

**Submission
No 79**

COERCIVE CONTROL IN DOMESTIC RELATIONSHIPS

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**Criminalising
coercive control in
New South Wales**

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Consultation, education and training can help ensure effective coercive control legislation for NSW

Thank you for the opportunity to provide this submission to the Joint Select Committee on Coercive Control.

In our response to some of the questions posed in the Discussion Paper, we hope to show that, by criminalising coercive control – while ensuring appropriate consultation, education and training – the NSW Parliament can:

- improve the protection of victims from ongoing abuse and help prevent all forms of avoidable violence and deaths
- change beliefs and societal norms about what constitutes a healthy relationship
- legislate in the interests of diverse NSW communities, as well as the police and courts.

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

The key advantages of creating an offence of coercive control are to:

- protect people from an under-recognised yet core element of family and domestic abuse
- prevent escalating forms of violence and abuse, including murder
- fill critical gaps in existing laws
- make it clear what society sees as acceptable and promote healthy, safe relationships.

Protect people from an under-recognised yet core element of family and domestic abuse

Our existing criminal laws fail to recognise a critical feature of family and domestic violence (FDV): that it is often characterised by ongoing patterns of behaviour, not merely single standalone incidents. Indeed, ongoing controlling and coercive behaviours have been identified as the core element of FDV and many victims have said that these behaviours are the worst part of FDV.¹

Criminalising coercive control will enable us to move from using an incident-based response to FDV to recognising in law the harmful patterns of controlling, coercive and other violent behaviours that cause significant suffering and trauma.

We must recognise coercive control as violence in and of itself. Exerting this type of power - which includes manipulation, control and isolation - is an act of violence, as it reduces an individual's agency and their ability to live a full life.

Coercive control harms and traumatises victims. The damaging effects of coercive control are 'experienced cognitively, emotionally and socially, frequently resulting in its victims being isolated, with little sense of self-worth or self-esteem'.² Victims report feeling mentally tormented, not being able to think straight because they are 'walking on eggshells' and feeling as if they are being smothered alive.³

Coercive control victims are almost always women⁴ - and these behaviours violate their equal rights to autonomy, liberty and dignity.⁵

¹ McGorrery, P., & McMahon, M. (2019). Criminalising 'the worst' part: operationalising the offence of controlling or coercive behaviour in England and Wales. *Criminal law review*, (11), 957-965.

² Walklate, S., & Fitz-Gibbon, K. (2019). The criminalisation of coercive control: The power of law?. *International journal for crime, justice and social democracy*, 8(4), 94.

³ ABC, 'Coercive control: The 'worst part' of domestic abuse is not a crime in Australia. But should it be?', November 2019.

⁴ McGorrery, P., & McMahon, M. (2019). Prosecuting controlling or coercive behaviour in England and Wales: Media reports of a novel offence. *Criminology & Criminal Justice*.

⁵ Stark, E., 'Coercive Control' in 'Violence Against Women: Current Theory and Practice in Domestic Abuse, Sexual Violence and Exploitation'. Edited by Nancy Lombard and Lesley McMillan. Jessica Kingsley Publishers.

Prevent escalating forms of violence and abuse, including murder

The NSW Domestic Violence Death Review Team found that 77 of the 78 perpetrators who killed their partner between 2017 and 2019 had used coercive control.⁶

Recent research has shown that there is a recognised timeline of behaviours that typically take place before someone kills their partner or ex-partner. The third stage of the eight-stage process is that the relationship becomes dominated by coercive control.⁷

Because these deaths can now be predicted, the NSW parliament has an opportunity to prevent them - some of them, at least - by criminalising coercive control.

The recent killing of Hannah Clarke and her three children is just one example of an appalling crime that was preceded by a long history of coercive control.⁸ Lloyd and Sue Clarke (Hannah's parents) believe that coercive control laws could have saved their daughter and grandchildren.⁹

And as stated in the findings of the Inquest into the death of Zahra Abrahamzadeh:

“The power of arrest and charging is the most powerful influence that police can bring to bear against a [domestic violence offender]. If that power is not exercised..., the domestic violence offender will think that he has ‘gotten away with it’. He will be encouraged to think that he can repeat his behaviour. The victim will think that she is not being taken seriously.”

For every person killed by their partner or ex-partner, there are many more who suffer serious and escalating forms of violence and abuse at the hands of a partner who has displayed coercive and controlling behaviours. By making coercive control an offence, the NSW Parliament will empower victim-survivors to report this abuse and enable the justice system to intervene early - before the abuse escalates.

Fill critical gaps in existing laws

Research has shown that the current approach of only prosecuting non-physical abuse when it contravenes a court order attracts penalties that are too lenient and offers insufficient protection to victims. Researchers have also argued that prosecuting physical abuse through the lens of incident-based offences puts an untenable burden on victims: the need to recall the details of specific actions (including the dates, times and locations these actions took place), even though these behaviours often occur over a period of several years.¹⁰

There are also significant concerns about relying on civil intervention orders to address coercive control. One key concern is that, in practice, the Apprehended Domestic Violence Order scheme in NSW is overly focused on a narrow depiction of FDV that emphasises single incidents.¹¹ To be effective, our laws must recognise and address the controlling, patterned and repetitive nature of FDV.¹²

Another important consideration is that criminal legislation will enable police to build a case against perpetrators, rather than relying on the victim to pursue civil proceedings. A report by Her Majesty's Inspectorate of

⁶ Women's Legal Service NSW, Criminalising Coercive Control - Why we need a thorough consultation process on how to effectively address coercive controlling violence, September 2020.

⁷ Monckton Smith, J. (2020). Intimate partner femicide: Using Foucauldian analysis to track an eight stage progression to homicide. *Violence against women*, 26(11), 1267-1285.

⁸ McGorrery, P., & McMahon, M., Coercive control is a key part of domestic violence. So why isn't it a crime across Australia? February 27, 2020, *The Conversation*.

⁹ Gearing, A., *The Guardian*, Lloyd and Sue Clarke: 'Coercive control laws could have saved Hannah and her three children', November 2020.

¹⁰ McGorrery, P., & McMahon, M. (2019). Prosecuting controlling or coercive behaviour in England and Wales: Media reports of a novel offence. *Criminology & Criminal Justice*.

¹¹ Wangmann, J. (2012). Incidents v context: How does the NSW Protection Order System understand intimate partner violence. *Sydney L. Rev.*, 34, 695.

¹² Burke, A. S. (2006). Domestic violence as a crime of pattern and intent: An alternative reconceptualization. *Geo. Wash. L. Rev.*, 75, 552.

Constabulary (in the UK) explains that the dynamics of domestic abuse mean that victims may not want the perpetrator to be prosecuted.¹³ Criminalising coercive control will better enable criminal justice agencies to fulfil their responsibilities to protect victims.

The introduction of coercive control laws in England has been highly effective, with research showing a high conviction rate (91% of cases analysed in a 2019 study led to defendants being convicted and sentenced) and a high proportion of custodial sentences (75% of those convicted received a custodial sentence and a further 16% received a suspended sentence of imprisonment.)¹⁴

Make it clear what society sees as acceptable and promote healthy, safe relationships

As McGorry and McMahon have written:

“One of the fundamental aims (if not the fundamental aim) of the criminal law is to ‘secure civil society’...by providing fair warning to all about which behaviours are prohibited. Everything not prohibited by the criminal law (the residual behaviours) falls within the ‘sphere of individual liberty’, the broad ambit of permissible actions and omissions, and people are entitled to rely on that state of affairs in planning their lives.”¹⁵

One long-standing criticism of civil protection order systems is that they confuse the important message that FDV is a crime.¹⁶ This is despite the fact that we have laws criminalising FDV. The absence of criminal legislation against coercive control - which many consider the core element of FDV¹⁷ - makes for an even more dangerous message.

While introducing England’s legislation criminalising controlling or coercive behaviour (section 76 of the Serious Crime Act 2015), the UK’s Minister for Preventing Abuse and Exploitation stated:

“We are sending a clear message that it is wrong to violate the trust of those closest to you and that emotional and controlling abuse will not be tolerated.”¹⁸

The lack of such laws in NSW, however, sends the dangerous message that our society will tolerate these behaviours.

This message surely influences the behaviour of perpetrators. It must also influence victim-survivors who, rather than seeing such control as normal, might otherwise recognise the warning signs and either leave their abusive partner or insist that they seek specialised FDV support such as a behaviour-change program.

As well as deterring the perpetration and discouraging the acceptance of FDV behaviours, by criminalising coercive control, the NSW parliament will help establish more equitable social norms. This will help ensure that young people across the state grow up with a better understanding of what healthy relationships look like.

¹³ Her Majesty’s Inspectorate of Constabulary Report (2014) Everyone’s business: Improving the police response to domestic abuse.

¹⁴ McGorry, P., & McMahon, M. (2019). Prosecuting controlling or coercive behaviour in England and Wales: Media reports of a novel offence. *Criminology & Criminal Justice*.

¹⁵ McGorry, P., & McMahon, M. (2019). Criminalising ‘the worst’ part: operationalising the offence of controlling or coercive behaviour in England and Wales. *Criminal law review*, (11), 957-965.

¹⁶ Wangmann, J. (2012). Incidents v context: How does the NSW Protection Order System understand intimate partner violence. *Sydney L. Rev.*, 34, 695.

¹⁷ McMahon, M., & McGorry, P. (2016). Criminalising controlling and coercive behaviour: The next step in the prosecution of family violence?. *Alternative Law Journal*, 41(2), 98-101.

¹⁸ Bradley, K, quoted in Home Office, ‘Coercive or Controlling Behaviour Now a Crime’, 29 December 2015, <<https://www.gov.uk/government/news/coercive-or-controlling-behaviour-now-a-crime>>.

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

To overcome the challenges of creating an offence of coercive control, the NSW Parliament should ensure:

- a thorough consultation process
- mandatory training for the courts, police and frontline workers
- a comprehensive public education program.

A thorough consultation process

There are concerns that criminalising coercive control could have unintended negative consequences for certain groups of people, including Aboriginal and Torres Strait Islanders, victim-survivors, people from culturally and linguistically diverse communities and people with disabilities.

To ensure that the laws are developed and implemented in appropriate ways for all people in NSW, we encourage you to use a thorough and transparent consultation process that gives diverse groups the opportunity to provide input to each step of the process. It is particularly important to involve victims of coercive control and other stakeholders in the drafting of the new law so that their experience can be taken into consideration.

The Scottish legislation - widely considered the gold standard - was developed using an exemplary consultation process. To ensure that the wording of the legislation was effective, the Scottish government consulted women's organisations on these laws and - critically - worked with them to co-write the legislation.¹⁹ There was also close consultation with victim-survivors.²⁰ The Scottish government invested several years in this process and we recommend a similar approach so that NSW too can develop and implement gold-standard legislation.

Mandatory training for the courts, police and frontline workers

Providing effective training for the courts, police and frontline workers will help overcome potential challenges such as:

- recognising what behaviour is considered criminal
- collecting evidence and prosecuting offences effectively for 'course of conduct' offences
- correctly identifying the primary aggressor
- avoiding unintentional collusion with perpetrators.

Section 76 in England was introduced as part of a 'whole of government' response to FDV. The intention has been to both criminalise behaviours that cause psychological harm and improve the police response to FDV. The UK's Attorney General introduced the reforms as one part of a greater reform to 'drive a culture change in the policing of domestic abuse' and to make people understand that domestic abuse is a serious crime.²¹ We hope that coercive control legislation in NSW will be introduced as part of a similar holistic framework.

It is important to allow sufficient time for training before the new law comes into effect. Once a law has been passed, we recommend allowing a 12-month period before it comes into effect. This will allow time to procure appropriate adult education providers to develop and deliver training on the new law.

Training will need to be developed for police, judges, prosecutors, defence lawyers, social workers, maternal health nurses, paramedics and other frontline workers.

¹⁹ Hill, J., 'Criminalising coercive control will replace the broken lens we have on domestic abuse', Women's Agenda, October 2020.

²⁰ Haydar, N., ABC News, 'Experts from Scotland who led push to criminalise coercive control give evidence to Australian committee', Dec 2020.

²¹ McMahon, M., & McGorrery, P. (2016). Criminalising controlling and coercive behaviour: The next step in the prosecution of family violence?. *Alternative Law Journal*, 41(2), 98-101.

An example of how training was provided in the UK was the College of Police providing face-to-face training in relation to the new offence. This included video testimonies from victims so that police officers understood why the offence was created and the range of behaviours that may be considered controlling or coercive.²²

To ensure effective implementation of the laws in Scotland, tens of thousands of training sessions were run before the laws came into effect. Because the police, prosecutors, judges and the community had a good understanding of the laws, there were over 400 incidents recorded and 13 offenders convicted in just the first three months of operation.

A comprehensive public education program

To ensure that victim-survivors, perpetrators and the wider community understand their rights and responsibilities under the new law, there needs to be a comprehensive public education program.

As stated previously, Hannah Clarke's parents are convinced that, had they and Hannah understood coercive control, Hannah and her three children could have been saved. The Clarkes can now recognise that Hannah's ex-partner exhibited 17 of the 25 behaviours that constitute coercive control. They can also see how the eight-stage framework of FDV homicide (cited above) played out in Hannah's life. They have called for community education to be brought in nationwide to help save the lives of other potential victims.²³

Public education should include a comprehensive, targeted campaign (using online, print, radio and television media). The campaign should be research-based and designed for all key demographic audiences (including being delivered in multiple languages).

The public education program should also include teaching high school students about coercive control and the new law. For example, in September 2020, the UK government made it compulsory to learn about coercive control at school. The new syllabus, Relationship Education, teaches students to understand and identify financial, emotional and physical abuse in teenage and adult relationships.²⁴

Conclusion

In closing, we would like to reiterate the need for effective criminal legislation against perpetrators of coercive and controlling abuse.

Moving from an incident-based response to FDV to an approach that addresses the harmful patterns of controlling, coercive and other violent behaviours will help protect people in NSW from this core element of FDV which, in itself, causes significant suffering and trauma. Developing and implementing effective legislation will also help prevent escalating forms of violence and abuse, including murder.

The effectiveness of the new laws can be ensured through a thorough and transparent consultation process, effective and mandatory training for courts, police and frontline workers, and a comprehensive public education program.

²² College of Policing (United Kingdom), Digest, January 2016, 12.

²³ Gearing, A., The Guardian, Lloyd and Sue Clarke: 'Coercive control laws could have saved Hannah and her three children', November 2020.

²⁴ Price, H., BBC, Coercive control: 'I was 16 and thought it was normal', November 2020.