Good Shepherd
Australia New Zealand

Inquiry into Coercive Control in Domestic Relationships

Joint Select Committee on Coercive Control
New South Wales

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Statement of Recognition

Good Shepherd Australia New Zealand acknowledges the Traditional Custodians of the lands and waters throughout Australia. We pay our respect to Elders, past, present and emerging, acknowledging their continuing relationship to land and the ongoing living cultures of Aboriginal and Torres Strait Islander Peoples across Australia. We recognise that the perspectives and voices of First Nations peoples should be at the forefront of conversations about family, domestic and sexual violence in Australia.

About us

Good Shepherd Australia New Zealand was established to address the critical, contemporary issues facing women, girls and families. We work to advance equity and social justice, and to support our communities to thrive. We aspire for all women, girls and families to be safe, well, strong and connected.

For over 30 years Good Shepherd has partnered with community organisations and peak bodies, local, state and federal governments, and universities to work collaboratively and in place-based settings to improve outcomes for vulnerable people. Our service provision focuses on safety and resilience, economic participation, and microfinance. Good Shepherd delivers services across Australia specifically for victim/survivors of family violence including but not limited to case management, family support work, counselling, and accommodation. Throughout all of our programs, including financial counselling and capability building we have identified that domestic, family and sexual violence is a pervasive factor of vulnerability—and is often the reason for seeking support.

Specifically, in New South Wales, Good Shepherd delivers specialist sexual assault counselling, youth and family counselling, support for young parents experiencing homelessness and individual and group work programs for young people experiencing difficulties in attending school. A common, intersecting theme in the delivery of all these programs is the presence of family violence, highlighting both the pervasiveness of the problem and its wide and varied impacts.

A central part of our purpose is to challenge the systems that entrench poverty, disadvantage and gender inequality. We do this through a range of research, policy development and advocacy activities.

Acknowledgements

We acknowledge the strength and resilience of the women and children we have the privilege of supporting as they rebuild their lives during and after violence; our sustained advocacy is a commitment to ensuring structural barriers are broken down and pathways to recovery are prioritised. We thank the practitioners from Good Shepherd family violence services who read and provided their invaluable insight and feedback on this submission.

Endorsements

This submission has been endorsed by:

- Domestic Violence New South Wales
- The Salvation Army Australia

Executive summary

The New South Wales (NSW) Joint Select Committee on Coercive Control was established to inquire into and report on coercive control in intimate relationships. The inquiry arises amid growing desire both in Australia and internationally, for improved justice system responses to coercive control. Good Shepherd Australia and New Zealand (Good Shepherd) commends the NSW multi political party efforts to facilitate a balanced and rigorous consultation process on justice system responses to this insidious social problem.

Good Shepherd understands and strongly supports the desire for improved justice system responses to coercive control. We unreservedly agree that the justice system can and should be improved in this respect and the pressure to do so is welcomed. However, Good Shepherd cautions against the criminalisation of coercive control as a separate offence, as a means by which to achieve such improvement. Our caution in arriving at this position is based on decades of practice experience working alongside women and children who have experienced coercive control in their lives. This work tells us that victims/survivors of family violence must navigate a range of systems, including legal systems, often with an inadequate response that does not provide protection from, or remedy for, the more intractable experiences of coercive control, such as economic abuse (and especially, debt abuse).

That is not to suggest that improvements to the civil and criminal law responses to coercive control are not needed. They are needed and with urgency. The recent family violence related homicides, which prompted this review, provide clear impetus for review of the justice system's response to coercive control. We believe the response should involve the whole of society. Currently, there is no shared understanding of coercive control *as* constituting family violence, and no standard approach to operationalising coercive control in legal processes, which limits our collective response. This speaks to the need for a nationally consistent conceptual framework for understanding, identifying, and responding to coercive control.

Recognising the context of coercive control, and that it impacts almost every aspect of a victim's/survivor's daily life, Good Shepherd has formed the view that improving justice system responses to coercive control is essential, but that we must look beyond simply the justice system as a mechanism for recourse and remedy. Indeed, cultural change cannot occur through legislation alone.

We believe the justice system is not the only (or even best) realm for early identification and intervention of coercive control. In fact, the exclusive focus on justice system responses has the potential to elide other avenues in society for early intervention. Therefore, we believe that improving non-legal responses, particularly those that increase financial independence and security for victims/survivors, is more crucial at this stage, than law reform, to achieve safe and effective early intervention, and to prevent family violence homicides.

Commissioner of the Royal Commission into Family Violence (RCFV) in Victoria, The Honourable Marcia Neave (in McMahon & McGorrery, 2020: v), has recently reiterated reservations about the introduction of criminal offences of coercive control, emphasising the practical difficulties in ensuring that these offences actually improve the situation for victims/survivors of family violence. The weight of current evidence favours the view that an offence of coercive control is not a priority, at this stage.

We believe that the NSW government should focus on targeted areas requiring improvement within the current civil-criminal justice system response. Specifically, the government should look to embedding a shared understanding of coercive control, shifting the focus away from physical violence to better accommodate experiences of non-physical violence (ensuring that victims/survivors are able to obtain an interim intervention order without the presence of physical violence). The NSW Government should also focus on improving non-legal responses to coercive control, recognising that coercive control has lasting, detrimental consequences beyond the confines of criminal law.

Our submission responds to discussion questions 1-5, 7-10, and 15 of the NSW Government Discussion Paper on Coercive Control. We welcome the opportunity to provide further evidence to the Committee in relation to this inquiry.

Overarching framework

A conceptual framework for understanding, identifying, and responding to coercive control in Australia.

The presence of coercive control in intimate relationships and the gendered nature of this abuse has been well established for many decades (Dobash & Dobash, 1979; Stark, 2007). Its effects on children and mothering practices have been documented in research (Elizabeth, 2017; Maher et al., 2020). However, measuring and operationalising the everyday reality of coercive control is not as readily understood or actionable. Inconsistencies in definitions and associated methods of identification have resulted in poor outcomes for victims/survivors.

Coercive control is an ongoing course of conduct, with cumulative impacts on those who experience it. It involves systematic regulatory tactics enacted by the perpetrator that induce fear and threat in the everyday lives of victims, such that their will is often overborne.

We believe that a nationally consistent conceptual framework of coercive control that is fit for purpose across jurisdictions, industries, and sectors, is necessary to provide a truly integrated, multi-disciplinary response. As part of this inquiry we encourage the Committee to consider how its findings can provide leadership at the national level including through the Women's Safety Ministers to build both national understandings and approaches toward reform. Our submission is reflective of the need for the NSW Government to develop this framework and demonstrates the opportunities that are presented when coercive control is considered within this holistic view.

Recommendations

It is our view that effective change requires strong emphasis on non-legal responses. As such, Good Shepherd recommends that the NSW Government:

Discussion Paper Question 8

1. Does *not* introduce an offence of coercive control unless there is sufficient evidence demonstrating that a new offence is necessary; and that an offence will achieve the stated objectives of improving women's safety.

Discussion Paper Question 3

2. Supports the introduction of a conceptual framework and definition of coercive control; including:
    a. Inserting an explicit definition of family violence, which encompasses coercive control as constituting family violence into NSW civil legislation.
    b. Prioritisation of improvements to the civil intervention order process to recognise and accommodate the experiences of coercive control, ensuring that forms of abuse, such as economic abuse are included and satisfy the test for an intervention order without the presence of physical violence.
    c. Development of a conceptual framework that enables the community, as a whole, to improve their recognition, understanding and response to coercive control—this is to include the development of an integrated referral system for those working outside of the specialist sector and updates to professional codes and practice guidance to ensure consistent responses to coercive control and family violence in all of its forms.
    d. Presentation of the framework to the Women's Safety Council as an evidenced-based approach for nationally consistent practice, noting that other States and Territories across Australia are contemplating the introduction of coercive control laws.

Discussion Paper Question 4

3. Institute tailored training and system improvements across the justice system to support practitioners' capacity to exercise their existing policy, professional practice and legislative responsibilities, including but not limited to:
    a. Embedded and career-long training for professionals working across other facets of society; training for non-legal family violence practitioners on justice system navigation is essential to identifying coercive control.
    b. Establishing integrated referral pathways alongside the recommended training and capacity building. Significant investment in identifying, assessing, referring and managing coercive control requires more resources to equate for the time that matters involved coercive control require to be effectively supported.

Discussion Paper Question 10

4. Monitors and evaluates professional practice and system improvements across the justice system relative to outcomes, and not simply whether activities and changes have occurred. In particular, NSW government monitor and evaluate the extent to which reforms:
    a. Improve victim/survivor safety, wellbeing and recovery.
    b. Improve the accountability of perpetrators of family violence.

Discussion Paper Question 15

5. Pilot a model for cross-sector service delivery outside of the legal services sector. The pilot should involve establishing debt abuse clinics to respond to coercive control in the mainstream financial services sector.

Discussion

Question one: What would be an appropriate definition of coercive control?

Defining Family Violence

Family violence is not expressly defined in NSW legislation. The *Crimes (Domestic and Personal Violence) Act 2007* (NSW) identifies a range of referral sources for behaviour constituting family violence, including references to behaviour contained within the *Crimes Act 1900* (NSW) and the *Criminal Code Act 1995* (Cth). The absence of a specific and expansive definition of family violence within legislation creates complexity in a system that is based on interpretation. Consequently, inconsistencies arise in terms of both legal and non-legal approaches to addressing family violence.

A fundamental and necessary step is the introduction of a definition of family violence within existing legislative frameworks. The definition should include economic abuse, as a key tactic of coercive control. We recommend that the NSW government draw on the *Family Violence Prevention Act 2008* (Vic) ('FVPA') as a world-leading example of defining and responding to coercive control through state legislation.

In its definition of family violence, the FVPA recognises that family violence includes coercive behaviour that controls or dominates a family member – and includes emotional, psychological, and economic abuse.

Family violence is defined in Victoria's FVPA as:

(a) Behaviour by a person towards a family member of that person if that behaviour
   i. Is physically or sexually abusive; or
   ii. Is emotionally or psychologically abusive; or
   iii. Is economically abusive; or
   iv. Is threatening; or
   v. Is coercive; or
   vi. In any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person; or

(b) Behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of, behaviour referred to in paragraph (a).

Given the absence of a nationally consistent definition of family violence across Australian state and territory, and Commonwealth jurisdictions, harmonisation of definitions is a further area where the NSW Government can influence change. Good Shepherd recommends a nationally consistent definition of family violence, which defines coercive control as *constituting* family violence, with all state, territory and Commonwealth definitions including practice examples, including but not limited to:

- Withholding financial support considered reasonably necessary to maintain a partner.
- Demanding financial resources or material goods as part of a marriage or relationships either at the beginning of the relationship or at any point during the relationship.
- Unreasonably preventing a person from taking part in decisions over household expenditure or any joint property.
- Controlling behaviour that denies personal financial autonomy.
- Force, fraud or coercion in obtaining social security payments.
- Force, fraud or coercion in obtaining bank loans, credit cards or other forms of financial debt.
- Force, fraud or coercion in relinquishing control over assets.
- Preventing a person from seeking, gaining or maintaining employment.

Defining Coercive Control

While coercive control is not expressly defined in NSW legislation, it is central to the family violence policy environment, reform agenda, and to specialist professional codes of practice. However, there is no nationally consistent definition or shared understanding. Inserting a clear definition of coercive control in NSW family violence legislation, consistent with the legislation in Victoria – a world leader in family violence reforms - would be a step towards achieving a shared national definition.

The term 'coercive control' is used to describe the ongoing nature of family violence, where the abuse is not always physical or even visible but pervades a victim's daily life. Recognising family violence *as* coercive control is not new. Use of this concept first arose in the 1970s, in the scholarship of leading family violence

experts Dobash and Dobash (1979: 15), who argued that 'violence in the family should be understood primarily as coercive control'. Evan Stark, social worker and academic, has since elaborated on this concept extensively in his pioneering work (2007). Stark (2007) uses the image of a cage, as an allegory for coercive control. His work has illuminated how coercive control entraps women in their daily life through a complex and invisible web of abuse.

Coercive control refers to a wide range of abusive behaviours including social, financial, psychological and technology-facilitated abuse.

It can include isolating a partner from their friends and family, restricting their movements, using tracking devices on their phone, interfering with their work or study, and controlling their appearance and access to money.

It has a devastating impact on victims' independence, wellbeing and safety. It is the most common risk predictor for intimate partner homicide.

The necessity of clear and comprehensive definitions

A clear and consistent definition should be embedded into legislation, policy settings and professional codes of practice within the State. It should require consistent and comprehensive assessment and response by all family violence system stakeholders, including justice stakeholders.

Although it is not without flaws, in terms of its utilisation, the current civil-criminal system ensures a perpetrator is held criminally accountable where a family violence intervention order is breached. Consistent and effective utilisation of this system is what is required for improved responses to coercive control, rather than further complicating an already complex system through the introduction of new legislation. NSW police codes of practice must require members to assess for coercive control, and investigate and lay criminal charges where appropriate, including for contraventions of family violence intervention orders and safety notices.

We agree with our sector colleagues, including Women's Legal Service Victoria (WLSV, 2020), that the existing and complementary civil and criminal legislative environment strikes the right balance to account for the socio-legal complexities of family violence.

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

Family violence involves repeated acts of abusive, exploitative, deceptive, threatening, and violent behaviour (Schechter, 1982; Dobash et al., 1992; Stark, 2007, 2010). What is consistent across relationships characterised by family violence is the intentional use of patterns of coercion and abuse to control the other person in an unhealthy and non-consensual way (e.g., social isolation; non-consensual sexual acts; coerced debt) (Dobash et al., 1992).

Ordinary relationships, which are characterised by equality and based on mutual respect and care, do not involve these behaviours. It is the level of *control* that is suggestive of an abusive relationship. For example, ordinary relationships may involve delegation of tasks, such as the management of finances by one member of the couple. However, this becomes abusive where a perpetrator denies the victim any oversight over – or access to – the finances or input into significant financial decisions (Pahl, 1983; Fehlberg, 1994; Singh & Lindsay, 1996; Singh, 2013; Ulbrick, 2020).

Question three: 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?

In responding to this question, we refer only to the civil law process. We make no further comment in relation to criminal law proceedings.

In most jurisdictions in Australia, coercive control is a feature of civil family violence legislation. As discussed in Question one, NSW civil family violence legislation provides no explicit definition of family violence. However, pursuant to Part 2 s 3(d) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) is recognition that "domestic violence extends beyond physical violence and may involve exploitation of power imbalances and patterns of abuse over many years".

Evidence of non-physical family violence can be used to establish the legal test for an intervention order; however, there must be an evidentiary basis. The respective family violence legislation across Australian jurisdictions, each require evidence that an affected family member (AFM) is fearful of the respondent, and that the AFM has reasonable grounds to fear the defendant. Obtaining an interim intervention order thus turns on the facts; a magistrate can make an interim order if they believe a person is not safe and needs protecting immediately. The notion of "immediate protection" can be a complicated concept in the context of non-physical violence.

While the current civil intervention order process as a response to family violence is an overwhelmingly successful piece of feminist law reform, providing protection to many women and children impacted by family violence, it is still a legal process, which is relatively inflexible. We believe there is scope to further improve the process. Specifically, there remains a need to shift away from the incident-based framework, with its enduring focus on discrete and acute acts of physical violence, which are more easily evidencable, towards greater recognition of evidence demonstrating a broader ongoing pattern of coercive control.

Ulbrick's recent Victorian-based research examining economic abuse as a form of coercive control, found that difficulties persist in utilising the civil intervention order process for non-physical forms of family violence. As one specialist family violence magistrate interviewed as part of the research explained:

> **To prove a case on economic abuse alone is very difficult actually. There just isn't a clear answer. And so it really turns on the facts, and that's actually really complex. So, to make a case on economic abuse alone is really tricky. It would have to be quite an obvious extreme example [of economic abuse], I think, for it to get up on a contested hearing … I think I have seen that, but it's often muddy, and he will say, "well I'm just a responsible financial manager and we are saving", or, "we're paying off the mortgage", or, "that's what we've got to do to be tight money managers". You can see that going both ways.**
>
> Anonymous Magistrate (Cited in Ulbrick, 2020: 158-159).

This was echoed by another specialist family violence magistrate, who stated:

> **It's really hard to encapsulate [economic abuse] well in court and explain it. And I don't think we do a good job. I don't do a good job of doing that … We put a lot of reliance on family lawyers to be able to explain and resolve those issues.**
>
> Anonymous Magistrate (Cited in Ulbrick, 2020: 158-159).

Although this research is Victorian based, it highlights the difficulties in establishing, to the requisite legal standard, the concept of fear, when the evidence involves non-physical violence. It emphasises the tendency of law to focus on physical or visible forms of violence, and the reliance on an incident-specific framework for understanding family violence. This has the effect of decontextualising the experience of family violence, which is typically long-term, ongoing and escalating. Family violence is cyclical and repeated; it is a set of behaviours – often physical, sexual, and non-physical – exerted to coerce and control the victim.

The current difficulties in utilising the civil intervention order process for non-physical family violence leaves these behaviours unrecognised and unaddressed, filtering into society an understanding of family violence that 'bear[s] little resemblance' to the everyday lived realities (Tuerkheimer 2004: 959). Critically, an opportunity to intervene early, before the point of crisis, and before the violence escalates, is lost.

Good Shepherd believes the civil system *is* capable of recognising and responding to this harm, but that the system requires improvement. In order to draw the court's attention to non-physical family violence, there is a need for enhanced understandings of coercive control among all practitioners, including judicial members.

According to Ulbrick (2020: 159), the difficulty in trying to prove economic abuse in the intervention order process was so commonly perceived by lawyers, that many conceded that because of the incident-based focus, they rarely make submissions in relation to non-physical abuse. This indicates that despite Victoria's comprehensive definition of family violence, there are still limitations in terms of how the definition is operationalised in practice. As one specialist family violence lawyer explained, not drawing the court's attention to economic abuse is:

> **…an expediency thing more than anything. Because you grab onto [something] easy to explain, tangible behaviours that meet the definition [in the legislation]. If you can do that to satisfy the definition and get your intervention order, that's what you'll do. Rather than kind of wading into the complexities of explaining how something is economically abuse … And also, the definition we have in Victoria, defined in the Act, I would say is unduly limited. It's not the definition I would use. It's quite a tight, narrow definition of economic abuse. And lawyers would think, "Well, what's the best evidence I have in order to meet the legal terms and get an intervention order?" If they've got some kind of physical stalking, verbal abuse, or it's recorded in a text message, something a bit more tangible, something that's easily evidenced – then I'm going to just rely on that, rather than trying to meet this kind of specific meaning of economic abuse in the legislation.**
>
> Specialist Family Violence Lawyer (Cited in Ulbrick, 2020: 159).

Another specialist family violence lawyer explained:

> **We're not drawing the court's attention to economic abuse enough. Lawyers aren't seeking it from the court as much as they should, they're not actually seeking those specific clauses, and that would require, then, a little bit more time to get those instructions about the economic situation and the economically abusive behaviours. Under time pressure, lawyers aren't getting full enough instructions from clients. And they're not seeking specific enough clauses in the intervention order, in order to curb the behaviour. Because that is one potential legal remedy open to us – there needs to be other change as well, but it's one option. But the IVO is not really a comprehensive legal remedy when you're dealing with economic abuse. Definitely the intervention order process could be better utilised and should be. But I don't think it's a perfect solution. There needs to be other change as well. Including a general recognition of economic abuse as coercive control, and understanding it better. And just understanding how interlinked it is with all those other types of things that happen at separation for women, and other kinds of family violence – and how interlinked they are.**
>
> Specialist Family Violence Lawyer (Cited in Ulbrick , 2020: 159).

It is therefore not a question of whether there are sufficient powers to address non-physical forms of family violence, but a question of insufficient training, time, and resources, which limits the utility of this process as a site for security for women and children. There are extraordinary time constraints within the civil intervention order lists by virtue of the increasing volume of family violence matters appearing before the courts.

The focus should be on the immediate safety needs of victims/survivors. However, addressing the broader impacts of coercive control is central to those needs.

Question four: Could the current framework be improved to better address patterns of coercive and controlling behaviour? How?

As discussed in detail above, we believe that the current framework can and should be improved to better address patterns of coercive control.

Good Shepherd believes that the NSW Government should develop a conceptual framework for understanding and operationalising coercive control. The framework should provide detailed practice guidance around coercive control and how interlinked it is with other forms of violence and abuse. The framework should be multi-layered not only providing conceptual understanding, but also providing guidance for those interfacing with family violence to respond, inclusive of community, corporate and government sectors. Such a framework should then be adopted as national best practice, enabling a shared understanding of coercive control across all sectors in society.

Recognising the extent of the impacts of coercive control on a victim's/survivor's life, and that the legal setting is not necessarily the earliest point for intervention, the conceptual framework should be fit for purpose to be used both in legal and non-legal settings, to identify risk early (issues spotting), enable the assessment and management of risk, the triaging of cases, and appropriate referrals for ongoing case management where necessary. Getting the framework and shared definition right will ensure that the system is designed around collaboration and integration. It will mean that identification of coercive control can occur at the earliest possible opportunity.

Good Shepherd also believes that embedding career long training of professionals both within the specialist family violence sector as well as in other industries across society would improve the early identification of coercive control.

Indeed, in the 2015-17 NSW Domestic Violence Death Review Team report, the NSW Coroner identified a key theme: the 'importance of viewing domestic violence holistically, as episodes in a broader pattern of behaviour rather than as incidents in isolation of one another', noting the vital role of police, the report recommended police review their systems, policies, and procedures to focus on context, rather than incidents in isolation.

Good Shepherd believes the current civil process can and should be improved, with further training and education, and the criminal law jurisdiction should also be strengthened to improve responses to coercive control. Good Shepherd believes these systems improvements can be made without recourse to legislating new criminal offences.

Question five: Does the law currently provide ways for courts to receive evidence of coercive controlling behaviour in civil and criminal proceedings?

As discussed in question three, while coercive control is within the meaning of NSW civil legislation, busy court lists means that only the most tangible evidence in relation to family violence is provided to the courts. As explained in question three, this results in a perpetual focus on physical acts of violence, which overlooks a consideration of evidence pertaining to a pattern of coercive control.

For many years, magistrates' courts have been buckling under the strain of oppressive daily caseloads, largely because of increasing numbers of family violence intervention orders (Younger, 2018). There has been a significant increase in the number of matters appearing before the magistrates' courts. The courts are inadequately resourced to deal with this surge. Consequently, family violence matters heard in the civil intervention order list receive insufficient time to explore all the different forms of coercive control a person has experienced. The appointment of additional magistrates and expansion of specialist family violence courts would relieve some of this pressure.

Good Shepherd makes no further comment in relation to criminal law proceedings.

Question seven: What are the advantages and/or disadvantages of creating an offence of coercive control?

As stated, Good Shepherd believes the current civil-criminal legislative environment across Australian jurisdictions strikes the right balance to account for the socio-legal complexities of family violence. However, while we echo the voices of our colleagues across Australia's specialist family violence sector in cautioning against the introduction of a separate offence of coercive control at this time, we respond to this question by reflecting on the use of criminalisation as a strategy for addressing the harms and risks related to non-physical family violence, to contribute to constructive dialogue over whether we *should* adopt new forms of criminalisation, and, if so, *how* we should criminalise.

Good Shepherd is of the view that if a new offence is to be legislated, it should be a general offence of family violence. A general offence would avoid the pitfalls of over-particularism, whereby 'the more energy devoted to drafting precision, the greater the risk that the exercise will not be capable of reflecting the continuum of harms experienced by victims/survivors' (Quilter, 2020: 127). Over-particularism has been shown to weaken criminal law and procedure (Quilter, 2020), and in this case, could have the effect of excluding behaviours that would otherwise reasonably fall within a pattern of family violence.

Good Shepherd asserts that research should be undertaken to determine whether there is a gap in existing legal arrangements, and that the evidence of this research should be used to inform what, if any, statutory developments are appropriate for filling any gap so identified.

Notwithstanding this, Good Shepherd urges NSW to consider whether there is a gap in the law's ability to respond to non-physical family violence. In Victoria, the RCFV identified that the critical gap in the justice system response to family violence was not the inability of existing laws to respond to coercive control, but rather, the absence of a shared understanding of family violence *as* coercive control. This, the Commission found, leads to victims' claims of family violence being minimised, trivialised, or disbelieved when they seek help.

Advantages

Arguments in favour of creating a new offence of coercive control, contend that the criminal law has a fundamental role in deterrence, and suggest that it is a means by which the justice system can better respond to the spectrum of ways in which family violence is perpetrated, and intervene earlier to family violence, thereby preventing the escalation of serious physical violence.

There are also arguments which suggest criminalisation is a way of establishing an offence structure, which matches the 'everyday' operation, spectrum, and moral wrong of family violence, subjecting perpetrators to not just a criminal penalty, but a level of societal opprobrium and moral censure for the insidious harms caused.

Good Shepherd agrees with the underlying principles of this approach and supports the desire for increased awareness and societal understandings around coercive control. Good Shepherd also strongly supports the notion that criminal law plays a fundamental role in filtering into society a clear message that coercive control is not condoned in civil society.

However, as WLSV (2020: 5) explain in their policy brief, what is often missing from the debate is alternatives to criminalisation. That is: 'not whether coercive control should be in law, but *where* coercive control should be in law'. We support WLSV's (2020: 5) assertion that 'coercive control is best placed in civil law, as the jurisdiction best suited to respond to the socio-legal complexities of family violence'.

In considering the introduction of new offences, Victoria's Royal Commission into Family Violence (RCFV, 2016: 27) found:

> Whatever laws we have will be only as effective as those who enforce, prosecute and apply them. Improving these practices – through education, training and embedding best practice and family violence expertise in the courts – is likely to be more effective than simply creating new offences.

Good Shepherd believes that the earliest point of intervention may exist outside the legal setting entirely. It may be that the earliest point of intervention for coercive control resides in broader society, in settings such as (but not limited to): banking and finance; utilities; insurance; superannuation; and general medical. Identifying a level of control, which is suggestive of family violence, in these settings may prevent the violence reaching crisis point, enabling a timely response outside, or in concert with, a legal response.

GSANZ Submission to the NSW Joint Select Committee on Coercive Control.

Disadvantages

There is significant evidence that discretion is not consistently well exercised by police members. Therefore, increasing discretionary powers in an area that is highly complex, nuanced, and subtle could have dire consequences for victims/survivors.

There are also substantial implications for men who use violence, in terms of leading to growth in the number of men entering the prison system. Specifically, it would result in growth in the remand or un-sentenced population, an environment already experiencing overcrowding. This would have flow-on effects in terms of access to vital rehabilitative programs, and perpetrators would be in a position of risk with respect to eviction from housing, loss of employment, and the worsening of existing mental health and/or substance misuse problems, all of which are connected to family violence in the first place (Russell et al, 2020). These problems endanger women and their children. Adequately resourcing rehabilitative and men's behaviour change programs, would ensure that violence is prevented in the long-term.

We also stand in solidarity, as allies, with community controlled First Nations organisations, and share their concerns about the implications this new law could have on Indigenous women, who are the most over-criminalised population in the world (FVPLS, 2016). We share the concerns that criminalising coercive control is in direct opposition to the process of reducing Aboriginal deaths in custody (FVPLS, 2016). The Aboriginal death in custody of Ms Dhu, who was a victim of family violence, and the deaths of many other Aboriginal women in custody, are a tragic reminder that as a society we are called upon to reverse the trend of imprisonment for Aboriginal and Torres Strait Islander peoples, and in particular, women who are the fastest growing prisoner population, and experience the highest rates of family violence (ABS, 2019). For almost all Aboriginal women who have interactions with the criminal justice system, their experiences of family violence are often the driving cause of their criminalisation (ALRC, 2018).

There is also evidence that Aboriginal women would have difficulties trusting that they would be treated equally in the criminal justice system under a new offence of coercive control (Bucci, 2020). The basis of this lack of trust is deeply rooted in a history of racist and discriminatory interactions with police. Including the fact that in recent history, 20 Aboriginal women in NSW were prosecuted for recanting allegations made to police about experiences of family violence (Robinson, 2013).

Coercive control is not sufficiently well understood by all engaged in the criminal justice response, to ensure that the legislation of a new offence would not carry the risk of criminalising those most in need of protection, the Inquiry must consult community-controlled family violence organisations and legal service providers.

Our caution is also influenced by a history of evidence of women's criminalisation as a result of being incorrectly identified as the predominant aggressor of family violence for their use of defensive violence (Cavanagh, 2003; Wangmann, 2009; Dichter, 2013; Judicial College of Victoria, 2018; Ulbrick & Jago 2018). Consistently and correctly identifying the person most in need of protection in family violence must be a priority before new laws are created.

Evidence also suggests that criminalisation of coercive control decreases safety for victims/survivors and accountability for perpetrators (WLSV, 2020).

The family violence intervention order process is undertaken in a safety-informed jurisdiction. A substantial amount of work has been done to establish specialist family violence legal services that are trauma- and safety-informed and delivered by staff who are trained in identifying risk indicators of family violence, in an environment that is safe and comfortable for all parties (Wangmann, 2009). This is a fundamental aspect of preventing and reducing family violence, keeping victims/survivors safe, and ensuring that perpetrators are visible to the system and held accountable. Placing responsibility for this work into a jurisdiction, such as criminal law, that is not a specialist jurisdiction could have real consequences for victims/survivors and their children (Ulbrick, 2020).

Australia is a unique nation. There is a level of care that needs to be taken when "borrowing" criminalisation innovations from other policy settings and jurisdictions. Given the complexity of coercive control, and the unique needs of Australian citizens, importing law reform initiatives before a formal process of "gap" detection in law has been carried out, bears a substantial level of risk.

Good Shepherd acknowledges there are flaws with the civil approach that can and should be rectified. Nevertheless, the current debates to criminalise coercive control as a separate offence overlook the key issues with the current justice system response. It is not that there is an inherent inability for the system to be utilised to respond to coercive control but rather, there is an absence of a shared understanding of coercive control as *constituting* family violence.

The criminal law plays a significant role in responding to family violence and ensuring the safety of victims/survivors. However, a criminal law response may not always be the most effective way of ensuring safety and holding perpetrators accountable. A criminal law response does not necessarily in-and-of-itself generate change in behaviour or increase safety and security for women.

Question eight: How might the challenges of creating an offence of coercive control be overcome?

Good Shepherd is of the view that the improved justice system response to coercive control must be progressively staged. The first stage must ensure family violence is expressly defined in NSW family violence legislation. The definition must reflect the nature and dynamics of family violence, and in this way, explicitly recognise coercive control as the defining feature of family violence. The immediate focus must be on the roll out of extensive and ongoing police training, and training of all professionals working across the specialist family violence services sector, as well as training of professionals working in allied-industries and the corporate sector.

Furthermore, Good Shepherd echoes the view that criminalising coercive control may operate to weaken criminal responses to family violence. As Tolmie (2018: 50) argues:

> Successful implementation of such an offence may require a complexity of analysis that the criminal justice system is currently not equipped to provide and will require significant reforms in practice and thinking. If it is not successful such an offence could conceivably operate to minimise the criminal justice response to family violence.

Good Shepherd asserts that improvements to the civil jurisdiction and the non-legal response mechanisms for addressing coercive control are required before criminalisation can be implemented to the benefit of victims/survivors.

The efficacy of offences introduced elsewhere must be examined in broad terms and include: the impact on help-seeking, victim/survivor experience of the court system, victim/survivor safety and wellbeing, perpetrator accountability, police accountability (alongside a robust independent complaints mechanism).

Good Shepherd urges the development of a conceptual framework of coercive control, which will increase societal understandings of the nature and dynamics of family violence. All justice system practitioners must be required to enact their responsibilities according to a nationally consistent definition. Crucially, coercive control must be capable of satisfying the test for an interim intervention order without the presence of physical violence. This will ensure the earliest possible intervention to prevent the escalation of violence and abuse.

Question nine: 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 evidence-base is evolving, and it may become the case in the future that a separate offence is an appropriate and necessary element of our response to coercive control. In that case, we reiterate our position that *if* a new offence were to be introduced, we advocate for a general offence of family violence that fairly labels and captures the moral gravity of the wrong and the continuum of harm. Good Shepherd makes no further comment or recommendation in relation to the scope of the offence, or behaviours/factors to be taken into account.

We take the opportunity to point out that the decision to craft new law, as a mechanism of "gap-filling", reflects a widespread perception that the focus on the existing criminal justice response on discrete, physically injurious assaults, is too narrow to capture the patterns of coercion and control central to the experiences of women seeking help for family violence. In almost all cases, the system responds only to the more readily identifiable and easily evidencable forms of violence, such as physical abuse. Non-physical forms of family violence, such as coercive control and economic abuse, are rarely sufficient alone to form the basis of an interim intervention order.

It is clear there are difficulties in operationalising everyday forms of non-physical violence in the legal process. However, while Good Shepherd agrees that the perpetual focus on physical forms of family violence undermines the civil intervention order system as a mechanism for protection for victims/survivors of family violence, there is insufficient evidence to support the notion that there is a gap in the legislative response to coercive control. In this regard we draw the Committee's attention to new national research, being undertaken by the Monash Gender and Family Violence Prevention Centre (MGFV), which is examining legal responses to coercive control; this research will centre the perspectives,

experiences, and expertise of victims/survivors of coercive control. This research will contribute significantly to the evidence-base on this issue.

We also remind the Committee that to date, no reviews have been conducted to analyse any possible gaps in NSW civil legislation, in terms of the justice system response to coercive control. Good Shepherd asserts that coercive control is not a problem that can be fixed by more law. The implications of 'gap'-filling as a criminalisation mechanism significant. As Quilter (2020: 113) explains:

> Single-stage executive driven lawmaking often follows a tragic fatality, which leads to a 'quick fix' legislative change usually in the form of the creation of a new offence. Historically, these laws have exceptional features, derogating from fundamental principles of the criminal law, and have led to overcriminalisation. The creation of a new offence expands the coercive and punitive parameters of the criminal law, often exacerbating, rather than remediating the core issue.

Good Shepherd suggests that what is required is a better understanding of the use of existing laws in NSW with respect to coercive control. To this end, Good Shepherd is currently undertaking research to examine possible gaps in NSW's legislative approach to family violence. The research is also considering the utility of 'coercion' in criminal law by examining the existing provisions related to slavery and human trafficking as contained within Sections 270 and 271 in the *Commonwealth Criminal Code, 1995 (Cth)*. Practice experience within this field has demonstrated considerable challenges in prosecuting offences of slavery and human trafficking—a key issue being the evidentiary requirements to establish the burden of proof of coercion as a key element.

In our view, it would be desirable to avoid creating new laws before the evidence-base is properly established.

Question ten: Could the current legislative regime governing ADVOs better address coercive and controlling behaviour? How?

It is necessary to lay out a brief overview of the history of the civil intervention order process as part of the response to family violence. The civil intervention order process was introduced to overcome the limitations of the criminal law in responding to family violence. The system was a product of feminist activism focused on generating a more sensitive and nuanced response to the specific

harms experienced by women in the context of family violence. It is well established that the criminal law is a blunt instrument that is neither sophisticated nor subtle enough to deal with the range of harms experienced (often co-occurring, cyclical and cumulative) as the primary or only response.

In light of this, civil protection orders were seen as having many key advantages over the criminal law insofar as its increased accessibility, the lower burden of proof (e.g., on the balance of probabilities rather than beyond reasonable doubt), the provision of future protection, and the ability of women to commence and instruct their own legal action. Importantly, it was considered that 'a civil procedure may ameliorate the reluctance many victims have about involving the criminal law and its associated features of punishment' (Wangmann, 2009: 16). They have subsequently become the most frequently relied on legal mechanism available to victims of family violence.

The civil intervention order system was not introduced as a replacement for criminal law. Instead, it provides another legal option to victims of family violence. It is therefore possible to have both an intervention order and criminal charges arising from the same incident. This is an appropriate and nuanced complementary approach.

We recognise that the civil process cannot be considered the only solution for dealing with coercive control, however, in the absence of other tangible remedies, we believe it is inadequate and unsatisfactory that this option remains inaccessible unless there is evidence of physical or visible violence.

The civil system must reflect best practice understandings and approaches to family violence. Currently, a limitation of the civil system across Australia is the absence of a consistent definition of family violence, which includes coercive control. NSW civil legislation provides no explicit definition of family violence at all. This is a critical issue to address.

We strongly believe that improved training/understanding around the centrality of coercive control to family violence is required to improve the civil process and to strengthen early intervention.

Unlike other crimes, family violence requires a more nuanced approach. Victims/survivors often remain tied to the perpetrator through shared custody of children, jointly held property, or joint liability to debt. For some victims/survivors, they may choose to remain with the perpetrator, or reunite after a period of separation, and simply want the violence to stop.

The civil process provides safety for victims/survivors, holds perpetrators to account and keeps them in sight of the justice system. Appropriate referrals can be made to address the perpetrator's individual behaviour/s and the constellation of contributing factors. The civil process recognises that a carceral approach in the first instance does not achieve the intended aims of rehabilitation for the perpetrator, or safety for the victim/survivor.

The lower burden of proof in civil law means that for an order to be made, the court must be satisfied that it is 'probable' the violence occurred and may occur again. However, as the excerpts from magistrates in Ulbrick's (2020) research reveals, the civil system is still not capturing and responding to non-physical forms of violence alone before they escalate into physical violence.

According to Ulbrick's research, this was a source of frustration for specialist family violence magistrates, who were critical of the fact that they rarely receive submissions in relation to non-physical violence, such as economic abuse:

> **I think it's an extremely poor situation that those that act for women in intervention order lists don't see this as a key question. That is shameful. It can be simple, "do you have your own income? Do you have access to the money you need? What do you think would happen if you left?" It's in the legislation. So lawyers not making submissions because they expect it to be rejected – how outrageous and shameful; that's not how the system works. And unless we've got them in the applications, unless we ask about it, we can't respond to it…**
>
> **… It does not have to be difficult. All you've got to say is, "Also, Your Honour, there's economic abuse, there's no money for the children". It is so common. Economic abuse is scarily common…**
>
> **… It's very frustrating from a judicial point of view that the lawyers don't take this more seriously. So, it's a massive problem in the understanding by lawyers, and the quality of legal appreciation on the other side of the bar table. And it's poor overall.**
>
> Anonymous magistrate (Cited in Ulbrick, 2020: 161)

Good Shepherd asserts that for the civil intervention order system to have a regulatory effect, applications must encompass the full breadth of family violence. It is problematic that it is apparently difficult to satisfy the grounds for an interim intervention order on the evidence of economic abuse alone.

GSANZ Submission to the NSW Joint Select Committee on Coercive Control.

Given its long-lasting and devastating impacts, and the reality that it typically occurs alongside other forms of violence, this in turn means that the opportunity for prevention of serious and ongoing violence is lost.

The most significant limitations of the system appear to be the absence of a shared definition of coercive control, and the current training practices of all practitioners, judicial members and police working in the family violence setting.

Question fifteen: 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?

Guiding any approach to preventing family violence should be the recognition that family violence is complex and requires an integrated and coordinated approach. A coordinated approach involves professional collaboration – and a sharing of practice approaches and priorities. For instance, health, allied health, and justice professionals play significant roles in identifying and intervening in family violence – and providing an integrated, consolidated intake point. An integrated approach to family violence reduces the burden on victims/survivors to navigate a fragmented service system, where they may find themselves ineligible for services they approach, while telling their story repeatedly.

There is a lack of consistency and coordinated responses to family violence in NSW. This is manifested through inconsistent or unclear policy and legislation as well as through working in siloes. Stronger structures for coordination need to be developed, if we are to respond early to coercive and controlling violence.

The structures of coordination and integration must be underpinned by the guiding principles of the safety of women; the accountability of perpetrators; and the agency of women.

Good Shepherd asserts that the prevention of coercive control is everyone's responsibility. We advocate for a consistent, coordinated approach that extends beyond police, courts, and corrections, to better include health, allied-health, and education professionals (e.g., GPs/maternal child health/obstetrics/refuges/legal services/fire services/schools) in the identification, early intervention and prevention of coercive control.

Such an approach would mean that whatever entry point a victim/survivor comes into contact with is the right one, acknowledging that the way a victim/survivor heals is often linked to how their abuse is handled.

Family violence frequently involves other social, legal and mental health issues, such as substance misuse, child protection involvement, criminal proceedings, and poor mental health. These factors require a multidisciplinary approach in order to properly address the underlying cause/s and meet the service needs of the individual/s. However, our practice experience suggests there are very limited multidisciplinary services available in the community in NSW, and of those that do exist, there is limited collaboration between services. There is a need for a multidisciplinary, collaborative approach to addressing coercive control that is underpinned by a framework of trauma-informed care. This approach also needs to be perpetrator focused. All services within the wide-ranging integrated model must be supported and trained to focus on perpetrators.

Good Shepherd asserts that the principles of a coordinated, multidisciplinary approach to coercive control must include:

1. A shared understanding by all stakeholders on what coercive control involves.
2. Development of mutual respect and space for the various perspectives and priorities that are present for multi-disciplinary professionals.
3. Institutional capacity building, including at basic training level.
4. Be victim/survivor led.

These principles ensure that whatever model is adopted to support coordination, whether services are connected with them formally or not, the approach for victims/survivors is consistent and not repetitive. Listening to the experiences of victims/survivors and how the fragmentation of responses impedes access to services, is critical.

In seeking to improve responses to coercive control, Good Shepherd is working to develop non-legal responses, which will strengthen cross-sector collaboration. Our novel, cross-sector pilot approach to addressing coercive control, considers the expansion of provisions or additional facilities for dealing with debt arising in the context of coercive control. Specifically, we are considering the utility of debt abuse clinics within the mainstream financial services sector.

We are also working to develop a risk guidance tool for use within the family law courts, as well as in the financial services/corporate sector, acknowledging that the current legal frameworks do not provide protection against coerced debt and that 'there isn't a safe risk assessment tool, in all contexts' (Ulbrick, 2020: 213).

Previous research by WEstJustice (Tonkin, 2018) demonstrated the need for early intervention support around economic abuse as a form of coercive control. This work only just scratched the surface of demand for this insidious social problem. Our work in this space will provide the holistic, early intervention and integrated approach to service delivery for victims/survivors as contemplated by the recommendations of the Victorian RCFV.

Good Shepherd urges the Committee to consider large-scale piloting and implementation of programs of this nature.

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