

**Submission  
No 148**

## **COERCIVE CONTROL IN DOMESTIC RELATIONSHIPS**

**Organisation:** Aboriginal Legal Service (NSW/ACT) Limited

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# ALS

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## Coercive Control

### THE ABORIGINAL LEGAL SERVICE (NSW/ACT)

#### **Introduction**

The Aboriginal Legal Service (NSW/ACT) Limited ('ALS') is a proud Aboriginal Community Controlled Organisation and the peak legal services provider to Aboriginal and Torres Strait Islander men, women and children in NSW and the ACT.

The ALS currently undertakes legal work in criminal law, children's care and protection law and family law. We assist Aboriginal and Torres Strait Islander people through representation in court, advice and information, as well as providing broader support programs and undertaking policy and law reform work. We provide this brief submission based on our direct involvement with and representation of Aboriginal and Torres Strait Islander people.

The ALS recognises the harm caused by coercive control and the fact that it is often a precursor to more serious intimate violence, but the ALS also considers that coercive control is deeply contextual, subtle and difficult to determine. Conduct that may be coercive in one relationship may not be in another and as a result, the law must be careful in its application of policy and punishment for what it perceives as coercive control.

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

The ALS recognises the challenges in defining coercive control due to its contextual and nuanced nature. The ALS agrees that the demarcation between coercive and controlling behaviours on one hand and voluntary choices in a relationship on the other hand may be difficult to determine. The example provided in the Discussion Paper of relationship finances is particularly informative. The control by one partner of the finances in a relationship may be a consensual position in one situation and an indicative of controlling behaviour in another.<sup>1</sup>

The issue of defining coercive control coupled with the problems of policy implementation unveil the potential of (mis)recognition of coercive control for perpetrators, victims and practitioners.<sup>2</sup>

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

The problems foreseen with defining coercive control stem from potential difficulties in distinguishing between behaviours in healthy relationships and those that may form a pattern of abuse. An indecent in isolation may not warrant the same criminalisation that a pattern of conduct may. This creates

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<sup>1</sup> NSW Government, 'Coercive Control' (Discussion Paper October 2020) 8, [2.5].

<sup>2</sup> Walklate S and Fitz-Gibbon K (2019) The criminalisation of coercive control: The power of law? International Journal for Crime, Justice and Social Democracy 8(4): 94-108. <https://10.5204/ijcsd.v8i4.1205> pg 99.

difficulties for police in defining conduct that amounts to coercive control and charging for these offences. It would be of concern to begin charging for certain individual acts, that may not reach the threshold of criminality. It is almost an impossible task to create a delineation between conduct that may be normal in some contexts and that conduct which may be considered coercive.

Moreover, when applied in the context of criminal justice responses, the tricky question must be asked; when does a 'normal' intimate partner relationship become criminal? There is an inherent blurriness between coercive control, romance and intimate partner relationships.<sup>3</sup> The criminal law proves a blunt instrument for drawing such distinctions.

**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?**

The *Crimes (Domestic and Personal Violence) Act 2007* (NSW) creates the legislative framework for responding to Domestic and Personal Violence in criminal and civil law. The CDPV Act provides a regime of offences and civil protection orders to respond to violence between those individuals in a domestic relationship.

Section 13 of the CDPV Act criminalises stalking or intimidation with the intention of causing physical or mental harm. The ALS agrees with the proposition put forward in the Discussion Paper that while the offence of stalking/intimidation prohibits some (but not all) forms of coercive control it does work to effectively capture a collection of behaviours that may be individual acts amounting to coercive control over time.

The ALS suggests as a primary position that behaviour amounting to coercive control can also be effectively managed through conditions of apprehended domestic violence orders (ADVO). There are a range of optional conditions set out in s35 of the CDPV Act (without limiting the court's ability to set such prohibitions as it considers necessary) that may also directly address coercive controlling behaviours.

The ALS would promote the recommendation that there may be ways that these existing provisions against coercive and controlling behaviours could be better utilised. This could include targeted training and support for police officers to improve the implementation of existing frameworks.

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

See question 10 below.

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

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

The ALS would submit that the law currently allows evidence of coercive control to be adequately taken into account in both sentence and criminal proceedings.

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<sup>3</sup> Chung D (2005) Violence, control, romance and gender equality: Young women and heterosexual relationships. *Women's Studies International Forum* 28(6): 445–455.  
<https://psycnet.apa.org/doi/10.1016/j.wsif.2005.09.005>

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

The ALS would be opposed to the introduction of any new criminal law offences designed specifically to capture coercive and controlling behaviours. Disadvantages would include:

### *The over-criminalisation of behaviour between individuals in relationships*

The difficulty in drawing the line between coercive and non-coercive behaviour could not be overcome. The ALS agrees that the creation of a specific offence of coercive control could inadvertently criminalise behaviours in relationships that are generally socially acceptable. As mentioned in the Discussion Paper, coercive and controlling behaviours are often nuanced, complex, and their form and nature, while capable of being generalised, may not equally apply to all relationships.<sup>4</sup>

Furthermore, there is a strong likelihood that due to the potential challenges of prosecuting as a standalone offence, an offence of coercive control would be primarily charged as a related or backup offence and would not achieve the intended aim of its introduction.

### *Issues with proving coercive control*

- Agree that the nuanced and complex behaviours that constitute coercive control will present significant investigative challenges for police.
- The requirement for complainants to give detailed and protracted evidence to ensure procedural fairness may in turn place additional stress on these victims and the court system
- Police will need significant additional expertise to investigate allegations of coercive control.
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### *The over-representation of indigenous offenders in the criminal justice system*

The ALS is mindful of the current over-representation of indigenous offenders in the criminal justice system. The implementation of a specific offence of coercive control is likely to disproportionately impact indigenous defendants.

There is limited understanding of how coercive control laws would impact Indigenous communities as well as people with disabilities. This is a serious concern given these groups traditionally experience further harm and disempowerment when they become involved in the criminal justice system.<sup>5</sup>

Aboriginal communities continue to experience devastating impacts rooted in colonisation and dispossession. The intergenerational trauma of family breakdown, combined with the trauma of systemic racism, entrenched poverty, limited educational and employment opportunities, substance abuse, mental health issues and homelessness, have contributed to the complexity and prevalence of family violence that exists today.

In particular, the criminalisation of the concept of coercive control could have the unintended result of the prosecution of victimised survivors. It has been suggested that it would result in far more women being brought into the system, particularly indigenous women.<sup>6</sup> The link between

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<sup>4</sup> NSW Government, 'Coercive Control' (Discussion Paper October 2020) 24, [6.8].

<sup>5</sup> *Australia is not ready to criminalise coercive control — here's why*, published October 1, 2020 12.01pm AEST < <https://theconversation.com/australia-is-not-ready-to-criminalise-coercive-control-heres-why-146929>>.

<sup>6</sup> Walklate S and Fitz-Gibbon K (2019) The criminalisation of coercive control: The power of law? *International Journal for Crime, Justice and Social Democracy* 8(4): 94-108. <https://10.5204/ijcjsd.v8i4.1205>.

intergenerational trauma and violence in intimate partner relationships should be considered in any decision to further criminalise certain behaviours in relationships.

*The fundamental inability of the law to address the wider issue of domestic violence*

The law itself is a blunt instrument in affording change to the wider social practices of violence rooted in gender inequality.

For criminal justice professionals, criminalising the concept of coercive control moves the focus away from responding to victims in an individual incident-led approach to a process-led manner that is concerned with addressing the cumulative effect of the minutiae of everyday behaviours.<sup>7</sup>

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

**Allow courts to make an ADVO where the PINOP has reasonable grounds to fear that they will be subject to coercive controlling behaviours.**

The ALS believes that the existing provisions regarding ADVOs could properly encompass behaviour that may be considered coercive control. The ALS supports the use of this existing framework rather than the creation of a specific offence of coercive control.

As a secondary position the ALS would be open to the suggestion in paragraph [8.2] of the Discussion Paper to allow courts to make an ADVO where the person in need of protection has reasonable grounds to fear they will be subjective to coercive and controlling behaviours.<sup>8</sup> We also support the alternative approach put forth in paragraph [8.3], to enable the court to take into account any evidence of coercive and controlling behaviours when deciding whether to make an ADVO on existing grounds.<sup>9</sup>

Any amendment or widened scope of the current legislative regime of ADVOs would be limited in practical capacity unless accompanied by policy changes to ensure that defendants and protected persons understand their effect. The ALS is aware of the need for adequate provision of trusted and culturally safe legal advice to both defendants and PINOPs.

We recommend the funding and resourcing of domestic and family violence practitioners, focused on supporting clients with understanding and varying ADVOs, within trusted legal services.

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

The ALS must confirm again that we believe the current framework is enough to protect against coercive and controlling behaviour but in the alternative, if a standalone offence was introduced, we would support a drafting similar to the Tasmanian legislation as under economic abuse with suitable fault elements in the creation of the offence.

Drafting suggestions:

- We strongly recommend that this should be an offence of intention

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<sup>7</sup> Walklate S and Fitz-Gibbon K (2019) The criminalisation of coercive control: The power of law? *International Journal for Crime, Justice and Social Democracy* 8(4): 94-108. <https://10.5204/ijcjsd.v8i4.1205>.

<sup>8</sup> NSW Government, *Coercive Control* (Discussion Paper, October 2020) 32 [8.2].

<sup>9</sup> NSW Government, *Coercive Control* (Discussion Paper, October 2020) 32 [8.3].

- We suggest the use of a reasonable person test as ‘unreasonable,’ which is to be proven by the prosecution. We do not support the inversion of the onus
- We recommend a closed list of conduct of coercive behaviours as described in the literature as opposed to a wide discretion.

Would not support the approach taken by other jurisdictions who have elected to require that the offender knew or ought to have known that their behaviour would have been abusive. This approach includes an objective standard of reasonableness through the requirement that an offender ‘ought to have known’ their behaviour was abusive. Such an approach again invites the risk that the threshold for criminal conduct may be set too low.

#### *Scope of domestic relationships to be covered*

The ALS would support the more limited scope of the legislation only applying to intimate partners and ex intimate partners (acknowledging the purpose of the proposed legislation being that coercive control in intimate relationships can be a pre-cursor to intimate partner homicide).

#### *Penalties and aggravation*

An offence of coercive control may arguably not meet the benchmark for intimidation in our view should be considered a less serious offence. We would not support a like penalty to intimidation. The ALS would suggest a penalty of 2 years which would still reflect it as serious offending but distinguish it from other behaviour such as stalking or intimidation.

#### *Defences*

We do not support a specified defence of reasonableness as we propose that unreasonableness should itself be an element of the offence.

#### *Other considerations*

- We strongly suggest that incidents need to be particularised.
- We would suggest that there be a threshold of at least three incidents before the offence is enlivened. This is in line with approaches taken in other areas of the law, such as in industrial law and the concept of bullying in the workplace where a single incident does not meet the threshold. We would support the need for there to be repeated and separate actions to constitute coercive control to better fit in line with its categorisation as an ongoing course of conduct rather than an individual incident.
- Would support a temporal aspect to the incidents. That there should be no more than 12 months since last incident (similar to Tasmania). This will again support the definition of coercive control as a more frequent pattern of behaviour and not separate and distinct incidents over a long period of time.

### **15. What non-legislative activities are needed to improve the identification of and response to coercive and controlling behaviours both within the criminal justice system and more broadly?**

At a basic level the criminal legal system is not deterring personal violence and further criminalisation of certain behaviours is not going to address the underlying cause of personal violence.

Alternatives to criminalisation should instead focus on economics, public health and human rights issues. Dealing with people’s basic economic needs, unemployment and providing early education and intervention regarding healthy personal relationships will have a greater overall impact on the prevention of intimate partner violence.

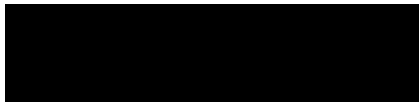
If behaviour amounting to coercive control is identified, instead of immediately criminalising this behaviour, a first response could instead be offering support services, such as counselling, case workers, access to domestic violence programs and overall greater access to drug and alcohol services. Providing potential victims with access to domestic violence liaison officers within the police force or considering the imposition of an ADVO.

The ALS supports further education and training for police working in the context of family violence and coercive control to develop their capabilities in identifying and responding to violence, and to develop their cultural awareness. It is imperative that training in cultural awareness is delivered by Aboriginal educators, with courses developed by Aboriginal Community Controlled Organisations.

With respect to non-legislative approaches to addressing coercive control, we would also recommend the joining up of free and low-cost legal services and other support services, such as health and housing, to provide holistic, wrap-around assistance to address the legal and related needs of Aboriginal people.

The ALS would recommend that the question of criminalising coercive control be re-visited after more comprehensive qualitative research of overseas jurisdictions as well as investing in community education as a primary prevention rather than introducing reactionary legislation.

**Aboriginal Legal Service (NSW/ACT) Limited**



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