Submission No 97

COERCIVE CONTROL IN DOMESTIC RELATIONSHIPS

Organisation: The Public Defenders

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Joint Select Committee on Coercive Control
Parliament House
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Sent electronically: coercivecontrol@parliament.nsw.gov.au

Dear Committee Members,

Discussion Paper: Coercive Control

We are grateful for the opportunity to provide submissions in relation to the above Discussion Paper.

The prospect of creating a criminal offence of coercive control involves consideration of complex and competing legal, social, health, and policy questions. It should not be undertaken unless necessary. The Public Defenders' position is that it is premature for an offence to be created in the context of the matters raised in the Discussion Paper, and that further research, analysis, and consultation is required to ascertain whether the creation of such an offence will achieve the stated objective of deterrence and punishment[1] without risking the criminalisation of non-criminal behaviour; further disadvantaging already marginalised and vulnerable

[1] Discussion Paper at 1.6

members of the community; and/or, counterintuitively, having a detrimental impact upon complainants and victim-survivors.

The Public Defenders support consideration of the outcome of the qualitative review recommended by the NSW Domestic Violence Death Review (DVDRT)[2], and the research by the NSW Bureau of Crime and Statistics ((BOCSAR) regarding the utilisation of the current regime of criminal offences. It is submitted that the investigation into the extent to which this regime is being utilised to address coercive control is a necessary step before any detailed consideration can be given to the creation of a new offence of coercive control.

Response to discussion questions

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

The appropriate definition of coercive control depends upon the context. For the purposes of these submissions, the Public Defenders adopt the definition of coercive control set out at 2.1 of the Discussion Paper.

However, Public Defenders submit that further research into both the utilisation of the relevant existing law in New South Wales, and the effectiveness of the implementation of statutory offences of coercive control in other jurisdictions is required before an appropriately precise and limited statutory definition can be drafted (should it ultimately be necessary to do so).

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

This question highlights the primary challenge of criminalising coercive control.

From a criminal law perspective, to avoid the risk of criminalisation of behaviours present in ordinary relationships, the specific intent of the alleged perpetrator to criminally coercively control another should be required to be proven beyond reasonable doubt.

[2] Domestic Violence Death Review Team, Report 2017-2019 (2020) 68-72

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?

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

Question 3 and 4 can conveniently be considered together. The criminal and civil law provide the police and courts with significant powers to address domestic violence, including non-physical and physical forms of abuse.

The *Crimes (Domestic and Personal Violence) Act* 2007 (*CDPV Act*) relevantly legislates apprehended domestic violence orders (ADVOs), and the criminal offences of contravening such an order (s.14), and stalking or intimidating (s.13). Section 11 of the *CDPV Act* defines a domestic violence offence as any personal violence offence, as defined by s.4, committed in in the context of a current or past domestic relationship, or:

> "(*b) an offence (other than a personal violence offence) that arises from substantially the same circumstances as those from which a personal violence offence has arisen, or*
>
> *(c) an offence (other than a personal violence offence) 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)."*

In addition to the stalk/intimidate and contravene ADVO offences in the *CDPV Act*, numerous State and Commonwealth offences criminalise violent and non-violent domestic violence (for example, offences of violence (including sexual offences), dishonesty offences, detain for advantage, property damage, use carriage service, recording/distributing intimate images), engaging the relevant bail, ADVO, and sentencing law.

Recently amendments pursuant to the *Stronger Communities Legislation Amendment (Domestic Violence) Act* 2020 broaden the powers of the courts and police in a number of ways, including:

1. procedurally, in respect of alternative means by which domestic violence complainants can give evidence;
2. in respect of ADVOs;
3. by amending the *CDPV Act* by:

    - inserting a new s.7(1)(c) to include in the definition of intimidation conduct that causes reasonable apprehension of:

        (i) injury to the person or to another person with whom the person has a domestic relationship, or

        (ii) violence to any person, or

        (iii) damage to property, or

        (iv) harm to an animal that belongs or belonged to, or is or was in the possession of, the person or another person with whom the person has a domestic relationship.

    - recognising the intersection between animal abuse and domestic violence in the objects of the Act (s.9 *CDPV Act);* and

4. by inserting s.306ZR: *Warning to be given by Judge in relation to lack of complaint in certain domestic violence offence proceedings* in *Criminal Procedure Act* 1986.

These amendments have either recently come into effect, or are yet to be proclaimed, so the impact of these amendments on the exercise of power by the police and courts is unknown.

It is apparent that the current regime of offences allows the justice system to respond appropriately to a significant number of the behaviours set out in the Discussion Paper at 2.2, as a wide range of the behaviours identified as constituting coercive control are already the subject of criminal sanction in New South Wales. The outcomes of the further research recommended by the DVDRT, and that being undertaken by BOSCAR, should be considered to determine the extent to which the existing powers are being effectively employed.

Research into the manner in which the law as it currently stands is being utilised to prosecute existing offences should be undertaken before further consideration is given to extending the powers of the police and the courts. Analysis of the implementation of offences of coercive control in other jurisdictions demonstrates that the creation of an offence without the adequate training and education of the relevant stakeholders may result in limited utilisation of the offence. The same may be applicable to the existing regime in New South Wales without relevant and targeted training.

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

The Public Defenders submit that the application of the law of evidence is the appropriate way to determine the admission of relevant evidence of coercive and controlling behaviour in criminal and civil proceedings.

It is noted that the amendments to the *Criminal Procedure Act* 1986 enacted by the *Stronger Communities Legislation Amendment (Domestic Violence) Act* 2020 expand the ways that complainants are permitted to give their evidence.

6. Does the law currently allow evidence of coercive control to be adequately taken into account in sentence proceedings? 13.

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

Questions 6 and 13 can conveniently be addressed together.

The purposes of sentencing are set out in s 3A of the *Crimes (Sentencing Procedure) Act* 1999, and the Public Defenders are of the view that amendments to the sentencing law are not required to meet those purposes of sentencing in respect of offences of domestic violence.

The High Court has expressed in very strong terms the need for the courts to denounce domestic violence. In *Munda v Western Australia* (2013) 249 CLR 600 at [55] the majority emphasised the requirement for a just sentence to accord due recognition to the human dignity of the victim

of domestic violence and the legitimate interest of the general community in the denunciation and punishment of a brutal, alcohol fuelled destruction of a woman by her partner. It was held that to impose a lesser punishment by reason of the identity of the victim as a domestic partner would be to create a group of second-class citizens, a state of affairs entirely at odds with the fundamental idea of equality before the law.

The High Court's subsequent judgment in *The Queen v Kilic* (2016) 259 CLR 256 recognised a societal shift in attitudes to domestic violence which may require current sentencing practices to depart from past practices, alongside a uniform application of principle: 266-7 [21] – [22].

Aggravating features referred to in s.21A(2) of the *Crimes (Sentencing Procedure) Act* 1999 have been interpreted and applied in a manner consistent with serious recognition of problematic features of domestic and family violence.

The Public Defenders are of the view that, consistently with this approach, each case needs to be considered on its own facts, including the presence of coercive and controlling behaviour, applying the statements of principle relevant to domestic and family violence in the cases binding New South Wales decision makers.

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

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

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?

Questions 7-9 can be conveniently considered together.

The Public Defenders recognise the potential advantages involved in creating an offence of coercive control as set out at 6.2-6.6 of the Discussion Paper, however submit that the identified advantages need to be considered with reference to the review of the utilisation of the regime currently capable of addressing coercive control.

The disadvantages extend beyond the risks identified in the discussion paper at 6.8-6.9, and further wide consultation is required to properly assess potential disadvantages and unintended consequences of creating an offence of coercive control before consideration is given to defining the scope of such an offence. As previously stated, the Public Defenders do not support the creation of an offence of coercive control at this stage.

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

The current regime provides a framework capable of addressing coercive and controlling behaviours in the context of ADVO conditions. It is submitted that education and/or training about coercive and controlling behaviour for police, judicial officers, the legal profession, social support services, and the community, may assist the current regime to better address that behaviour.

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?

The Public Defenders do not support the codification of the admissibility of context and relationship evidence in relation to domestic and family violence proceedings. The common law in these areas is well established, and, in our experience, generally appropriately applied in the higher courts. The Public Defenders are not aware of the improper exclusion of admissible context and relationship evidence in domestic and family violence proceedings.

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?

The Public Defenders do not support the further codification of jury directions, noting that the *Criminal Procedure Act* 1986 has already been amended with the insertion of s.306ZR which states:

> ***306ZR Warning to be given by Judge in relation to lack of complaint in certain domestic violence offence proceedings***
>
> *(1) This section applies if, on the trial of a person for a domestic violence offence, evidence is given or a question is asked of a witness that tends to suggest—*
>
> *(a) an absence of complaint in respect of the commission of the alleged offence by the person on whom the offence is alleged to have been committed, or*
> *(b) delay by that person in making a complaint.*
>
> *(2) The Judge—*
>
> *(a) must warn the jury that absence of complaint or delay in complaining does not necessarily indicate that the allegation that the offence was committed is false, and*
> *(b) must inform the jury that there may be good reasons why a victim of domestic violence may hesitate in making, or may refrain from making, a complaint about a domestic violence offence, and*
> *(c) must not warn the jury that delay in making a complaint is relevant to the victim's credibility unless there is sufficient evidence to justify the warning.*
>
> *(3) If the trial of the person also relates to a prescribed sexual offence alleged to have been committed by the person against the same victim, the Judge may—*
>
> *(a) also give a warning under section 294, or*
> *(b) give a single warning to address both types of offences.*

The Public Defenders submit that the flexibility to adapt jury directions to the specific circumstances of a case, with reference to the applicable common law and the guidance provided by the Judicial Bench Book, should not be limited by further legislation restrictions.

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

No. The Public Defences submit that further investigation of the utilisation of current available legislation should be properly undertaken prior to embarking on the creation of further offences or law reform.

14. 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?

The Public Defenders endorse the whole of government approach set out in the Discussion Paper at 9, and support targeted education and training for key staff, and education and awareness raising in the community.

Yours faithfully.

for

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