Act, which creates the crime of 'controlling or coercive behaviour', is defined in the same way except does NOT include ex-partners, though a current proposal being debated would extend coverage to ex-partners. The Domestic Abuse Scotland Act (DASA) creates the crime of 'domestic abuse' and applies to intimate partners, ex partners, but not family members. The DASA includes child abuse as an aggravating factor.

Recommendation

We recommend that a new criminal offence apply to current and ex-partners, include child abuse, but not extend to other family members, the approach of the DASA. This reflects both who is most likely to be victimised by coercive control and the nature of the victimisation, which is typically 'ongoing' and may encompass more than one relationship status. Within abusive relationships, the period of 'separation' is often one of heightened danger, when protection is vital.⁶ The inclusion of children recognises the extent to which children are 'weaponized' against a parent or hurt as a means of control. Extending protection to other family members dilutes the normative weight of the offence as a means of stemming abuse in relationships.

What offences does it cover?

Deciding which acts to cover with a new offence starts with two realities, that many acts considered relatively harmless in other contexts (such as slaps, insults, interrogation, surveillance) cause serious harm in the context of coercive control and that common offences (such as domestic violence, stalking, sexual abuse and harassment, for e.g.) have

¹ Shanna Conroy, Marta Burczykca and Laura Savage, 'Family violence in Canada: A statistical profile, 2018' available at <https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2019001/article/00018-eng.pdf?st=K9ISdDk5> accessed 1/1/21.

² Evan Stark and Marianne Hester, 'Coercive Control: Update and Review' (2019) 25(1) *Violence against Women* 81.

³ Ibid.

⁴ Evan Stark, 'Domestic Violence, Children and the Institutional Response' in Eve Buzawa, Carl Buzawa and Evan Stark (eds), *Responding to Domestic Violence: The Integration of Criminal Justice and Human Services* (Sage 2017) 369.

⁵ Ibid.

⁶ For example, separated and divorced women are the most common targets of stalking and cyber-stalking. See Vivianne Elizabeth, 'Custody Stalking: A Mechanism of Coercively Controlling Mothers Following Separation' (2017) 25(1) *Feminist Legal Studies*; Harald Dressing, Josef Bailer, Anne Anders and Christine Gallas, 'Cyber Stalking in a Large Sample of Social Network Users: Prevalence, Characteristics and Impact Upon Victims' (2013) 17(2) *Cyberpsychology, Behavior, and Social Networking* 61.

entirely different dynamics and consequences when they are part of a continuing course of conduct directed at partners.

Background

Coercive control entails the combination of violent and nonviolent tactics over time to dominate a partner, degrade them, exploit their resources and deprive them of rights and liberties. The dynamic and effect of offences committed in the context of coercive control is distinctive to that context. For example, assaults in the context of coercive control are notable less for their severity than for their frequency, their sexual nature and their cumulative effect over time.⁷ Similarly, sexual coercion occurs across a broad spectrum in coercive control that extends from threats of STDs like HIV and literal rapes to 'rape as routine,' where consent is based on terroristic threats but no violence is involved.⁸ Stalking in the context of coercive control has also been linked to nonfatal strangulation,⁹ an elevated risk of homicide¹⁰ and producing psychological effects consistent with PTSD.¹¹ The same is true for 'child abuse' which, in the context of coercive control, is likely to be ongoing, multi-faceted and contingent on its effect on the primary victim mother.

England/Wales and Scotland

In England/Wales section 76 Serious Crime Act (s76) criminalises what it refers to as 'controlling or coercive behaviour'. Using the justification that other elements of coercive control were already crimes in England/Wales, s76 has a narrow focus on emotional/psychological abuse. In cases involving coercive control, this means that police/CPS have to prosecute s76 alongside other existing non control specific laws such as the law on offences against the person, and/or sexual offences. The Domestic Abuse (Scotland) Act (DASA) takes a broader approach, and criminalises all aspects of coercive control as one offence. Note, these are not necessary elements of the offence but are elements that may be present alone or in combination, and include physical, sexual and emotional aspects of abuse.

Recommendation

We recommend that New South Wales craft a bespoke offense, as in Scotland, as a way to highlight the complex nature of the crime and focus public, police and CPS attention on the multiple elements of the offense. The alternative approach fragments law enforcement and puts statutes to a service far removed from their original purpose. For example: in England/Wales the Offences Against the Person Act 1891 was drafted in the Victoria era to deal with street fights and pub brawls. As is to be expected, it is not well suited to the prosecution of domestic abuse. Because of s76's narrow focus, any physical violence in England/Wales still has to be prosecuted using the offences against the person regime. In fact, more than 75% of the domestic abuse currently prosecuted in

⁷ Evan Stark and Ann Flitcraft, 'Medicine and Patriarchal Violence,' in *Women at Risk: Domestic Violence and Women's Health* (Sage 1996) 3.

⁸ Evan Stark, *Coercive Control* (Oxford University Press 2007).

⁹ Martyna Bendlin and Louise Sheridan, 'Nonfatal Strangulation in a Sample of Domestically Violent Stalkers: The Importance of Recognizing Coercively Controlling Behavior' (2019) 46 (11) *Criminal Justice and Behavior* 1528.

¹⁰ Richard Standsfield and Kirk Williams 'Coercive Control Between Intimate Partners: An Application to Nonfatal Strangulation' [2018] *Journal of Interpersonal Violence* 1.

¹¹ Emma Short, Andrew Guppy, Jacqui Hart and James Barnes, 'The Impact of Cyberstalking' (2015) 3(2) *Studies in Media and Communication*.

England/Wales comprises offences against the person. In Scotland, all aspects of abuse including physical abuse can be prosecuted under the DASA.

In addition to the broad offence created by the DASA, we recommend that New South Wales include economic abuse as a possible element of coercive control.¹²

Perpetrator or victim focus?

Background

Another key question when constructing a new offence is whether to focus solely on the perpetrator, or to include the harm to the victim (the victim response) as a constituent element of the offence.

England/Wales and Scotland

One advantage to the Scottish approach is its perpetrator focus. To minimise the chance that new laws would revictimise women, the DASA highlights specific behaviour as criminal rather than its effects. The response of the victim—whether injury or fear—is not a constituent part of the criminal offence. This avoids the ‘resilient victim’ problem that has been an issue in England and Wales – the fact that a victim who manages her routines despite the control is unfairly penalised by an offence that focuses on disruption of the victim’s routine, for example. It also addresses a major grievance of the anti-abuse movement, which concerns the extent to which abused women have been revictimized by the roles they are forced to play in the arrest, charging and prosecution of abusive partners. It was hoped that the perpetrator focus would instead make victimless prosecutions possible. It is too early to say whether this is so. Because some elements of the offense (such as cyberstalking, harassment and intimidation etc.) involve personal knowledge and effects, it is probable that prosecuting coercive control in the absence of victim testimony will always be difficult.

In England and Wales the prosecution have to prove that the behaviour has had a serious negative impact on the victim. This involves the victim giving evidence as to the harm she has experienced, which, in an adversarial system of justice, has advantages and disadvantages. Survivors tell us that being cross examined on intensely personal responses in an adversarial context is extremely challenging and can feel like revictimisation, to an extent. On the other hand, the expectation that victims in England will show harm has made it possible for abused women to provide evidence of a range of abuse experiences - such as how being ‘photo-shamed’ makes them feel - that have fallen outside the law’s purview until now. Witness statements and testimony, in other words, have been critical to early prosecutions under s76 in England, particularly as a way to demonstrate the ongoing and tortuous nature of the offence, e.g. through testimonial evidence establishing the credibility of electronic telephonic and written statements. Proper safeguarding for the victim/witness

¹² Nicola Sharp-Jeffs, *Into Plain Sight: How Economic Abuse Is Reflected In Successful Prosecutions of Controlling Or Coercive Behaviour* (Surviving Economic Abuse 2017); Judy Postmus, Gretchen Hoge, Jan Breckenridge, Nicola Sharp-Jeffs, and Donna Chung, *Economic Abuse as an Invisible Form of Domestic Violence: A Multi Country Review*. (2020) 21 (2) *Trauma, Violence and Abuse* 261; Nicola Sharp-Jeffs, *Understanding the Economics Of Abuse: An Assessment Of The Economic Abuse Definition Within the Domestic Abuse Bill* (2021 forthcoming) *Journal of Gender-Based Violence*.

is essential, as is some form of emotion and practical support throughout the process – England and Wales have introduced the Criminal Justice Independent Domestic Violence Adviser for this reason which has had a degree of success. The relative value of bringing ‘victim voices’ to bear in judicial proceedings must be weighed against the potential harms victims face from exposure and court proceedings.

Sentencing

Coercive control is a serious crime meriting a lengthy sentence. Approximately 70% of the partner assaults that are reported to police take place in the context of coercive control.¹³ Coercive control accounts for similar proportions of reported incidents of stalking by partners (a majority of all stalking cases), reported sexual assaults, nonfatal strangulation, harassment and a range of minor crimes treated as nuisance offenses.¹⁴ It is the major context for partner homicide and a major context for child homicide in England.¹⁵ It has been linked to a number of psychiatric outcomes, including suicidality, depression and PTSD, including the evidence from the National Australian Health Survey.¹⁶ But the most salient outcome for victims are the isolation, subordination, humiliation and loss of liberty occasioned by coercive control. In England/Wales, the s76 offence carries a maximum sentence on conviction of 5 years in prison. In part this reflects the fact that s76 has such a narrow focus – physical violence, for example, that is prosecuted separately under the offences against the persons regime will also be sentenced separately. The maximum prison sentence in Scotland, where the DASA captures all coercive controlling behaviour in one statute, is 14 years.

Recommendation

We recommend a new tier sentencing scheme with a maximum sentence for conviction at trial of 14 years and a lesser sentence of 5 years for a plea.

Part Three: Challenges and how to Overcome Them

In this, final section we address question 8 – how might the challenges of creating an offence of coercive control be overcome? As part of this response we also deal with the issues raised by question 15: what non-legislative activities are needed to improve the identification of and response to coercive and controlling behaviours both within the criminal justice system and more broadly?

¹³ Stark op. cit 2009. Using the W.E.B. (an early measure of CC) to identify 71% of abused women as “battered”: Paige Hall Smith, Gloria Thornton, Robert DeVellis, Joanne Earp and Ann Coker ‘A Population-Based Study of the Prevalence and Distinctiveness of Battering, Physical Assault, and Sexual Assault in Intimate Relationships’ (2002) 8(10) *Violence Against Women* 1208. A recent study of a cross-section of younger women found coercive control was the most common form of IPV reported (58%): Angie Kennedy, Deborah Bybee, Heather McCauley and Kristen Prock, ‘Young Women’s Intimate Partner Violence: Victimization Patterns Across Multiple Relationships’ (2018) 42(4) *Psychology of Women Quarterly* 430.

¹⁴ Bendin op. cit; Sylvia Walby and Jonathan Allen, *Domestic Violence, Sexual Assault and Stalking: Findings From the British Crime Survey Home Office Research Study 276* (Home Office 2004).

¹⁵ Women’s Aid, *Nineteen Child Homicides Report* (2004) available at

<https://www.womensaid.org.uk/shop/reports/nineteen-child-homicides/> accessed 21 January 2021; Jane Monckton Smith, ‘Intimate Partner Femicide: Using Foucauldian Analysis to Track an Eight Stage Progression to Homicide’ (2020) 26(11) *Violence Against Women* 1267.

¹⁶ Susan Rees, Derrick Silove, Thien Chey and David Forbes, ‘Lifetime Prevalence of Gender-Based Violence in Women and the Relationship With Mental Disorders and Psychosocial Function’ (2011) 306(5) *National Library of Medicine* 513.

Unnecessary Concerns

It is worth pointing out that a number of ‘concerns’ expressed by commentators at the beginning of the English/Welsh initiative have not, in fact, materialised. One such concern, expressed by opponents of criminalising coercive control, was that the scope of the conduct covered would be too broad, and that criminal justice agents would struggle to “boundary” the relevant criminal behaviour. Would behaviour be criminalised that is in fact benign? In fact, a review of the early cases confirms that with training, police and prosecutors are able to distinguish between behaviour that is criminal and that which is not.¹⁷

A second concern in England and Wales was that the emphasis on ‘psychological abuse’ and ‘control’ would increase the ratio of women arrested for nonviolent abuse offenses. Again, this has not materialised in England and Wales, where the perpetrators prosecuted are almost without exception male. To the contrary, use of coercive control has greatly reduced confusion of primary aggressors with victims.

Commitment of resources and leadership

Commitment of resources and leadership is a key area of focus. Perhaps a more significant concern is the argument that, without resources and leadership, police are no more likely to enforce new coercive control laws than they are current domestic violence offences. In England, enforcement of new coercive control laws has varied considerably by jurisdiction suggesting the important roles of local leadership and fiscal support.

Coercive control is not only new law. But if engaged correctly, it is a new way to respond to woman abuse. To implement coercive control laws requires a commitment to training, and leadership and cultivation of support services.

It is too soon to gauge the police response in Scotland, but we are encouraged by the fact that Scotland deferred enforcement of the new offense for two years during which it prepared its police, CPS system and judiciary for implementation. In particular, and in contrast to England/Wales, all three criminal justice agencies – police, judiciary and prosecution – have been given extensive and compulsory coercive control training.

Recommendation

We recommend a major commitment of new resources to coercive control, proper training and the designation of experienced leadership accountable for enforcement. Without this commitment, a new law can serve as a form of disguised betrayal to victims and survivors.

¹⁷ Amanda Robinson, Andy Myhill and Julia Wire, ‘Practitioner (mis) understandings of coercive control in England and Wales’ (2018) 18(1) Criminology and Criminal Justice 29.

Perhaps the most persuasive argument against a new offense is that without this commitment, new law may be no better than none.

Coercive control merits a specialised response

Coercive control is challenging to investigate and prosecute and has more in common with other serious crimes such as terrorism and kidnapping than common assault. Course of conduct offences are inevitably more time consuming to investigate because there are often several elements to the offence; criminal acts may have occurred over a considerable period and in diverse settings in addition to the home; types of evidence may vary considerably in terms of quality and accessibility; offenders often move from one jurisdiction to another; and the victim may be the primary or sole witness. While the victim's cooperation is often helpful, a continuing threat is commonplace, even if a couple is separated. Major elements of the offence can usually be established without the victim involvement. But specialised investigative units are often required to develop a case and coordination between several departments is sometimes needed to track offenders and victims.

Background

The Chief Procurator Fiscal for Scotland for Crimes against Women, Anne Marie Hicks, took responsibility for overseeing the response by police and CPSs and established a Specialised Team of Prosecutors to assist local police and assume responsibility for cases. Police Scotland also established the Coercive Control Team to track and pursue offenders. In England, where the new offence was introduced amidst severe cuts in funds to policing, arrests and prosecutions proceeded haltingly at first. Nevertheless, several jurisdictions successfully brought highly cases and police intervention was greatly facilitated by a risk assessment tool developed by the College of Policing in London specifically for coercive control cases and the assignment of coercive control to specialised teams, like sex crimes units.

Recommendation

We recommend that legislation recognise the specialised nature of policing and prosecuting coercive control and allocate funds accordingly.

Addendum on Funding

We justify the relatively high upfront investment in new law on coercive control in terms of the cost saving accrued by addressing numerous minor offenses under the rubric of a single, bespoke major offense. With a reasonable risk assessment in place that could distinguish coercive control from cases of simple assault, it would be possible to triage the tier of misdemeanour nuisance offenses ('domestics') to management by social care agencies, at enormous savings in justice resources. Conversely, as the most widespread and devastating crime against women, coercive control merits comparison to other serious offences such as robbery and kidnapping. In Scotland, coercive control cases are assigned to a special branch at Police Scotland with regular liaison with local officers and overseen by a Special Procurator Fiscal for all of Scotland. Larger PD in England have also addressed this problem by assigning coercive control cases to specialised teams such as those dealing with sex

crimes. It is likely that as demand grows a similar process of specialisation will take place in the Crown Prosecutors office and the Judiciary.

Other Challenges

There is also no getting away from the fact that coercive control is 'more law.' Critics of an carceral approach to social problems like wife abuse believe that its good intentions will be lost behind policing policies that discriminate against the poor, migrants and people of colour.

What about acts committed prior to enactment of a new crime?

Coercive control is a course of conduct crime. So an offender's history of prior abuse-related offenses against the victim can be critical to building a case. An outstanding question is what status to give acts committed prior to the enactment of the new offence, whether they can be introduced to support the case at trial, maintained in the case file to support a charging decision or disregarded altogether. In either cases, prosecuting coercive control entails the creation and maintenance of an historical data base that permits the development of victim/offender risk profiles and allows arresting officers and CPS to view an offender's criminal history at the charging stage.

Recommendation

We recommend that whatever decision is made on the acts to be included as elements of the offense, provision be made to collect historical data sets to assess victim progress, build a case and track offenders.

Further Questions and Follow Up

We will happily answer any questions the Committee may have about the issues raised in this paper, or indeed pertaining more generally to the introduction of coercive control as a criminal offence.

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