Submission No 95

COERCIVE CONTROL IN DOMESTIC RELATIONSHIPS

Organisation: NSW Liberal Women's Council

Date Received: 29 January 2021

29 January 2021

Dear Chair,

The rates of domestic violence and homicide in Australia continue at an unacceptable level. As the Minister for Prevention against Domestic Violence and Attorney General the Hon. Mark Speakman MP states in his foreword to Crime Prevention NSW's discussion paper on the Criminalisation of Coercive Control, the overwhelming majority of murders deemed to have occurred in a domestic violence context between 10 March 2008 and 30 June 2016 occurred in relationships that were characterised by coercive and controlling behaviours. (refer page 2 of https://apo.org.au/sites/default/files/resource-files/2020-10/apo-nid309001.pdf).

The NSW Liberal Women's Council deliberated on the issue of coercive control over several months starting in April 2020, appreciating that the frequency of domestic homicide and abuse in homes across our state is unacceptable and a new approach is warranted. As such, on August 25, 2020 the attached motion was debated and passed by the Council. This motion was subsequently shared with the Minister for the Prevention of Domestic Violence the Hon. Mark Speakman MP and represents our considered position on this gap in the law.

The insidious nature of coercive control robs the victim on their autonomy and sense of self determination, comparable to other forms of modern slavery. Coercive control is at its core a restriction of a victim's freedom, made worse given its association to domestic homicide.

The creation of a specific criminal offence of coercive control would draw a line in the sand under these behaviours marking them publicly as unacceptable. Criminalisation should trigger the formal education of the population. If the signs of coercive control were more widely known then these worrying behaviours could be caught sooner by people in abusive relationships and their support networks. By identifying and raising awareness of these red flags we have another tool in the effort to break the cycle of abuse and seek to save lives.

Kind reaards.

Mary-Lou Jarvis
Vice President of the Liberal Party (NSW Division)
President of NSW Women's Council

Motion passed at the NSW Liberal Women's Council General Meeting held 25 August 2020.

CRIMINALISING COERCIVE AND CONTROLLING BEHAVIOUR IN NSW

It is resolved that the Women's Council of the NSW Liberal Party call on the NSW Attorney General and Minister for Prevention of Domestic Violence, the Hon. Mark Speakman SC MP to consider:

- A. Criminalising coercive and controlling behaviour in domestic relationships;
- B. Limiting bail being granted to defendants when charged with such an offence;
- C. Providing for other appropriate laws of procedure to assist complainants during the hearing of the offences;
- D. Emphasising the seriousness of these offences and attempt to ensure the safety of complainants as part of the sentence and
- E. Building on the Scottish approach with Government committing additional training for law enforcement and resources for the provision of expert witnesses if needed.

BACKGROUND

Summary of the issue and proposed solutions:

There is no doubt that too many people experience abusive behaviour in their relationships. To date, the criminal law in New South Wales and the *Crimes (Domestic and Personal Violence) Act* 2007 (NSW), deals with many issues and protects people from many forms of abusive behaviour in their relationships. However, the current laws in New South Wales do not protect people in relationships from all types of abusive behaviours. For example, research shows that people (mainly but not exclusively women), in relationships, can experience their partner perpetrating patterns of behaviour that are coercive or controlling and can lead to psychological or physical harm.

We propose that there is a gap in New South Wales' law that allows complex patterns of abusive behaviour to be considered as merely 'bad behaviour' if they do not immediately result in physical violence. However, these patterns of coercive and controlling behaviour have real psychological and social consequences and can be early indicators of eventual violence or homicide. The actions of a coercive and controlling perpetrator (including economic abuse, emotional or psychological abuse), in relation to domestic relationships, are the subject of Australian laws, but only ground the basis of some kind of domestic violence order.

The exception is in Tasmania which provides for two offences, those of "Economic abuse" and "Emotional abuse and intimidation" but which are otherwise somewhat limited. In New South Wales, we have the offence of "Intimidation", but this is also a very specific offence which does not cover many forms of abuse experienced in unhealthy domestic relationships. The most extensive "coercive and control" offence is provided in Scotland, known as an offence of "domestic abuse". Scotland also has appropriate laws in relation to bail, criminal procedure and sentencing, in relation to the offence of domestic abuse. It is widely recognised amongst advocacy groups that the most dangerous time for a women leaving an abusive relationship is when she tries to escape. New South Wales should have similar laws in place that recognise patterns of abuse in relationships and protect victims when they try to leave.

In addition, we posit that there is inherent value in amending the law because legislation sparks societal education. We accept that even under the Scottish model convictions are low. However, the purpose of the law is not to achieve high conviction rates but to guide society in what is acceptable behaviour. Further, these low conviction rates may be a result of the laws

being new and that the Scottish jurisdiction is only now having its eyes opened to what constitutes coercive control, learning that it is not just 'bad behaviour' but is dehumanising abuse. This motion implores the Government to take action now so that the New South Wales community may become privy to this same enlightenment.

The concept of coercive control was first defined by sociology Professor Evan Stark as a "pattern of domination that includes tactics to isolate, degrade, exploit and control" victims, "as well as to frighten them or hurt them physically" recognising that the fear of physical harm is enough to assert control over a victim¹.

In addition, NSW Police officers should be trained to recognise, investigate and deal with the victims of coercive and controlling behaviour.

The motion proposed:

That laws in New South Wales should be enacted which-

- A. Criminalise coercive and controlling behaviour in domestic relationships;
- B. Limit bail being granted to defendants when charged with such an offence;
- C. Provide for other appropriate laws of procedure to assist complainants during the hearing of the offences;
- D. Emphasise the seriousness of these offences and attempt to ensure the safety of complainants as part of the sentence and
- E. Build on the Scottish approach with Government committing additional training for law enforcement and resources for the provision of expert witnesses if needed.

Is it a federal, state, local or internal party issue?

As outlined in the *Background and Discussion* various jurisdictions within Australia have different laws relating to domestic violence and financial or emotional abuse. This motion sits firmly in the realm of a New South Wales law and is a State Liberal Party issue that aims to inform the State parliamentary team's policy and ultimately change the law in New South Wales.

Background and Discussion:

What is the current law in New South Wales in relation to domestic abuse?

The Crimes (Domestic and Personal Violence) Act 2007 (NSW) ("CDPVA") deals with a number of issues. The main issues are as follows-

An offence of stalking or intimidating another person with the intention of causing the
other person to fear physical or mental harm. This includes causing the person to fear
physical or mental harm to another person with whom he or she has a domestic
relationship-s13.

"Intimidation" means conduct (including cyberbullying) which amounts to harassment or molestation of the person, or any approach made to a person by any means that causes the person to fear for her/his safety, or any conduct that causes a reasonable apprehension of injury to a person or to a person with whom he or she has a domestic relationship, or of violence or damage to any person or property-s7.

¹ <u>https://www.abc.net.au/news/2019-11-19/coercive-control-domestic-abuse-australia-criminalise/11703442</u>

- An offence of knowingly contravening a prohibition or restriction specified in an apprehended violence order (either an interim order or a final order) ("AVO")-s14. This violence order includes an "apprehended domestic violence order" ("ADVO") or an "apprehended personal violence order" ("APVO"). An ADVO is made in circumstances where there is or has been a domestic relationship. An APVO is made in any other circumstance-ss15,18.
- An application for an AVO can be made by a police officer or by the person requiring protection. In most cases, an application for an AVO, either by a police officer or by a protected person, is made on the basis of suspicion or belief (by a police officer) or an allegation (by the protected person) of certain offences-ss 48,49,51,52,53. These offences include the numerous criminal personal violence offences under the *Crimes Act* 1900 (NSW), for example, murder, manslaughter, wounding or grievous bodily harm, the various assaults including the various sexual assaults, kidnapping, recording or distributing intimate images without consent, various firearms offences, and various property offences, as well as the offences of stalking, intimidation or contravening AVO's under the CDPVA.
- An application for an AVO can also be made if a police officer suspects or believes that an offence, other than the various personal violence offences, "the commission of which is intended to coerce or control the person against whom it is committed or to cause that person to be intimidated or fearful (or both)", is committed or will be committed-ss11(c),49. (This definition is part of the definition of "domestic violence offence"-s 11). This is the only reference to coercing or controlling behaviour. Ultimately, the effect of this section is that if someone is suspected of committing an offence, which is not a "personal violence offence" (as defined in s4), and the intention of the perpetrator when committing this offence is to coerce or control a person, and a police officer suspects or believes that the offence has or will be committed, then evidence of this suspicion or belief may ground an application for an AVO.
- The Court will only make an ADVO if the person seeking protection has or has had a domestic relationship with another person and she/he has reasonable grounds to fear, either the commission of a "domestic violence offence" or intimidation or stalking by the perpetrator, and the conduct is such that, in the opinion of the court, the conduct is sufficient to warrant the making of the order-s16.
- "Harassment" usually means abusing or insulting behaviour, ongoing torment, bullying, creating aggressive pressure, persecution or forceful pestering/ hassling.
- As a result of the consideration of the above, it is clear that "intimidation" (as defined in the CDPVA) and indeed "harassment", does not deal with "coercive" or "controlling behaviour". Further, "coercive and/or controlling behaviour" is not a separate offence.

What are some other laws in relation to domestic abuse?

- The *Domestic Abuse (Scotland) Act 2018* received Royal Assent on 9 March 2018. This law creates an offence of "domestic abuse" which includes the following-
 - A person ("A") engages in a course of behaviour against another person ("B") or a child of B or against another person
 - the behaviour has as its purpose or among its purposes, one or more relevant effects, or would be considered by a reasonable person to be likely to have one or more relevant effects
 - the relevant effects are making B dependant on, or subordinate to, A; isolating B from friends, relatives or other sources of support; controlling, regulating or monitoring B's day to day activities; depriving B of, or restricting B's freedom of action; frightening, humiliating, degrading or punishing B
 - o A and B are partners or were partners i.e., in a relationship
 - A reasonable person would consider the course of behaviour to be likely to cause B to suffer physical or psychological harm

- either A intends to cause B to suffer, or A is reckless as to whether B suffers the physical or psychological harm
- o Psychological harm includes fear, alarm and distress
- The offence does not depend on proving that the course of behaviour actually caused B to suffer the harm
- The offence does not depend on proving that B actually had any of the relevant effects on her/him
- The offence is aggravated if A directs behaviour at a child or A makes use of a child in directing behaviour against B, or if a child hears or sees or is present during the course of behaviour
- It is a defence if A shows that the course of behaviour was reasonable in the particular circumstances
- The maximum penalty as a summary offence is 12 months and if prosecuted on Indictment, the maximum penalty is 14 years.
- The Scottish laws also state that anyone charged with this offence will need to show exceptional circumstances in order to obtain bail-s23D *Criminal Procedure (Scotland) Act* 1995. Also, the accused is prohibited from conducing his own case i.e., in person, when a witness is giving evidence-s288DC *Criminal Procedure (Scotland) Act* 1995. Further, in relation to sentencing for such an offence, the sentencing court "must have particular regard to the aim of ensuring that the victim is not the subject of a further such offence committed by the convicted person"-s210AB (1) *Criminal Procedure (Scotland) Act* 1995.
- In England and Wales, section 76 of the Serious Crime Act 2015 provides for an
 offence of controlling or coercive behaviour in an intimate or family relationship. The
 essence of this offence is that a person commits an offence if
 - A repeatedly or continuously engages in behaviour towards another person i.e., B that is controlling and coercive
 - o at the time of the behaviour, A and B are personally connected
 - o the behaviour has a serious effect on B and
 - o A knows or ought to know that the behaviour will have a serious effect on B
 - "personally connected" is defined as -being in an intimate personal relationship, or, that they live together and (i) they are members of the same family or (ii) they have previously been in an intimate personal relationship with each other
 - A's behaviour has a "serious effect" on B if it causes B to fear, on at least 2 occasions, that violence will be used against B OR it causes B serious alarm or distress which has a substantial adverse effect on B's usual day to day activities
 - It is a defence if A shows that in engaging in the behaviour, A believed that he/she was acting in B's best interests and that the behaviour was in all the circumstances reasonable. However, the defence is not available in relation to behaviour that causes B to fear that violence will be used against B
 - The maximum penalty on indictment is 5 years, or a fine or both. In summary proceedings the maximum penalty is 12 months or a fine or both
- In Ireland, s39 of the *Domestic Violence Act 2018* provides for an offence of coercive control. The essence of this offence is that-
 - A person commits an offence where he or she knowingly and persistently engages in behaviour that -is controlling and coercive, has a serious effect on the other person and a reasonable person would consider likely to have a serious effect on a relevant person.
 - A person's behaviour has a serious effect on a relevant person if the behaviour causes the relevant person -to fear that violence will be used against him or serious alarm or distress that has a substantial adverse impact on his or her usual day to day activities.

- The punishment for this offence is-if heard summarily-a fine or max of 12 months or both-if on indictment then -a fine or max of 5 years or both.
- A "relevant person" is a spouse or civil partner of that other person or is or was in an intimate relationship with that other person.
- In Tasmania, ss 8 and 9 of the *Family Violence Act 2004* ("FVA") provide offences for "Economic abuse" and "Emotional abuse and Intimidation". Section 8 states that-
 - A person must not, with intent to unreasonably control or intimidate his or her spouse or partner or cause his or her spouse or partner mental harm, apprehension or fear, pursue a course of conduct made up of one or more of the following actions-
 - Coercing his or her spouse or partner to relinquish control over assets or income
 - Disposing of property owned jointly, or by one of the persons or by an affected child, without the consent of the relevant person or child
 - Preventing his or her spouse or partner from participating in decisions over household expenditure or the disposition of joint property
 - Preventing his or her spouse or partner from accessing joint financial assets for the purpose of meeting normal household expenses
 - Withholding, or threatening to withhold, the financial support reasonably necessary for the maintenance of his or her spouse or partner or an affected child.
 - The punishment for this offence is a fine not exceeding 40 penalty units or a term not exceeding 2 years.
- Section 9 of the FVA provides for an offence of "Emotional abuse or intimidation". The
 essence of this offence is-
 - A person must not pursue a course of conduct that he or she knows, or ought to know, is likely to have the effect of unreasonably controlling or intimidating, or causing mental harm, apprehension or fear in, his or her spouse.
 - "a course of conduct" is defined as including limiting the freedom of movement of a person's spouse or partner by means of threats or intimidation.
 - The maximum penalty for this offence is a fine not exceeding 40 penalty units or imprisonment for a term not exceeding 2 years.
- It is interesting to note that s12 of the FVA states that a person charged with a family violence offence (which includes the offences under ss8 and 9) is not to be granted bail unless a judge, court or police officer is satisfied that release of the person on bail would not be likely to adversely affect the safety, well being and interests of an affected person or affected child. Without limiting what to consider, the following factors must be considered-
 - Any available risk screening or rehabilitation program assessment; the
 person's demeanour; the availability of suitable accommodation for the person
 and an affected person or affected child; any other matter that may be relevant.
- In the Northern Territory, the Domestic and Family Violence Act 2007 (NT) provides a definition of "domestic violence" which includes intimidation, stalking and economic abuse and a "Domestic Violence Order" ("DVO") can be obtained.
- In Queensland, the Domestic and Family Violence Protection Act 2012 (Qld) also provides for a definition of "domestic violence" which includes "emotional or psychological abuse" and "economic abuse" which if proved, can be the subject of a DVO.
- In South Australia, the Intervention Orders (Prevention and Abuse) Act 2009 (SA) provides a definition of "abuse" which includes "emotional or psychological harm" and

"an unreasonable and non consensual denial of financial, social or personal autonomy", which also can be the subject of a DVO.

- In Victoria, the Family Violence Protection Act 2008 (Vic) provides a definition of "family violence" which includes "emotional and psychological abuse" and coercive behaviour.
 Family Violence Intervention Orders can be obtained.
- In Western Australia, the Restraining Orders Act 1997 (WA) provides for Family Violence Order" and the definition of "family violence" includes any behaviour that "coerces or controls" a family member.
- In the ACT, the Family Violence Act 2016 (ACT) also provides a definition of "family violence" which includes "emotional or psychological abuse", "economic abuse" and "coercion". The relevant orders can also be obtained as a result of proof of such behaviour.

The following are some examples of coercive and controlling behaviour-

- threatened to expose private photographs of their partner or expartner
- prevented their partner from ending the relationship by threatening to, or actually engaging in, self-harm
- confiscated or destroyed their partner's mobile phone
- deleted all male contacts on their partner's social media
- threatened to or actually harmed their partner's pets
- demanded that their partner eat certain foods
- demanded that their partner sleep on the floor
- prohibited their partner from seeking or continuing employment
- controlled their partner's finances, with one giving his partner an allowance out of her own income
- conducted regular inspections of their partner's home or body for evidence of infidelity.

In most cases (but not all), these behaviours have occurred in the context of a relationship that at some point involved actual or threatened physical violence -see https://www.smh.com.au/lifestyle/gender/it-s-time-coercive-control-was-made-illegal-in-australia-20190501-p51iyq.html

Recently, the brutal murder of Hannah Clark and her children at the hands of her estranged husband in 2019 in Queensland outraged people across Australia. The Liberal Opposition in that state committed to criminal coercive control if elected in September 2020. The Clarke case was a prime example of a victim who was manipulated and controlled but never physically harmed until she chose to leave her abusive partner. It was at this moment when his control was at its weakest, that Mr Baxter chose to orchestrate the ultimate form of control in ending the lives of his wife and childrenThat same year journalist Jess Hill published her Stella award winning book *See What You Made Me Do – Power, Control and Domestic Abuse.* The book brings to light the experiences of Australian women suffering at the hands of coercive controlling partners. The stories are harrowing and the consequences on the lives of these women, their families, friends and children are life shattering.

Through criminalising coercive control, New South Wales Liberals can protect these women and draw a line in the sand ruling these behaviours unacceptable and allowing perpetrators to get the rehabilitation they need to cease offending.

In early 2020, the New South Wales Attorney General, the Hon. Mark Speakman publicly committed to begin consultation on criminalising coercive control. The writers of this motion commend Mr Speakman for his commitment and offer a contribution to the form the law may take, eager to see this consultation commence.

Does this policy proposal align with Liberal values?

The New South Wales Liberal Government has made clear commitments on the reduction of domestic violence reoffending with 'breaking the cycle' being one of the Premier's 12 Key Priorities. The New South Wales Government's website states its goal to "reduce the rates of domestic violence reoffending by 25% by 2023"². While this is a noble ambition, under the current legislation, a whole cohort of domestic abuse remains unrecorded.

Criminalising coercive control aligns with Liberal values of "freedom of thought, worship, speech and association" and the "importance of the family and the role of law and justice" in a humane society³. Currently the law in New South Wales is blind to fundamental breaches of the most basic freedoms of a parliamentary democracy, by leaving patterns of behaviour and the effects of coercive control on the personal freedom of victims within the family unmonitored and unpunished.

In addition, the Liberal National Party (LNP) in Queensland (our Liberal National Coalition equivalent) publicly committed to introduce legislation to criminalise coercive control prior to the 2017 state election⁴. The LNP reiterated this promise after the tragic death of Hannah Clarke and her children in 2019⁵. In addition, the LNP will double penalties for strangulation – a red flag for future domestic homicide - and enforce clamped GPS trackers on 200 high risk abusers.

Most recently (21 June 2020), the New South Wales Attorney General has announced the 'Speak Out' initiative – a resource for domestic violence victims. However, while coercive control remains legal in this state, a large cohort of domestic abuse victims who are at risk of becoming domestic violence or domestic homicide victims, remain unprotected and unable to utilise this important Government service.

Proposed Solution/s:

- Criminal laws should be enacted along the lines of the domestic abuse law in Scotland, however, the definition of "psychological harm" should also include "anxiety", "depression" and "lack of self esteem".
- The NSW coercive and controlling laws should be a "show cause" offence under s16B of the Bail Act 2013 (NSW).
- Laws of procedure, similar to Part 5 of the Criminal Procedure Act 1986 (NSW), should apply in hearings of these offences – for example ss291, 294A, 294B, 294C, 294CA,294D.
- When considering what sentence to impose, the Court must consider how to ensure that the complainant and any children, are not subject to any further such offences committed by the defendant.
- In tandem with the introduction of these laws the New South Wales Government should provide additional resourcing to train law enforcement officers in recognising coercive and controlling behaviour and funding for experts, as needed. Police should investigate irrespective of whether any family law proceedings have commenced.
- Consideration be given as to whether more funding should be provided for psychological treatment/counselling for perpetrators, including as part of the criminal process for example whether there should be mandatory psychological treatment/counselling as part of any bail conditions.

⁴ https://www.smh.com.au/lifestyle/gender/it-s-time-coercive-control-was-made-illegal-in-australia-20190501-p51iyq.html

² https://www.nsw.gov.au/premiers-priorities

³ https://www.liberal.org.au/our-beliefs

⁵ https://www.brisbanetimes.com.au/politics/queensland/pattern-of-emotional-abuse-would-be-a-crime-under-lnp-government-20200226-p544iy.html

What potential social impacts (cost/benefits), if any, is this proposed policy likely to have?

Through criminalising these patterns of behaviours, the New South Wales Government signals to the community more broadly that these behaviours are not acceptable. Women and potential future victims then have the opportunity to learn to identify red flags early on in their lives and their relationships. Potential perpetrators have an opportunity to identify a worrying pattern of behaviour in themselves and seek rehabilitation before coming into contact with the legal system. Changing the legal status of these behaviours would encourage public education and can help end the cycle of abuse through allowing victims to identify themselves as such and remove themselves from the situation before physical violence is perpetrated against them. It would also provide a legal recourse for victims as needed.

What potential economic impacts (costs/benefits), if any, is this policy likely to have?

The only economic impact is potentially the initial extra training for police and payment for mandatory psychological treatment/counselling for perpetrators and experts in court, if needed.

Key Stakeholders: impacts and consultation

- Those who will be positively impacted:
 - Victims of coercive control and their families. In particular, the children in these situations would no longer be forced to live with abusive parents. The benefits will also extend to other women (and men) who are blind to the signs of coercive control and as such, are susceptible to falling victim to it.
- Those who will be negatively impacted:
 - Perpetrators of domestic abuse.
 - Potentially people whose partners lie about their behaviour in order to seek revenge when their partner ends the relationship. However, they would require evidence to prove their accusations and lying to police is already a crime.
- Other relevant stakeholders:
 - o Women's shelters, domestic abuse services, courts and the police.
 - It should be noted that criminalising coercive control is also supported by the New South Wales Labor Party and as such, the risk of this becoming a political issue is low.
- Consultation: Ongoing.

Alternative Approaches

- Are there alternative approaches on this issue?
 - Yes, there are alternative approaches to this issue for example the proposed laws may be drafted differently. However, the emphasis should be on criminalising coercive and controlling behaviour or at least changing the current legislative approach so it is more equipped to deal with non-physical domestic abuse.
- Is there likely to be strong opposition to this proposed policy?
 - There is some concern around the issue of 'policing bad behaviour' where the state intervenes in areas that some may think ought to be left to private citizens self-regulation. However, the problem of coercive control goes beyond selfregulation as by definition the victim loses the power (or believes they have lost the power) to exert agency over their own life.

What are the consequences, if any, of doing nothing on this issue?

Continuation of current rates of domestic homicide in New South Wales is the worst consequence of doing nothing.

The social impacts of the current legal status of coercive control are unacceptable.

The impact on the individual of "repetitive infliction of traumas like these" [coercive controlling behaviours] have long been recognised by experts as resulting in "a form of mental captivity" 6.

This kind of mental captivity in a parental figure will have a profound effect on inter-generational understandings of healthy and acceptable adult relationships and has the potential to extend the cycle of abuse.

Are there any potential unintended consequences you foresee?

No.

Are there any other matters that should be noted, considered and/or addressed?

Further attention should be given to alternative methods of policing of coercive control – for example trailing the use of female police stations such as lose in South America. In addition, close attention needs to be paid to facilitating safe ways for victims to leave these situations.

⁶ p.7, Introduction See What You Made Me Do Jess Hill

References:

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