THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: CLC:RHrg2011113

27 January 2021

The Hon Natalie Ward, MLC
Chair
Joint Select Committee on Coercive Control
Parliament House
Macquarie Street
Sydney NSW 2000

Dear Ms Ward,

Discussion Paper: Coercive Control

The Law Society welcomes the opportunity to make a submission to the Inquiry into coercive control in domestic relationships.

The Law Society has responded to the questions raised in the Discussions Paper *Coercive Control* in the attached submission.

We note the Attorney General's statement that the Discussion Paper is the starting point and a guide to help consideration of this complex topic, and agree that any legislative reform must be approached with great caution and care.[1] We would welcome the opportunity to be involved in future discussions about the policy approach to best address the issue of coercive control as the Inquiry progresses.

The Law Society contact for this matter is Rachel Geare, Senior Policy Lawyer, who can be reached on (02) 9926 0310 or at rachel.geare@lawsociety.com.au.

Yours sincerely,

Juliana Warner
President

[1] The Department of Communities and Justice, *Coercive control – Discussion paper*, 2020, p2.

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

Coercive control describes a pattern of abusive behaviours and control over time intended to create fear. As the behaviours are deeply contextual and often occur slowly over a period of time, it can be difficult to identify. Because coercive control is a broad concept it is very difficult to define.

We consider that there is a gap in the current law and that the best way to address coercive controlling behaviour is via a specific criminal offence, rather than further expanding domestic violence legislation. As discussed below, particularly in response to Question 9, the offence should be very tightly prescribed and tailored. As coercive control can cover a wide variety of conduct and motivations, a legislative response will necessarily need to be finely tuned. A broad brush offence would risk criminalising dynamics and behaviour within couples and families that does not warrant moral, let alone criminal, sanction.

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

Endeavouring to distinguish between a relationship that may be dysfunctional, but not necessarily coercive, is where the difficulty lies.

A criminal act must be proved beyond a reasonable doubt and attract a penalty. The challenge is determining what conduct is so serious that it should be criminalised. This is why the drafting of the offence is so important, as is the training of police to properly identify the behaviour.

Any new offence will be very difficult to draft. There is a risk of criminalising people with alcohol, drug and mental health issues – the vulnerable and disadvantaged who may not fit into the norms of relationships held by others.

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* (CDPV Act) creates the legislative framework for responding to domestic violence in criminal and civil law.

All domestic violence has an element of coercive control. Our preferred approach of introducing a new offence is to try to capture that which is not already covered by existing offences.

Section 13 of the CDPV Act criminalises stalking or intimidation with an intention to cause fear of physical or mental harm. The definitions of "intimidation" and "stalking" under ss7 and 8 provide that the court may have regard to any pattern of violence in determining whether the conduct is stalking or intimidation. Section 13 already prohibits some forms of coercive control, because the definition of intimidation in s7 of the Act includes (c): "*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".

Section 11(1)(c) of the CDPV Act provides that existing criminal offences, when committed in the context of a domestic relationship, can constitute a domestic violence offence if it involves coercive or controlling behaviour.

Other relevant criminal offences under the *Crimes Act 1900* that address aspects of coercive control include offences such as malicious damage, cruelty to animals, unlawful deprivation of

liberty, recording and distribution of intimate images of a person without consent ("revenge porn"), etc.

Police and courts have very broad powers to make ADVOs under the CDPV Act. We are of the view that expanding ADVOs to include coercive control as a new ground would create a greater risk of net widening and delivering an insufficient response to the serious patterns of behaviour it is intended to target. Behaviours that may amount to coercive control can already be managed through conditions of ADVOs.

We note that the justice system is only a partial solution to addressing domestic violence. Victims need to feel empowered to leave these relationships and sufficient social supports must be in place to allow them to do so. Women's shelters and domestic violence services must be properly funded and resourced.

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

NSW police officers should receive ongoing training in relation to technology facilitated abuse in domestic violence matters e.g. spyware apps that can capture passwords, monitor emails and calls and track a person's movements etc. Training is also required to ensure police officers are up to date with digital forensics, so that they can extract evidence from computers, phones and servers to better investigate existing offences by modern means.

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

To the extent that evidence of coercive and controlling behaviour is relevant to the proceedings, the law of evidence is sufficient. If a new offence is introduced it will expand the circumstances where such evidence will be relevant.

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

Coercive control will often be a highly relevant consideration for the court in assessing the objective seriousness of a domestic violence offence, which will have a bearing on the nature and length of any sentence imposed.

In sentencing for domestic violence offences, the High Court has said that it is the duty of the courts to vindicate the human dignity of victim-survivors.[2] The courts recognise that an act of violence against a person's intimate partner is a serious breach of trust, which significantly heightens the seriousness of an offence and which will ordinarily lead to higher sentences.[3] Decisions have recognised that domestic violence involves the exercise of power, dominance and control.[4]

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

A criminal offence has the benefit of covering conduct not currently addressed by existing offences or ADVOs and sending a clear message to the community that coercive and controlling behaviour is unacceptable. A high level of seriousness would need to be demonstrated to justify a criminal response. The offence would have its own penalty and allow

[2] *Munda v Western Australia* (2013) 249 CLR 600, [55].
[3] *The Queen v Kilic* (2016) 259 CLR 256, [28].
[4] *R v Burton* [2008] NSWCCA 128, [97].

for courts to punish an offender for such behaviour, as compared to a breach of an ADVO, where the breach may be unrelated to coercive or controlling behaviour.

Any new offence will be very difficult to draft. The possible disadvantages of a specific offence include criminalising what society would regard as reasonable behaviour within a relationship. The dynamics within relationships differ widely. Criminalising relationship behaviour can be unhelpful and undesirable if it is not so egregious as to be criminal. There is also a risk of criminalising people with alcohol, drug issues, mental health issues – the vulnerable and disadvantaged who may not fit into the norms of relationships held by others.

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

We consider that compulsory training for all police officers and the availability of comprehensive social services are vital components to the success of introducing a new offence.

We note that the Scottish uptake of the offence in the early stages was greater than in England and Wales, which is likely due to the support around the commencement of the Scottish offence. This support included enhanced training of police officers and staff, funding was also provided to Scottish Women's Aid and a public awareness campaign to increase understanding of the scope of domestic abuse and encourage victims to come forward.[5]

Police in NSW would require specialist training to identify, investigate and gather evidence for a new coercive control offence. Criminal offences ordinarily address a particular act or instances of offending conduct, whereas a coercive control offence would involve a course of acts or events that only become criminal when taken together as a whole.

Significant training of the judiciary would also be required.

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?

We have considered the various models used by different jurisdictions where coercive control has been criminalised. Below is not a proposed draft, but rather what we consider to be the essential elements of any new offence:

It is an offence if:

1. A person intentionally engages in a pattern of persistent coercive and controlling behaviour (the behaviour).
2. The person intends by the behaviour to cause fear of serious harm to an intimate partner or former partner (noting the very wide definition of a domestic relationship in NSW).
3. The behaviour causes the victim to fear serious harm.
4. The behaviour is not reasonable in the circumstances.

The offence needs to capture the persistent nature of the offending, intentionally and persistently – similar to the Irish model. Specific intent is a very important safeguard. There is good reason for including proof of actual fear, in contrast to the existing stalk/intimidate offence which does not require proof that the person alleged to have been stalked or intimidated actually feared physical or mental harm. This is because the gravitas of the new offence is deliberate behaviour that causes fear – the nature of the physical act is not as relevant as the conduct itself.

[5] The Department of Communities and Justice, *Coercive control – Discussion paper*, 2020, p15.

We consider that any new offence should require a minimum number of three instances of coercive or controlling behaviour which take place as part of a pattern of behaviour (each particularised on the indictment), in addition to the inclusion of the word "persistent", as part of the offence. We note that the existing persistent sexual abuse of a child offence in s66EA of the *Crimes Act 1900* requires at least two offences. Given the conduct being targeted under the new offence may by otherwise lawful conduct (e.g. withholding of finances) we consider that a requirement of at least three instances of coercive/controlling behaviour would be appropriate.

The offence in England and Wales lacks specificity as to what comprises "repeated or continuous" behaviour of the defendant: the offence requires the behaviour to have a serious effect on the victim, and this is defined to require at least two occasions. However, feedback from an experienced UK criminal lawyer is that the lack of particulars of the first aspect of the offence means that trying to respond (from a defence perspective) is near to impossible.

This highlights the importance of sufficiency of particulars as an important procedural fairness safeguard in any new offence.

We have concerns that there may not be the specialist training for police to deal with the offence, which is likely to be quite complex, and this could result in the offence being applied very broadly and unfairly. The sanction of the DPP to commence proceedings is one way to address this concern. If DPP sanction is required, it would also be an indication from the legislature that the offence is sufficiently serious for the DPP to be involved. If DPP sanction is not supported, as an alternative, the offence could require DPP involvement with the ability to refer back to police.

A tiered penalty regime could be given further consideration as an alternative to one high maximum penalty to reflect different levels of harm.

We are of the view that children as defendants should be excluded from the offence. The new offence should be subject to a statutory review after an appropriate period of time.

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

We do not consider that the civil regime is the way to address coercive control. The civil ground for an ADVO is already very broad. As noted above, expanding ADVOs would create a greater risk of net widening and may deliver an insufficient response to the serious patterns of behaviour an offence would be intended to target.

The current grounds for an ADVO are very broad and the available conditions can appropriately cover coercive and controlling behaviour. If a new targeted offence is created, courts will be able, and police will be required on a provisional basis, to make an ADVO grounded on the new offence under s16(1)(a) and s27(1)(a)(i) respectively.

Breaching a condition of an ADVO is a criminal offence punishable by imprisonment (s14(1)). High numbers of people are breached on ADVOs, particularly ATSI and other disadvantaged groups, and this contributes to high remand figures.[6] Breach offences would not necessarily be tied to coercive control; the breach could be of another condition.

[6] Bureau of Crimes Statistics and Research, *Breach rate of Apprehended Domestic Violence Orders in NSW*, 2016, p1.

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?

We consider that codification is unnecessary. The common law with respect to context and relationship evidence is very clear. We are unaware of any problem with the introduction of context and relationship evidence in domestic violence proceedings.

Our experience is that there is no issue with judicial officers admitting evidence where relevant. If there are concerns, then judicial training or additions to the Bench Book may be a more practical and effective response than codification.

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 paper refers to the possibility of codifying jury directions in the *Criminal Procedure Act 1986*.

The Law Society is of the view that jury directions should not be legislated. Legislation is inflexible and cannot comprehensively address the changing circumstances in which judicial directions may need to be given.

We note that the Law Reform Commission considered and rejected codification of jury directions in its report *Jury Directions*.[7] The Law Reform Commission concluded that:

> … there is an inherent potential for inflexibility in the introduction of a statutory scheme or codification that seeks to anticipate the issues on which a jury will need instruction. It is our view that the adoption of such a scheme could pose a risk to the fairness of the trial process if it detracts in any way from the ability of the trial judge to assess the needs of the particular case and to tailor the directions to the jury to accommodate those needs. A trial judge is in the best position to understand the dynamics of any particular trial and to devise directions that meet the demands of that trial.[8]

The Law Reform Commission's preferred approach was to retain and strengthen the existing Bench Book framework, noting that suggested directions can be tailored to the individual case that can evolve in response to appellate decisions.[9]

We note that if an offence is introduced, it may warrant a new direction in the Bench Book for the benefit of the accused in relation to lack of particulars of times, dates, and events.

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

As noted above, coercive control will often be a highly relevant consideration for the court in assessing the objective seriousness of a domestic violence offence, which will have a bearing on the nature and length of any sentence imposed.

If a new offence is introduced, it will have its own penalty. There is no need for an additional aggravating factor under s21A of the *Crimes (Sentencing Procedure) Act 1999*.

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[7] NSW Law Reform Commission, *Report 136: Jury Directions*, 2012.
[8] Ibid. p41.
[9] Ibid, pxii.

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

We have no further avenues of reform to raise at this 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?

We support non-legislative activities to improve policy and service responses and community awareness about coercive control, including: improved support programs and services to target prevention; improved and ongoing education of young people about expectations of relationships; appropriate training for police, judiciary, legal professionals, court staff, domestic violence support service staff and other professionals interacting with complainants and defendants such as those in the health, education and child protection sectors etc.

The last decade has seen a series of punitive responses to perpetrators of domestic violence, including broadening of police powers, lengthening of ADVOs, the introduction of a register of domestic violence offenders and increased surveillance, including electronic monitoring, of domestic violence offenders. We support investment in programs and support to perpetrators of coercive controlling behaviour, and domestic violence more generally, with the objective to prevent the behaviour and reduce the likelihood of it recurring. For instance, the current ReINVEST clinical trial is seeking to determine if treatment with a common antidepressant (sertraline) is effective in reducing offending behaviour in highly impulsive men with histories of violence, including domestic violence.

We consider that further expansion of criminal offences and sanctions should be accompanied by investment in therapeutic based programs to support perpetrators address the underlying causes of their behaviour.