

**Submission
No 53**

COERCIVE CONTROL IN DOMESTIC RELATIONSHIPS

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Joint Select Committee on Coercive Control

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Submitted [online](#)

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Submission in relation to Coercive Control Provisions

Feminist Legal Clinic Inc. is a community legal service based in Sydney that works to advance the human rights of women and their children. The Principal Solicitor is also a current member of Legal Aid's Domestic Violence Practitioner Scheme and provides regular advocacy services on roster for the WDVCS at Local Courts. We now address the questions raised in the Discussion Paper as follows.

1. What would be an appropriate definition of coercive control?

Any definition of coercive control needs to take account of the context of the relationship. For example, parents and carers should not be exposed to risk of prosecution for simply “*controlling, regulating or monitoring*” the activities of a child.¹ How a parent should appropriately treat a child is very different from how a man should treat his female partner. The definition and legislation generally must be framed so that it is specific to the conduct it is intending to criminalise.

The Scottish legislation, which is being heralded as a model in this area, is specific to abusive behaviour towards a partner or ex-partner and does not extend to every domestic relationship.² It does capture abusive behaviour directed at a child where the purpose is to coerce or control the perpetrator's partner. However, it does not attempt to cover the field by providing a catch all provision for all forms of coercion within domestic relationships. For example, there is no doubt more suitable and specialised legislation that should be applied to care and protection of children, elder abuse or abuse perpetrated by carers of people with disabilities.

Neither the Scottish legislation nor any of the proposed legislation here in NSW is sex specific, which is rather disingenuous since it is quite clear that the impetus for this legislation is community outrage over increasingly shocking reports of male violence against female partners and their children, where the only precursor was often a

¹ Section 14A *Crimes (Domestic and Personal Violence) Amendment (Coercive Control—Preethi's Law) Bill 2020*

² Section 1 Domestic Abuse (Scotland) Act 2018, <https://www.legislation.gov.uk/asp/2018/5/section/2/enacted>

relationship characterised by coercive control.³ However, without explicitly framing this legislation for the protection of women there is a high chance it will be used against them instead of for their protection.

The existing domestic violence legislation recognises “*that domestic violence is predominantly perpetrated by men against women and children*”.⁴ However, despite this recognition in the objects of the legislation, these provisions are increasingly being weaponised against women by abusive males, with regular misidentification of women as perpetrators.⁵ Although it is quite clear statistically that males are overwhelmingly the perpetrators of domestic violence, there is an increasing predilection by police to charge women for minor assaults that have occurred in a context in which they are the victim of overarching abuse. In 2019, the percentage of women being identified as perpetrators of domestic violence has ballooned with women making up 22 per cent of people named as defendants in these proceedings.⁶ Too often women plead guilty or consent to orders in these circumstances due to the stress and difficulty defending charges and AVO applications being instigated by their abusers.

Women are increasingly exposed to the risk of prosecution by a superficial “equality” narrative that ignores physical disparities between men and women, uneven distribution of caregiving responsibilities, systemic imbalances in resources and power and the fact that violent and sexual crime is overwhelmingly committed by males. For the rare woman who does resort to substantive violence, the general criminal laws are available to ensure justice is served. It is crucial to ensure the domestic violence laws are not inappropriately transformed into a further means of victimising vulnerable women.

The continued unwillingness to draft legislation that is specific to the purpose of protecting women from male violence is undermining good intentions and not only failing to protect victims but exposing them to the risk of prosecutions instigated by their abusers. The current Bills before parliament would also enable male perpetrators to circumvent the family law and simply prosecute women who impede their contact with children. The government should take heed of the fact that many aggressive men’s rights activists are welcoming the proposed coercive control legislation and take care not to unwittingly expose women and children to further victimisation.

The government should not shy away from drafting provisions that specifically protect women from male violence. It is an object of the existing NSW domestic violence legislation that it enacts provisions that are consistent with principles underlying the *Declaration on the Elimination of Violence against Women* (DEVAW).⁷ Any definition of coercive control should be framed so that it specifically criminalises abuse by males directed at females. This does not suggest that other forms of abuse occurring within other domestic relationships should go without penalty, but that they should not be used to detract from the sex specific focus of this

³ <https://www.abc.net.au/news/2020-02-29/hannah-clarke-murder-prompts-nsw-mp-coercive-control-power-law/12012300>

⁴ Section 9(3)(b) of the NSW *Crimes (Domestic and Personal Violence) Act 2007*

⁵ [Equality with a Vengeance: the over-incarceration of women](#), *Precedent*, Issue 147, August 2018

⁶ <https://www.thesaturdaypaper.com.au/news/law-crime/2020/11/07/policing-family-violence-nsw/160466760010676#hrd>

⁷ Section 9(1)(c) of the NSW *Crimes (Domestic and Personal Violence) Act 2007*

legislation and should instead be prosecuted under more appropriate sections of the general criminal law.

2. How should it distinguish between behaviours that may be present in ordinary relationships with those that taken together form a pattern of abuse?

The current Bills before the NSW Parliament have the potential to criminalise every parent in the state. To overcome this problem, we believe the legislation must be drafted like the Scottish legislation so that it is specific to relationships between partners and ex-partners. In addition, we would strongly recommend that it is made specific to the protection of females from male violence. We have suggested appropriate wording for the provisions below.

3. Does existing criminal and civil law provide the police and courts with sufficient powers to address domestic violence, including non-physical and physical forms of abuse?

No, currently it is very difficult for women trapped in relationships characterised by coercive control to obtain assistance from law enforcement authorities in the absence of physical violence. We can provide case studies that demonstrate this difficulty if required.

4. Could the current framework be improved to better address patterns of coercive and controlling behaviour? How?

The current legislation specifically recognises that domestic violence “*may involve the exploitation of power imbalances and patterns of abuse over many years*”.⁸ However, in practice it is very difficult to have the police and the courts give due weight to these contextual factors. By amending the legislation to recognise male coercive controlling behaviour directed at a female partner as discrete grounds for an ADVO in the absence of any other criminal offence, the legislative framework will be improved in its capacity to address sex-based patterns of abuse.⁹

5. Does the law currently provide adequate ways for courts to receive evidence of coercive and controlling behaviour in civil and criminal proceedings?

Currently police are largely entrusted with investigating and gathering the evidence required to bring an ADVO application on behalf of a victim. Unfortunately, the police have a highly masculine culture, and statistically (and verified by anecdotal accounts) there are likely to be many perpetrators within their ranks who are hostile to the interests of women.¹⁰ The reluctance of police to act in many cases is well documented and yet access to bringing private applications is increasingly restricted.¹¹ The loss of Chamber Magistrates and restrictions on the availability of legal aid means that the process of bringing a private application is largely inaccessible for many women. We have even been told at one court that there was no form available

⁸ Section 9(3)(d) of the NSW *Crimes (Domestic and Personal Violence) Act 2007*

⁹ Amendment required to Section 11(1)(c) of the NSW *Crimes (Domestic and Personal Violence) Act 2007*

¹⁰ <https://theconversation.com/police-perpetrators-of-domestic-violence-what-do-we-know-and-what-can-be-done-49441>; <https://www.abc.net.au/news/2020-10-19/police-in-australia-are-failing-to-take-action-against-domestic/12757914?nw=0>

¹¹ We have been informally advised by police officers that there is a Memorandum of Understanding between the courts and the police allocating responsibility for APVOs to the court system and ADVOs to the police.

for the purpose and it was not possible to bring a private ADVO. Furthermore, children are specifically excluded from private applications by the legislation.¹²

Evidence of patterns of abusive behaviour should be highly relevant for establishing grounds for an ADVO, but in our experience are often ruled inadmissible. There is a tendency to focus on only the most recent incidents and in many cases a refusal to consider a history of protracted domestic abuse, including patterns of controlling and coercive behaviour despite this being highly relevant to whether the person in need of protection (PINOP) fears the defendant. In other cases, magistrates will accept the fears are real, but maintain that they are not reasonable. There seems to be a resistance by some magistrates to accept anything short of documented physical violence as providing reasonable grounds for an application. The introduction of a coercive control offence could therefore play an important educative role in requiring police and magistrates to overcome their reluctance to take these reports seriously. Directions to magistrates to admit evidence of coercive and controlling behaviour in domestic violence matters generally would also be helpful.

6. Does the law currently allow evidence of coercive control to be adequately taken into account in sentence proceedings? If the answer is no to questions 5 or 6, how could the law be improved to ensure the evidence is admissible and is given adequate weight in civil and/or criminal proceedings?

No. In our experience in the Local Court victims are unlikely to be heard in sentencing proceedings where there has been a plea entered. If she is heard at all it is most likely to be in support of the defendant. While it would be good generally to see greater provision made for victims to have input in sentencing proceedings, this could prove counterproductive in domestic violence matters where victims are already regularly placed under duress to provide supportive statements for defendants during sentencing.

7. What are the advantages and/or disadvantages of creating an offence of coercive control?

The advantage of the offence would be that it would provide many women trapped in relationships characterised by coercive control with a means of obtaining protection when they decide to end the relationship. Unfortunately, women in these circumstances are often turned away by police on the basis that there has been no recent violent incident to ground an application. This leaves many women unsupported and many feel they have no choice but to remain in a coercive relationship to ensure their own and their children's safety.

The clear disadvantage is that unless the provisions are drafted to be specific to the protection of women it is likely to be weaponised against them by male perpetrators. Furthermore, those who are chronic victims of coercive control are unfortunately the least likely individuals to come forward to instigate charges against the perpetrator. Unfortunately, our adversarial legal system favours those who are aggressive and confrontational and have access to greater financial resources and these are more likely to be male perpetrators of coercive control rather than their victims.

¹² Section 48(3) of the NSW *Crimes (Domestic and Personal Violence) Act 2007*

8. How might the challenges of creating an offence of coercive control be overcome?

As stated above, the legislation must be drafted so that it is specific to the protection of women from abusive male partners and cannot be used against them.

9. If an offence of coercive control were introduced in NSW, how should the scope of the offence be defined, what behaviours should it include and what other factors should be taken into account?

The Scottish legislation lists 5 key effects of coercive control. This has been largely emulated by the Bills proposed by both Greens and Labor. We suggest a slightly amended version using sex-specific language for the reasons outlined above.

Insert section 14A to read:

Coercive Control

A male must not engage in repeated or continuous conduct that constitutes coercive control of a female partner or ex-partner.

Maximum penalty—Imprisonment for 12 months imprisonment or 10 penalty units, or both

Coercive control by a male is conduct that has, or is reasonably likely to have, one or more of the following effects on a female partner or ex-partner —

- i) Causing her to be dependent on him or feel subordinate to him*
- ii) Isolating her from friends, family or other sources of support*
- iii) controlling, regulating and monitoring her day to day activities*
- iv) depriving or restricting her freedom*
- v) frightening, humiliating, degrading or punishing her.*

We also think that the legislation should identify some examples of common means of exercising coercive control including financial and psychological abuse and threats involving manipulation of legal, immigration and health systems. It is all too common to hear of men threatening, and succeeding, to have their wife involuntarily committed to a mental health unit, charged by police, deported or otherwise separated from her children.

10. Could the current legislative regime governing ADVOs better address coercive and controlling behaviour? How?

Yes. Section 16 of the *Crimes (Domestic and Personal Violence) Act 2007* should be amended with the addition of the words highlighted as follows:

(1) A court may, on application, make an apprehended domestic violence order if it is satisfied on the balance of probabilities that a person who has or has had a domestic relationship with another person has reasonable grounds to fear and in fact fears--

(a) the commission by the other person of a domestic violence offence against the person, or

(b) the engagement of the other person in conduct in which the other person--

(i) intimidates the person or a person with whom the person has a domestic relationship, or

(ii) stalks the person,

(c) repeated or continuous conduct by a male which is intended to coerce or control a female partner or ex-partner with the purpose of:

vi) Causing her to be dependent on him or feel subordinate to him

vii) Isolating her from friends, family or other sources of support

viii) controlling, regulating and monitoring her day to day activities

ix) depriving or restricting her freedom

x) frightening, humiliating, degrading or punishing her.

being conduct that, in the opinion of the court, is sufficient to warrant the making of the order.

11. Should the common law with respect to context and relationship evidence be codified within the CPA (or other relevant NSW legislation) to specifically govern its admissibility in criminal proceedings concerning domestic and family violence offences? If yes, how should this be framed?

Yes, appropriate amendments should be made to the *Criminal Procedure Act 1986* to facilitate the introduction of this new summary offence. In the most extreme cases we would expect that additional indictable charges would be laid pursuant to other sections of the *Crimes Act 1900*. While recognising the seriousness of the proposed new offence, we believe a summary offence with a lower penalty may be more often utilised and therefore more effective in providing women with protection. While a woman is not always ready to see her partner imprisoned, she must be provided with support to escape an abusive relationship when she is ready and of course a breach of associated AVO orders would likely attract a tougher response. We would rather see a lesser penalty and a higher rate of successful AVO applications, prosecutions and convictions. We note the Scottish legislation only provides for a maximum penalty of 12 months imprisonment. We do not believe more draconian maximum penalties will improve the efficacy of the provisions.

12. Would jury directions specifically addressing domestic and family violence be of assistance in criminal proceedings? If so, what should a proposed jury direction seek to address?

Summary matters are dealt with in the Local Court and therefore jury directions would not be applicable in that context. Increasing the seriousness of the offence will in some cases increase women's reluctance to report to police and could result in a reduced rate of prosecutions and convictions. Many victims, including many indigenous women, are reluctant to report their partners in circumstances where they are likely to be imprisoned. Women frequently seek charges dropped against their partner or to vary or revoke orders brought by police for their protection. Women are

often acting under duress of one sort or another when making these applications but there is no doubt it reduces the efficacy of the current system. It is important that police and courts develop a more nuanced understanding of domestic violence and work to patiently empower women rather than penalise them when they do not embrace a punitive approach to males who have harmed them.

13. Should provisions with respect to sentencing regimes be amended? If so, how?

If a draconian sentencing regime is enforced this is also likely to result in a greater reluctance by police to charge and unwillingness for magistrates to convict or sentence men for activity which has hitherto been largely accepted within many sections of our community. We would suggest that it is more effective to have legislation that is more likely to result in a greater number of successful AVO applications and prosecutions of male perpetrators on behalf of victims and thereby provide more significant protection to women than underutilised provisions.

14. Are there any other potential avenues for reform that are not outlined or included in the questions above?

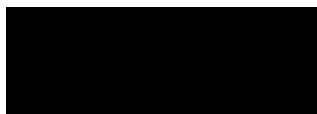
Yes, chamber magistrates should be reintroduced and/or free legal services operating within a feminist framework expanded into the Local Courts for the express purpose of assisting women to draft private ADVO applications and provide representation to women in cases where police are unwilling to assist. The police are often not the most appropriate body to be representing women's interests for the reasons outlined above. Specialist women's police stations, similar to those which have been successful in some South American countries, should also be explored as another solution to this problem.

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?

It is very important to simultaneously run a community education campaign to raise awareness of these changes and the need for them, and should include distributing through appropriate services, the media, schools and other educational bodies. Any campaign must clearly identify this as a sex-based issue and should address the underlying attitudes of male entitlement which are at the root of this problem. Obscuring the sex-based reality of domestic violence will only undermine the effectiveness of any reforms.

Feminist Legal Clinic Inc. would be happy to contribute to these efforts once appropriate reforms have been decided.

Regards



Anna Kerr
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