

**Submission  
No 109**

## **COERCIVE CONTROL IN DOMESTIC RELATIONSHIPS**

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**Position:** Deputy Dean

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Chair, Joint Select Committee on Coercive Control

CC: Trish Doyle MP (Deputy Chair)  
Abigail Boyd MP (Member)  
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Steph Cooke MP (Member)  
Rod Roberts MP (Member)  
Peter Sidgreaves MP (Member)  
Anna Watson MP (Member)

Dear Ms Ward and Committee Members,

**RE: CRIMINALISING COERCIVE CONTROL IN NSW**

Thank you for the invitation to make a submission in response to the discussion paper published in October 2020 about whether NSW criminal law should be extended to capture what is now commonly referred to as *coercive control*.

The discussion paper discusses a broad range of issues. There are no doubt many reforms across the criminal law and related areas that would benefit from review in light of our contemporary understanding of domestic abuse. Our submission is, however, limited to the issue of whether a new, standalone offence should be enacted to criminalise the behaviours known as ‘coercive control.’

We understand the term ‘coercive control’ to refer to a pattern of control and domination in a domestic relationship that can include verbal, economic and psychological abuse, as well as sexual and physical violence. The term is commonly associated with the work of Evan Stark but should not be dependent on that single stream of research and advocacy. The issue of criminalising ‘coercive control’ is significant because many of these abusive behaviours are not yet criminalised, and those that are directly or indirectly criminalised do not adequately recognise the harms caused and/or are difficult to enforce. Significantly, taken individually – rather than as repeated behaviours, or a course of conduct - the impact of some relevant behaviours is likely to be underestimated and could appear to be something that should not be the subject of the criminal law. Criminalisation of this conduct will also afford greater recognition to the harms experienced by women, as coercive control is a gendered form of abuse, most often perpetrated by men against their female partners. We believe that contemporary understandings of the non-physical aspects of domestic abuse, as well as the cumulative impact of that abuse, justifies the introduction of a new offence criminalising coercive control.

For the past five years we have researched coercive control laws and their impact in the United Kingdom and Europe. We have consistently advocated for the introduction of a similar offence in each Australian State and Territory. We base our advocacy on:

- research that establishes the prevalence of this abuse;
- the severe and adverse impact this abuse has on the health of victims as well as the multiple ways in which it breaches their fundamental human rights;
- the absence of adequate protections and remedies for victims in existing criminal and civil laws; and
- Experiences relating to coercive control laws introduced in other common law countries that demonstrate that such offences can be operationalised.

We believe that a new coercive control offence could improve women's safety, legitimise victim perceptions of what they often describe as the worst part of abuse, catalyse a generational shift in how police, courts and the broader community conceptualise domestic abuse, and provide police and others in the justice system with a tangible mechanism to respond to this abusive behaviour when it is identified.

But we have some important caveats. The most important are: (1) we do not favour a simple importation of any of the offences that have been enacted elsewhere, nor do we support any of the draft Bills introduced thus far in SA<sup>1</sup> or NSW<sup>2</sup> (the NSW Greens' Bill is the closest to model legislation); and (2) criminalisation should only occur if there is a concomitant strategy of awareness-raising, education, training and adequate resourcing.

That is, we recommend not just the criminalisation of coercive control as a pattern of abusive behaviour, but criminalisation *done right*.

Outlined below are our detailed justifications for the introduction of a new standalone offence (Part I), information about the enactment and operation of coercive control offences in other common law jurisdictions (Part II) and our recommendations, including identifying critical issues in the development of a new offence (Part III).

## **PART I: WHY AN OFFENCE CRIMINALISING COERCIVE CONTROL IS NEEDED**

A new, standalone offence criminalising ‘coercive control’ is needed because:

- the cumulative effect of repeated abuse – physical and non-physical results in significant harms to victims’ health and human rights
- non-physical abuse is widespread in the Australian community, and
- current laws do not adequately protect victims from either non-physical abuse or repeated abuse in general.

### **A. Non-physical domestic abuse is widespread**

In July 2020 a large-scale survey reported the experiences of abuse of 15,000 Australian women aged 18 and over.<sup>3</sup> Of those women who had been in a cohabitating relationship at some point in the preceding 12 months, 11% reported having experienced coercive control (compared with 8% reporting physical violence and 4% reporting sexual violence). The most common forms of abuse experienced by those who were subject to coercive control were constant verbal abuse and insults, jealousy or suspicion about friends, and the monitoring of their time and whereabouts. This is consistent with research in other jurisdictions finding that psychological and economic abuse are the most common forms of abuse.<sup>4</sup> Significantly, women who experienced coercive control were also likely to be subjected to *severe* physical and/or sexual abuse. With more than one in ten women in a cohabitating relationship in Australia experiencing coercive control, these results are deeply troubling.

Another troubling finding that illustrates how coercive control permeates abusive relationships comes from findings in relation to intimate partner homicide. Research in Australia and elsewhere<sup>5</sup> has identified that women who are killed by their partners or ex-partners are likely to have been victims of coercive control by these men prior to their deaths. A detailed review of cases in NSW where a person killed their intimate partner revealed that in 77 of the 78 cases (99%) there had been a history of domestic violence where the male abuser had used coercive and controlling behaviours (such as psychological and emotional abuse) towards his partner.<sup>6</sup> In fact, a history of coercive control in the relationship was a stronger predictor of intimate partner homicide than a disclosed history of physical assault (which was present in 86% of cases). There is also the currently under-researched issue of suicides caused by domestic abuse, which may be twice as prevalent as intimate partner homicides.<sup>7</sup>

Before leaving the issue of the prevalence of coercive control, we note that although we recognise that it is much more commonly perpetrated by men than women, we do not advocate for the introduction of a gendered offence. There have been a handful of cases in England and Wales in which women have been charged with or convicted of coercive control,<sup>8</sup> involving both male and female victims. Consequently, any legislation that is introduced should be non-gendered, such that offenders and victims can be male, female or non-binary, and also in heterosexual, homosexual or other types of domestic relationship.

## **B. The effects of a repeated pattern of domestic abuse are severe**

While the negative consequences of physical abuse are well-documented, accumulating research confirms the negative impact that non-physical abuse also has on victims. Depression, post-traumatic stress disorder, chronic stress, homelessness, an increased risk of being incarcerated, suicide attempts and high levels of substance abuse are just some of the consequences of being subjected to this form of domestic abuse.<sup>9</sup> Some studies have reported that psychological abuse has an even more negative impact than physical abuse, which is consistent with reports from victims.<sup>10</sup> In the words of one victim, '*It's the emotional scars that scar the worst, more so than the physical violence.*'<sup>11</sup> Currently, the effects of coercive control are largely absorbed by victims as private (health) harms and by the community as a public health problem. It is appropriate that the criminal law is now used to protect victims from these harms.

Coercive control also breaches the fundamental human rights of victims, including their right to security, their freedom of movement, their freedom of opinion and numerous other rights. A human rights perspective informed both the development and introduction of relevant laws in the UK and Ireland. In part, those new laws were responding to an aspect of a human rights treaty: Article 33 of the *Istanbul Convention*, which requires all member states of the Council of Europe to criminalise psychological abuse where it occurs as a course of conduct. While Australia is not a signatory to that particular treaty, the Australia Human Rights Commission has recognised that domestic and family violence breaches many of the basic human rights of victims.<sup>12</sup> Any new law that addressing coercive control should be developed within the context of seeking to protect the basic human rights of victims.

## **C. Existing legal mechanisms to protect victims from coercive control are inadequate**

As the discussion paper notes, there are existing civil and criminal remedies that could arguably address coercive control. Each of these, though, even collectively, is insufficient.

### *i) Civil Orders (AVOs)*

Those who oppose the introduction of a coercive control offence sometimes assert that the conduct can already be prohibited through the operation of an apprehended violence order (AVO) or similar. Yet the inadequacy of these orders in severe cases of domestic abuse has been recognised for many years. In summary:<sup>13</sup>

- not all family violence victims in need of a justice system response have an active AVO at the time of the abuse, effectively rendering much of the abuse lawful, and preventing police and others in the justice system from responding.
- AVOs are frequently breached by intractable family violence perpetrators and clearly lack the denunciative force required to protect all victims;
- breach offences carry very low maximum penalties given the potentially serious and ongoing abuse that the contravention offence can try and capture;

- they perpetuate the excessive over-incarceration of Indigenous women in particular;
- their civil nature and incident-based focus means there is a significant risk of cross-applications being made by perpetrators as a form of systems abuse;
- they can conflict with, and are subordinate to, family law orders;
- they are premised on the occurrence of individual incidents, not courses of conduct, and thereby carry a higher risk of misidentification of women as primary aggressors;
- police typically only impose safety orders in situations involving alleged physical or sexual violence, leaving the financial and administrative burden of seeking a court-ordered intervention order on victims when the alleged abuse is non-physical; and
- state denunciation of domestic abuse should not depend on whether a court order was in place.

To be clear, intervention orders and criminal prosecutions for breaches of those orders have a proper role to play in the protection of victims, but it is wholly improper and inaccurate to suggest they have received ‘scant regard’<sup>14</sup> in criminalisation debates thus far, or that they are sufficient to address the issue of non-physical abuse in domestic relationships.

#### *The drafting of the AVO provisions in NSW*

We would also note a definitional problem with the existing AVO legislation in NSW. The *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 11 identifies coercion and control as forms of domestic violence. In particular, an AVO can be ordered against a person if there are reasonable grounds to fear that a person might commit a *domestic violence offence* (s 16(1)(a)). A *domestic violence offence* is then defined to include, among other things, ‘an 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)’ (s 11(1)(c)). But while this might seem to address the issue of coercive control, it is peculiar that it is not then a standard condition of each AVO not to commit a *domestic violence offence*; instead, the AVO prohibits assaults, threats, stalking and property damage (s 36). As a result, the legislative mention of coercive control is relevant only in the making of an AVO, not in reviewing any possible breach. (Whatever the outcome of this present inquiry, we believe that consideration should be given to making it a standard condition of each AVO that the respondent must not commit a *domestic violence offence* as defined in s 11(1)(c)).

Moreover, the restrictive definition of *domestic violence offence* means that coercive controlling behaviours are not captured in intervention order legislation unless the underlying behaviour is already criminalised (i.e., ‘an offence’), such as property damage. This fails to capture the varied (and often non-criminal) behaviours that can constitute a pattern of coercive control, such as restricting a partner’s access to financial resources, monitoring their electronic communications or demanding they sleep on the floor.

## ii) Existing criminal offences

It should go without saying that if existing offences are capable of adequately capturing coercive control, there is no need for a new offence. There are multiple criminal offences in NSW that could arguably be used to prosecute certain coercively controlling behaviours, such as threats to kill or seriously injure another person, actually damaging or threatening to damage another person's property, stalking, and more. These offences, however, perpetuate the current approach of viewing domestic abuse as one incident at a time, inhibit the admissibility of other forms of (currently non-criminal) abuse, narrow the lens through which a sentencing court can view the abuse in context, and reduce the likelihood that victims, police and others will recognise the behaviour as coercive control. The same is true of false imprisonment offences.<sup>15</sup>

The offence most commonly identified as likely to capture coercive control is stalking. Like the proposed new offence, stalking offences require a course of conduct. But shoe-horning coercive control into an intimidation and stalking offence is unsatisfactory. First, an intimidation and stalking offence will not capture coercive controlling behaviours that do not cause the victim to apprehend actual violence or fear harm; this could include economic abuse and many forms of psychological abuse (such as humiliating or degrading the victim). Further, as we have argued elsewhere, while stalking offences in some Australian jurisdictions appear to be charged in the context of behaviours between *current* intimate partners, this does not accord with community understandings of the term 'stalking' and thereby inhibits reporting, detection and prosecution of coercive control where the prohibited behaviours occur between current intimate partners.<sup>16</sup>

Finally, some coercive control behaviours are simply not criminalised. Intentional emotional abuse, for example, is a harm recognised as a tort in civil law but is not recognised as a criminal offence *per se*.<sup>17</sup> Consequently, subjecting a partner to repeated and extreme degrading and humiliating abuse does not give rise *per se* to any remedy at, or protection via, criminal law.

## **PART II: A COERCIVE CONTROL OFFENCE CAN BE OPERATIONALISED AND WORKABLE – LESSONS FROM OTHER COMMON LAW COUNTRIES**

Those who oppose the criminalisation of coercive control frequently claim that the behaviour is too hard to define for the purposes of the criminal law and/or that any relevant offence will be unworkable in practice. In this section, we highlight data from, and developments in, other jurisdictions that have criminalised repeated non-physical domestic abuse. This is important for a number of reasons. First, it demonstrates that it *is* possible to operationalise the concept of coercive control. Second, it gives us practical insights into how relevant offences that have been introduced in other jurisdictions work in practice.

### A. Tasmania (2005)

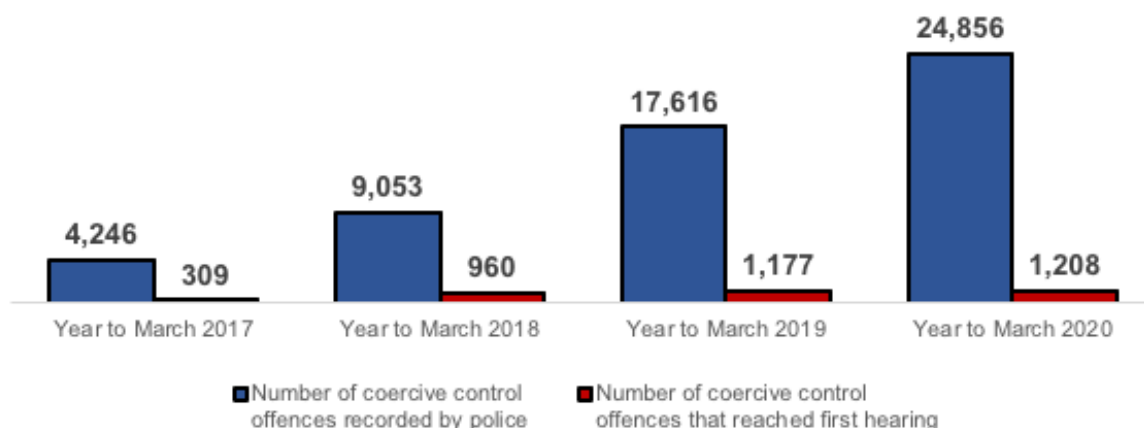
In 2005 two new offences came into effect in Tasmania: emotional abuse and intimidation (*Family Violence Act 2004* (Tas) s 9) and economic abuse (s 8). In 2015, the Tasmanian Sentencing Advisory Council reported that there had been just 8 convictions for these offences in their first decade of operation.<sup>18</sup> Problems in the drafting of the offences may have contributed to the low prosecution rate,<sup>19</sup> although we note that there has been an increasing use of those offences in recent years.<sup>20</sup> The significant increase in the number of proven charges could be because of the extension of the statute of limitations (from 6 months to 12 months in October 2015), but we would attribute it to the increasing attention these offences have received, leading to greater awareness among those responsible for charging decisions.

### B. England and Wales (2015)

On 29 December 2015, the offence of *controlling or coercive behaviour* came into effect in England and Wales. The first conviction was less than five months later, for a man who sent his partner photos of the women he thought looked better than her, required her to only eat tuna and beetroot, demanded she do a gruelling amount of exercise each day, and threatened to beat her if she didn't do what he said.<sup>21</sup>

In the year ending March 2017 police in England and Wales had recorded 4,246 coercive control offences. As shown in Figure 1 below, this has increased significantly each year since, to almost 25,000 recorded offences in the year ending March 2020.<sup>22</sup> Per capita this amounts to about 4 in every 10,000 people in England and Wales being recorded as having engaged in controlling or coercive behaviour in the year to March 2020.

**Figure 1:** Number of coercive control offences in England and Wales recorded by police each year to 31 March, and number of coercive control offences that made it to first hearing each year to 31 March 2017 to 2020



Published statistics and research indicate that the operationalisation of the offence (like the behaviour) is highly gendered. In a review of files at one police force, researchers found that 95% of recorded offenders were male.<sup>23</sup> In published Ministry of Justice data, of the 598 offenders who were found guilty of controlling or coercive behaviour in the three years to



March 2020, 99% (591) were male and 1% (7) were female.<sup>24</sup> Similarly, in our own research (reviewing media reports of proven controlling or coercive behaviour cases), we found over 99% (106 of 107) of offenders were male.<sup>25</sup> The one exception involving a female perpetrator and a male victim in our research was a genuine instance of coercive control.<sup>26</sup> Significantly, each of the exceptional cases in which women have been prosecuted read like genuine instances of coercive control rather than cases of misidentification, thereby addressing the concern that the introduction of the offence would incorrectly identify female victims as perpetrators.<sup>27</sup> Moreover, this gendered operationalisation occurred in a jurisdiction frequently criticised for the lack of training police received in relation to the new offence.

Sentencing outcomes in England and Wales are also illustrative. In the year ending March 2020, 70% (193 of 276) of offenders convicted of controlling or coercive behaviour received a prison sentence, while the other 30% received a suspended sentence or community order. These outcomes address a further concern voiced by critics: that the introduction of a new offence will contribute to overincarceration. As this data illustrates, criminalisation is not necessarily synonymous with incarceration. Imprisonment is just one of the many sentencing options available to courts, and in appropriate cases other sentencing orders such as an Intensive Correction Order or Community Correction Order can and should be imposed.

### **C. Ireland (2019)**

On 2 January 2019 the offence of *coercive control* came into effect in Ireland. To date, there has been just a handful of reported conviction for the offence. The first conviction (following a guilty plea) was in February 2020, involving a man who physically assaulted his partner, made nearly 6,000 phone calls to her within a three-month period, made her take her phone with her wherever she went so that he knew where she was, burned her clothes and broke her hair straightener to deter her from leaving the house and socialising, and left threatening phone messages when she escaped to a hotel.<sup>28</sup>

The second conviction, in November 2020, followed a jury trial and resulted in a 10.5-year prison sentence (the accused was also found guilty of intimidation and multiple assault offences).<sup>29</sup> The offender had smashed his former partner's phone, cut her face and neck with a pizza slicer, taken control of her social welfare income, isolated her from friends and family, threatened to drown her, threatened to kill her family, verbally abused her (calling her a 'disgrace' and a 'waste of space'), dragged her by her hair, punched her and stamped on her head and arm, breaking the latter.

As of August 2020, there were 'a number of additional cases ... before the courts' and 'investigations were ongoing in 32 other' cases.<sup>30</sup> More recently, the number of cases under consideration has been estimated to be 'at least 50'.<sup>31</sup>

### **D. Scotland (2019)**

On 1 April 2019 Scotland's *abusive behaviour* offence came into effect. Early statistics are promising. In the first few months of operation, 'more than 400' offences had been reported to police, and 13 people were convicted.<sup>32</sup> In the first financial year of operation (2019–20) there

were nearly 1,700 abusive behaviour offences reported to police – 94% of alleged perpetrators were male and the offences had a 69% ‘clear up’ rate (which we understand to mean police considered there to be sufficient evidence to conclude the offence had actually occurred).<sup>33</sup> Also in that first year of operation, police referred 1,065 charges to the Scottish prosecution service, 96% of which resulted in criminal proceedings, 24% of which were charged on the basis that some of the behaviour was directed towards, used, or occurred in the presence of a child (section 5 of the Scottish *Domestic Abuse Act*), and 96% of perpetrators were male. The considerable uptake of reporting, recording and prosecuting coercive control offences in Scotland is often attributed to the careful consultation that preceded enactment of the new offence, as well as the widespread training that both preceded and followed the new offence coming into operation.<sup>34</sup>

### **E. Northern Ireland (2021)**

In January 2021, Northern Ireland became the final jurisdiction in the United Kingdom to criminalise coercive control (only the formality of royal assent remains). While there is no data to call upon yet, we would encourage the members of this committee to review the transcribed debates that occurred during the various stages of the Bill’s passing. They demonstrate the near-unanimous cross-party support for the legislation, the value of victim-survivor input during iterative drafting of the legislation, the fundamental import of awareness-raising, training and resourcing co-occurring with criminalisation, and the need for jurisdiction-dependent sensitivity rather than the simple introduction of an offence developed elsewhere.<sup>35</sup>

### **F. Other jurisdictions**

We would also advocate those responsible for drafting any new offence to look broadly. Other countries, such as Sweden (1998: *gross violation of a woman’s integrity*<sup>36</sup>), Portugal (2007: *mental abuses and deprivations of liberty*<sup>37</sup>) and France (2010: *psychological violence*<sup>38</sup>) have also introduced offences targeting a pattern of physical and non-physical domestic abuse.

## **PART III: RECOMMENDATIONS**

In this section we highlight our key recommendations for this committee.

### **A. Draft and enact a new offence**

In addition to it being critical that any legislation in NSW does not merely copy and paste the language of legislation in another country, we also do not believe that any of the four Bills attempting to criminalise coercive control introduced thus far in New South Wales and South Australia should form the basis of a coercive control offence in NSW. Most have substantial – or in the NSW Greens example, at least moderate – issues that would need to be addressed.

Problems in existing Bills include:

- i) The Labor Bill in SA defines *mental harm* to include emotional harm in s 14B, which is discordant with that definition of that same term elsewhere in the Act (s 21 of the *Criminal Law Consolidation Act 1935* (SA)); does not include physical or sexual violence, both of which are key aspects of coercive control; allows for a consent defence in s 14C(3)(a), which is incongruous with an offence directed at the subversion of another person's liberty/autonomy; applies extra-territorially as per s 14C(4), with no need for a connection to South Australia; allows a single incident to constitute coercive control in s 14C(5), whereas coercive control is inherently a *pattern* of behaviour; and on various occasions suggests that a government entity will be given the power to make regulations expanding or constraining the scope of the offence, a task we would be very wary about taking out of the hands of parliament.
- ii) The Private Member's Bill in SA has an overbroad definition of *in a relationship* (yet excludes post-separation abuse) and does not define the behaviours that would constitute 'controlling or coercive behaviour'.
- iii) The Labor Bill in NSW does not define the abuse as a pattern of behaviour (which is fundamental to a coercive control offence), uses an over-broad definition of *domestic relationship*, and does not specify what the mental element of the offence should be.
- iv) The Greens Bill in NSW is the closest to model legislation in Australia, but there are still issues, particularly in the list of behaviours recognised as abusive. For instance, it relegates economic abuse to a subsidiary clause in s 14A(4) rather than including it as abusive behaviour directly in s 14A(2)(a)(ii), losing the signalling effect of gathering the behaviours in a single location; arguably includes an improper rebuttable presumption that a domestic relationship existed; rather than defining *violent* behaviour in s 14A(11), s 14A(2)(a)(i) could more simply read 'is menacing, intimidating, or *physically or sexually* violent' to be more clear about the inclusion of sexual violence; and legislatively permitting courts to take judicial notice of the trauma of abusive behaviour in s 25AB of the *Sentencing Act* (i.e. 'the common experience of courts') arguably unnecessarily allows each judicial officers' anecdotal experience – as opposed to factual submissions of counsel – to play a role in their decision-making.<sup>39</sup>

We raise these issues not to undermine the efforts made by those who have introduced these Bills, nor those who have advised them or consulted with them. Instead, reviewing and contrasting them highlights issues for consideration that may otherwise have been missed.

## **B. Consult transparently and widely**

In drafting a new offence, there should be wide-ranging, non-partisan, transparent and iterative consultation about any new offence. During that consultative process, the following substantive matters must be considered:

### ***What relationships are covered?***

There is no consistent approach in overseas jurisdictions as to what relationships the prohibited behaviours must occur within. While they uniformly include current intimate partners, regardless of cohabitation, they then distinguish between whether they include former partners (and if so, whether the former partners are cohabitating) or other family members (and if so, which family members). We offer no firm view on this aspect of a coercive control offence in NSW because there are varying persuasive arguments as to where the line should be drawn. We would, though, at a minimum, include both current and former intimate partners, regardless of cohabitation. Given the relative ease of drafting a provision to exclude reasonable behaviours of parents towards their minor children, we consider any suggestion that coercive control legislation has or would necessarily capture this conduct wholly<sup>40</sup>

### ***Should proof of actual harm be required?***

An offence that criminalises non-physical abuse must address the foundational and distinctive issue of whether actual harm caused by the abuse must be established. Should a victim be required to give evidence of the actual effect of the abuse, perhaps supported by expert psychiatric or psychological evidence? Or is it sufficient that the behaviour of the offender would be *likely* to cause psychological harm to a reasonable person in the victim's circumstances? There is also no consistent approach to this offence element in overseas jurisdictions. It is not necessary to prove actual harm in Tasmania or Scotland, while in England the behaviour must have had a 'substantial effect' on the victim's 'day-to-day activities'. The argument in favour of requiring that actual harm be experienced by the victims is that it concretely restricts the scope of the criminal law to instances where the perpetrator has actually caused harm to another person. This argument is, however, in our view, outweighed by those against requiring a harm element.<sup>41</sup> Requiring proof of harm would mean that victims would need to testify about the extent of their psychological trauma, and then be subjected to the rigours of cross-examination. It also places the burden on the victim to have been harmed by behaviour, even if the behaviour is objectively wrongful, and this creates especial difficulties in prosecuting coercive control in relationships between those who are migrants or refugees and whose relationship predated their emigration from a patriarchal culture. There are mechanisms available for limiting the application of a coercive control offence to genuinely wrongful behaviours without requiring proof of actual harm to the victim. In particular, the offence can be premised on a subjective mental state by the perpetrator (intent or recklessness about causing certain harms) and an objective analysis of their behaviour (unreasonableness in all the circumstances). To that end, consideration should also be given to whether the reasonableness of the alleged offender's behaviour should be (a) an element of the offence via unreasonableness, thereby requiring proof beyond reasonable doubt (b) a defence to the offence via reasonableness, lowering the standard to a balance of probabilities, or (c) both.

***What should be the maximum penalty?***

What is the appropriate maximum penalty for a coercive control offence, and should it be an indictable or summary offence? The maximum penalties for coercive control offences vary considerably in jurisdictions that have criminalised it. They range from 2 years' in Tasmania, to 5 years' in England, Wales and Ireland, to 14 years in Scotland and Northern Ireland. While we offer no firm views on what the exact maximum penalty should be, we do caution against it being too low. There will be a very broad spectrum of cases captured by this new offence, particularly if (as it should) it includes physical and sexual violence. A new offence will capture comparatively low-level offending (such as abuse falling in the lower end of objective seriousness occurring over a brief timespan) as well as comparatively high-level offending (such as abuse occurring over years, even decades, underscored by a litany of psychological, economic, physical and sexual violence). The maximum penalty must allow for those more serious cases, but not in a way that expects the average/median sentence to necessarily be that high in the majority of cases.<sup>42</sup>

***Should there be an aggravated form of the offence?***

We would also caution against having an aggravated version of the offence (not present in any other jurisdiction that has criminalised coercive control), because it can result in inconsistency due to plea negotiations, and can adequately be addressed by classifying the offence as one that is indictable but triable summarily (thereby limiting the maximum penalty when it is prosecuted in a Local Court). We also recognise that the sentencing legislation in NSW demands a maximum financial penalty be set for any particular offence<sup>43</sup> but would recommend some form of guidance for courts around the inappropriateness of fines in most family violence cases.<sup>44</sup>

***Should children who witness abuse thereby be deemed victims?***

Children are witnesses to domestic abuse, weaponised for the purposes of abuse, and victims of abuse. Any coercive control offence should recognise this, taking particular guidance from the Scottish legislation.

***Should companion animals be included as indirect targets of abuse?***

Immense emotional and psychological harm can be done to victims by killing, torturing or otherwise harming their companion animals. This should be acknowledged in the drafting of the offence.

***Should the offence operate retroactively?***

It is a fundamental tenet of the criminal law that it does not operate retroactively to punish pre-criminalisation conduct unless there is a clear legislative intention to that effect. Given that coercive control is by its nature a course of conduct offence, it is very likely that in the initial years of operation there will be many cases in which the alleged abuse straddles the time period before and after commencement of the offence. We have found a number of cases in England and Wales where this nuance, unaddressed in their legislation or statutory guidance framework, appears to have led to some offenders being convicted of pre-commencement behaviours.<sup>45</sup> Consideration should be given to whether an Australian offence should operate wholly retroactively (which we do not advocate), or alternatively, which of the more plausible options should be taken: no retroactive application at all, or a limited retroactive application only in

instances where the alleged abuse occurs both before and after commencement of the new offence, in order to avoid the legally-desirable but factually-farcical approach of segmenting a single pattern of abuse.

***Should behaviours or their effects be prohibited?***

The jurisdictions that have criminalised coercive control have, rather than focusing on the specific behaviours of the offender (which are myriad and unpredictable), instead focused on the *effects* that the offender's behaviour will have on the victim (which are myriad but far more predictable and consistent). The same approach should be taken in NSW. However, those behaviours or effects are defined, at a minimum the offence should capture actual or threatened physical or sexual violence, social isolation, humiliation and degradation, monitoring, manipulation, and economic abuse. The latter in particular has been overlooked in most other jurisdictions' legislation, despite the centrality of economic abuse in coercive control. The new offence must also, though, be drafted in a way that effectively captures genuine instances of abuse while not capturing other behaviours. The criminal law is a 'measure of last resort'<sup>46</sup> and any offence that criminalises coercive control should be drafted to capture the wrongful harms to which such an offence is directed, but no more. We would also caution against the term 'coercive control' actually appearing in the legislation itself; it is a useful shorthand during these discussions, and will be invaluable during the education and awareness-raising that should coincide with criminalisation, but using it in the legislation itself would unnecessarily tie the prohibited behaviours to a particular model. We prefer the approach taken in Northern Ireland's and Scotland's legislation, describing the offence more generally as 'abusive behaviour'.

**C. Any new offence must be accompanied by extensive education and training**

Thus far, the most successful operation of one of the new coercive control offences appears to have been in Scotland, which in a few short months had already seen 'more than 400' recorded offences and 13 convictions.<sup>47</sup> An extensive consultation process preceded the introduction of that offence. It involved extensive consultation with victim-survivors and their advocates, the driving presence of Women's Aid Scotland, and the engagement of police, prosecutors and other key workers. The extensive consultation process resulted in multi-party support for the Bill, which was passed unanimously. Before the offence of domestic abuse came into effect, most Scottish police had received some training, with about one-third receiving intense training. In contrast, when the English/Welsh offence came into operation, just 8 of the 48 police forces had received training, which no doubt explains why a slow initial uptake followed by a doubling in the number of recorded offences each year. The difference that training can make is clear: there were 41% more arrests for coercive control in police forces that had been trained in the new offence compared to those that had not.<sup>48</sup>

Prior to the commencement of a new offence there should be full and proper training for anyone whose work will be affected by the new offence – the judiciary, prosecutors, defence lawyers, police, domestic violence service providers, and other frontline responders such as paramedics. The comparative experiences in Scotland versus England and Wales provide examples of the impact of proper pre-commencement training on the reception and operationalisation of new offences dealing with this abuse.<sup>49</sup> That training should then be provided on an ongoing basis.

In this context, we are heartened to see the NSW Greens Bill specify that the offence would not commence until 12 months after enactment. This would allow the organisations responsible for awareness-raising and training the necessary time to develop (and deliver) those campaigns and programs in full knowledge of the final text of the Bill. We advocate training that follows the proven footsteps of (and perhaps even involves) organisations such as *SafeLives UK*, based on best practice adult education methods.<sup>50</sup>

#### **D. Provide the necessary resources**

The effective implementation of a new coercive control offence will be largely dependent on the willingness of the NSW government to whole-heartedly embrace this reform and resource it appropriately. This will not be a cheap endeavour in the short-term. But the investment in doing this right is not only a moral obligation, but a financially sound one. Nationally KPMG has estimated the annual cost of violence against women and their children to be between \$22 billion and \$26 billion, more than \$4 billion of which is borne by governments.<sup>51</sup> The shift in community conceptions of domestic abuse as a result of criminalising coercive control, and consequent protection of victims and deterrence of further such behaviours, has the potential to, in the medium- and long-term, significantly reduce that figure.

#### **E. Plan for measurement and evaluation**

As a course of conduct offence, intentionally designed to include behaviours that are already criminal in addition to some that are not, measuring the prevalence of coercive control, the effect it has on recorded crime statistics for other offences, or even its own crime statistics, will be a complex exercise.<sup>52</sup> A single recorded offence can capture years of abuse, potentially reducing the number of recorded (for example) threat offences, even though the prevalence remains the same. The various behaviours may also be recorded by police as their individual incidents but then charged or resolved as coercive control. The value of a coercive control offence may also occur in spaces far outside police statistics, such as reduced misidentification of women as primary aggressors in response to alleged breached of intervention orders, or an unmeasurable reduction in domestic abuse consequent to increased community awareness following the introduction of a new offence. Even separate to police statistics, surveys of people's experience of coercive control may well suggest an increase in such behaviour because criminalisation will invariably improve awareness, which in turn will lead to a greater willingness to identify it and report it. We raise these potential implications only to highlight the importance of considering how to measure any new offence, and especially what the effect of a new offence will be, prior to enactment.

## **CONCLUSION**

We have recommended the criminalisation of coercive control, extensive consultation on draft legislation, and concomitant awareness-raising, education and training, and resourcing. We look forward to seeing an exposure draft of a Bill designed specifically for the NSW context, one informed by a wide range of views on this issue, especially those most at risk of further disenfranchisement. In turn, we hope any exposure draft will also come with an indication of



which system reforms would be implemented to ensure criminalisation is done appropriately, as well as an indication about the extent of resources that will be made available to relevant organisations in order to make that happen. Without that critical context, it will be hard to expect victim survivors, the family violence sector more broadly, Indigenous groups or the legal sector, to support the final product.

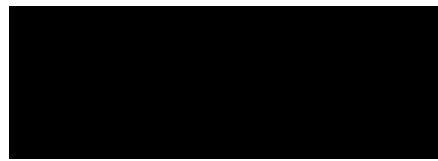
Thank you again for the opportunity to contribute to Australia's first public inquiry into criminalising coercive control.

Kind regards,



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Deputy Dean, Deakin Law School



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<sup>1</sup> In particular, the [Criminal Law Consolidation \(Domestic Abuse\) Amendment Bill 2020](#) and the [Criminal Law Consolidation \(Coercive Control\) Amendment Bill 2020](#).

<sup>2</sup> In particular, the [Crimes \(Domestic and Personal Violence\) Amendment \(Coercive and Controlling Behaviour\) Bill 2020](#) and the [Crimes \(Domestic and Personal Violence\) Amendment \(Coercive Control—Preethi’s Law\) Bill 2020](#).

<sup>3</sup> Hayley Boxall, Anthony Morgan and Rick Brown, *The Prevalence of Domestic Violence Among Women During the COVID-19 Pandemic*, Statistical Bulletin no. 28 (Australian Institute of Criminology, 2020).

<sup>4</sup> Paul McGorrrery and Marilyn McMahon, ‘Criminalising psychological violence in Europe: (Non-)compliance with Article 33 of the *Istanbul Convention*’ (accepted, forthcoming) *European Law Review*.

<sup>5</sup> Jane Monckton-Smith, ‘Intimate partner femicide: Using Foucauldian analysis to track an eight stage progression to homicide’ (2020) 26(11) *Violence Against Women* 1267.

<sup>6</sup> NSW Domestic Violence Death Review Team, *Report 2015–2017* (NSW Domestic Violence Death Review Team, 2017). This occurred in the 67 cases where the victim of abuse (65 women, 2 men) was killed by the male perpetrator and also the 10 cases where the woman victim killed her male abuser.

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<sup>8</sup> BBC News, ‘Woman jailed for controlling partner at their Stewartby home’, *BBC News*, 16 April 2018 <<https://www.bbc.com/news/uk-england-beds-bucks-herts-43782671>>; Phillip Dewey, ‘Police officer’s wife denies accusations of making up catalogue of abuse for financial revenge’, *Wales Online*, 16 November 2019 <<https://www.walesonline.co.uk/news/wales-news/police-officers-wife-denies-accusations-17319939>>; David Huntley, ‘Abusive woman left girlfriend needing 10 stitches in one of her “regular beatings”’, *Teesside Live*, 30 November 2020 <<https://www.gazettelive.co.uk/news/teesside-news/abusive-woman-left-girlfriend-needing-19351906.amp>>.

<sup>9</sup> Marilyn McMahon and Paul McGorrrery, ‘Criminalising coercive control: An introduction’, as in Marilyn McMahon and Paul McGorrrery (eds.), *Criminalising Coercive Control: Family Violence and the Criminal Law* (2020).

<sup>10</sup> See *ibid.* Further for the views of victim-survivors, see for example, Women’s Safety NSW, *Criminalising Coercive Control: Position Paper* (2020) 38–40.

<sup>11</sup> Rosemary Bolger, ‘Domestic violence perpetrators using non-physical abuse “to avoid being caught”’, *ABC News*, 8 March 2015 <<https://www.abc.net.au/news/2015-03-08/domestic-violence-perpetrations-using-non-physical-abuse-to-avoi/6289278>>.

<sup>12</sup> Australian Human Rights Commission, *Fact Sheet: Domestic and Family Violence – A Workplace Issue, a Discrimination Issue* (2014).

<sup>13</sup> On these various points, see Heather Douglas, ‘Not a crime like any other: Sentencing breaches of domestic violence protection orders’ (2007) 31(4) *Criminal Law Journal*; Heather Douglas, ‘Do we need a specific domestic violence offence?’ (2015) 39(4) *Melbourne University Law Review* 434; Heather Douglas and Robin Fitzgerald, ‘The domestic violence protection order system as entry to the criminal justice system for Aboriginal and Torres Strait Islander people’ (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 41; Jane Wangmann, ‘Incidents v context: How does the NSW protection order system understand intimate partner violence’ (2012) 34(4) *Sydney Law Review* 695; Suzanne Poynton et al, *Breach Rate of Apprehended Domestic Violence Orders in NSW*, Bureau Brief Issue Paper no. 119 (2016); Marilyn McMahon, Paul McGorrrery and

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<sup>14</sup> Sandra Walklate and Kate FitzGibbon, 'Why Criminalise Coercive Control? The Complicity of the Criminal Law in Punishing Women Through Furthering the Power of the State' (2021) *International Journal for Crime, Justice and Social Democracy* (advance online publication).

<sup>15</sup> Alexandra M. Ortiz, 'Invisible bars: Adapting the crime of false imprisonment to better address coercive control and domestic violence in Tennessee' (2018) 71(2) *Vanderbilt Law Review* 681.

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<sup>17</sup> Leslie Y. Garfield, 'The case for a criminal law theory of intentional infliction of emotional distress' (2009) 5(1) *American University Criminal Law Brief* 33.

<sup>18</sup> Sentencing Advisory Council (Tas), *Sentencing of Adult Family Violence Offenders*, Report no 5 (2015) (finding that there had been 198 charges laid for the Tasmanian offences by the end of 2019).

<sup>19</sup> Marilyn McMahon and Paul McGorrrery, 'Criminalising emotional abuse, intimidation and economic abuse in the context of family violence: The Tasmanian experience' (2016) 35(2) *University of Tasmania Law Review* 1.

<sup>20</sup> Kerryne Barwick, Paul McGorrrery and Marilyn McMahon, 'Ahead of their time? The offences of economic and emotional abuse in Tasmania, Australia', as in Marilyn McMahon and Paul McGorrrery (eds), *Criminalising Coercive Control: Family Violence and the Criminal Law* (Springer, 2020); Women's Legal Service Tasmania, *Submission: Inquiry into Family, Domestic and Sexual Violence* (2020).

<sup>21</sup> BBC News, 'Controlling partner Mohammed Anwaar jailed for 28 months', 18 May 2016 <<https://www.bbc.com/news/uk-england-south-yorkshire-36322931>>.

<sup>22</sup> Office for National Statistics, *Domestic Abuse in England and Wales: Year Ending March 2017* (2017); Office for National Statistics, *Domestic Abuse in England and Wales: Year Ending March 2018* (2018); Office for National Statistics, *Domestic Abuse in England and Wales: Year Ending March 2019* (2019); Office for National Statistics, *Domestic Abuse and the Criminal Justice System: England and Wales* (2020).

<sup>23</sup> While some of the 5% of women in the recorded police statistics were no doubt themselves the 'primary victim' in the relationship, rather than the 'primary perpetrator' – we would be naïve to assume otherwise – these statistics give a measure of reassurance that the offence is primarily being operationalised in an appropriately gendered manner at *all* stages of the criminal justice process (by police *and* prosecutors). Charlotte Barlow, Kelly Johnson, Sandra Walklate and Les Humphreys, 'Putting coercive control into practice: Problems and possibilities' (2020) 60(1) *British Journal of Criminology* 160.

<sup>24</sup> Office for National Statistics, 'Domestic abuse in England and Wales – Appendix tables' <<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/datasets/domesticabuseinenglandandwalesappendixtables>>. This includes 233 of 234 convictions in the year ending March 2019, and 57 of 59 convictions in the year ending March 2018. Our figure refers to numbers and per centages where the gender of the offender was known.

<sup>25</sup> Paul McGorrrery and Marilyn McMahon, 'Prosecuting controlling or coercive behaviour in England and Wales: Media reports of a novel offence' (2019) *Criminology & Criminal Justice*, advance online publication.

<sup>26</sup> The case attracted significant media attention because it broke the trope of male perpetrators and female victims, and we have seen it touted (inappropriately) as evidence that coercive control is not gendered. Consideration should be given to what strategies might be employed if and when a similar case occurs in Australia that would simultaneously emphasise the gendered nature of domestic abuse without delegitimising the victim's experience in that particular case. The Journal (Ireland), 'First woman convicted under UK's new domestic violence laws

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<sup>27</sup> See above n 8.

<sup>28</sup> The Journal (Ireland), ‘State’s first conviction for coercive control handed down in Donegal Circuit Court’, 12 February 2020 <<https://www.thejournal.ie/coercive-control-conviction-ireland-5004102-Feb2020/>>.

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<sup>33</sup> Scottish Government, *Recorded Crime in Scotland, 2019–20* (2020) <<https://www.gov.scot/publications/recorded-crime-scotland-2019-2020/>>.

<sup>34</sup> See, for example, the testimony of Scottish Women’s Aid CEO Marsh Scott before Australia’s federal inquiry into family, domestic and sexual violence: House of Representatives, Standing Committee on Social Policy and Legal Affairs, *Inquiry into Family, Domestic and Sexual Violence*, public hearing, 3 December 2020 <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/House/Social\\_Policy\\_and\\_Legal\\_Affairs/Family\\_violence/Public\\_Hearings](https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/Family_violence/Public_Hearings)>.

<sup>35</sup> Northern Ireland Assembly, *Official Report (Hansard): Monday 18 January 2021* (2021) <<http://aims.niassembly.gov.uk/officialreport/report.aspx?&eveDate=2021/01/18&docID=321621#3196487>>; Northern Ireland Assembly, *Official Report (Hansard): Tuesday 17 November 2020* (2020) <<http://data.niassembly.gov.uk/HansardXml/plenary-17-11-2020.pdf>>.

<sup>36</sup> *Swedish Penal Code* Ch 4 s 4a (‘A person who commits [specified] criminal acts ... against a person with whom they are or have previously been in a close relationship is, if each of the acts was part of the repeated violation of the person’s integrity and the acts were liable to severely damage the person’s self-esteem, guilty of *gross violation of integrity* and is sentenced to imprisonment for at least nine months and at most six years.’)

<sup>37</sup> *Portuguese Criminal Code* art 152.

<sup>38</sup> Law 2010-769 art 31.

<sup>39</sup> On the inappropriate extension of when judicial officers can take judicial notice of a fact, see Peter McClellan and Amber Doyle, ‘Legislative facts and section 144 – A contemporary problem?’ (2016) 12 *Judicial Review* 421.

<sup>40</sup> Miranda Devine, ‘Miranda Devine: Mark Latham protects families from nonsense Bill’, *Daily Telegraph*, 19 January 2021 <<https://www.dailytelegraph.com.au/news/opinion/miranda-devine-mark-latham-protects-families-from-nonsense-bill/news-story/09ed87a806e5df7ef69de875122a5b05>>.

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<sup>43</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 15(2).

<sup>44</sup> See, for example, guidance provided by the National Domestic and Family Violence Bench Book, '9.3.4.3. Fines' <<https://dfvbenchbook.aija.org.au/options/fines/>>. We know of only one case in England and Wales – there may be more, but we are unaware of them – in which a fine was imposed for controlling or coercive behaviour, and that was because the behaviour was at the lower end of seriousness and there had been no further abuse since the relationship ended a year earlier: Sarah Howells, 'Chivenor marine fined for mounting "perfect surveillance package" on wife', *North Devon Gazette*, 5 March 2018 <<https://www.northdevongazette.co.uk/news/chivenor-marine-fined-for-controlling-behaviour-1-5420804>>.

<sup>45</sup> Paul McGorry and Marilyn McMahon, 'Criminalising "the worst" part: Operationalising the offence of coercive control in England and Wales' (2019) 11 *Criminal Law Review* 957.

<sup>46</sup> See, for example, Nils Jareborg, 'Criminalization as last resort (*ultima ratio*)' (2004) *Ohio State Journal of Criminal Law* 521.

<sup>47</sup> BBC News (UK), 'New domestic abuse laws: More than 400 crimes recorded', 17 August 2019 <<https://www.bbc.com/news/uk-scotland-49374667>>.

<sup>48</sup> Iain Brennan et al, 'Policing a new domestic abuse crime: Effects of force-wide training on arrests for coercive control' (2021) *Policing and Society* (advance online publication).

<sup>49</sup> For instance, research conducted in late 2017 found that 85% of police at a single police force in England had not undertaken specific training on policing domestic abuse generally (let alone about the new offence) in the previous two years, since the criminalisation of controlling or coercive behaviour: Charlotte Barlow and Sandra Walklate, 'Gender, risk assessment and coercive control: Contradiction in terms?' (2021) *British Journal of Criminology* (advance online publication).

<sup>50</sup> David A. Kolb, *Experiential Learning: Experience as the Source of Learning and Development* (1984).

<sup>51</sup> KPMG, *The Cost of Violence Against Women and their Children in Australia: Final Report* (2016) <[https://www.dss.gov.au/sites/default/files/documents/08\\_2016/the\\_cost\\_of\\_violence\\_against\\_women\\_and\\_their\\_children\\_in\\_australia\\_-\\_summary\\_report\\_may\\_2016.pdf](https://www.dss.gov.au/sites/default/files/documents/08_2016/the_cost_of_violence_against_women_and_their_children_in_australia_-_summary_report_may_2016.pdf)>.

<sup>52</sup> See, for example, Andy Myhill, 'Measuring coercive control: What can we learn from national population surveys?' (2015) 21(3) *Violence Against Women* 355.