

**Domestic Violence Prevention Council Advisory Board
Joint Discussion Paper on Criminalising Coercive Control**

Summary and Recommendations

1. This paper reflects the collective discussions of the Domestic Violence Prevention Council (DVPC) Advisory Board, established to advise the DVPC who will advise Yvette Berry MLA, Minister for the Prevention of Domestic and Family Violence, on the feasibility of criminalising coercive control as a stand-alone offence in the ACT.
2. Criminalising the behaviour, if done appropriately, could provide clarity over what coercion is and improve the options available for victims. It is noted that not all Advisory Board members agree as to whether the criminalisation of coercive control is the most effective immediate mechanism to improve family violence outcomes. However, the Board agrees that coercive control is the insidious thread of behaviour that runs through the majority of instances of family violence. That is, coercive control is inextricably linked with family violence and should not be viewed as separate or different.
3. Before any legislative reform is considered, the Advisory Board recommends that:
 - a. Further community-led consultation occur with Aboriginal and Torres Strait Islander communities, supported by resourcing and adequate timeframes. This consultation should:
 - i. Allow adequate time for the Aboriginal and Torres Strait Islander Reference Group of the DVPC (the Reference Group) to consider this paper and discuss it in person;
 - ii. Ensure Torres Strait Islander community members, in addition to Aboriginal community members, are included in community consultation, noting there are no Torres Strait Islander representatives on the Reference Group;
 - iii. Seek to understand how coercive control functions in Aboriginal and Torres Strait Islander communities;
 - iv. Ensure accessible language, including consideration of the term 'coercive control'.
 - b. Further community-led consultation occur with any other communities identified by the Domestic Violence Prevention Council as being at risk of unintended consequences as a result of legislative reforms, particularly LGBTIQ+, culturally and linguistically diverse, and disability communities. This consultation should also be supported by resourcing and adequate timeframes;
 - c. The ACT Government observe implementation of legislation to criminalise coercive control in other Australian jurisdictions, to inform possible approaches in the ACT.
4. Furthermore, if legislative reforms are developed, they should be accompanied by:
 - a. Exploration of existing family violence offences, particularly the family violence order scheme, to determine gaps and areas for improvement;
 - b. Ongoing implementation of the recommendations from the 2020 Family Violence Act Review;
 - c. Continued consultation across government, support agencies and the wider community regarding coercive control, in particular:

- i. Continued consultation with Aboriginal and Torres Strait Islander communities; and
 - ii. Continued consultation with culturally and linguistically diverse, LGBTIQ+ and disability communities.
 - d. A commitment to eliminating unintended consequences as far as practicable;
 - e. Continued establishment of formalised information gathering and sharing mechanisms from across government and support agencies;
 - f. Broad-scale, consistent training for all agencies, including training for first responders to address instances of Aboriginal and Torres Strait Islander women being incorrectly identified as perpetrators;
 - g. Expansion of specialised family violence services and teams; and
 - h. Ongoing community education to assist members of the public to identify and respond to coercive behaviours – this should include consideration of the accessibility of the language of ‘coercive control’.
5. The ACT Government is encouraged to progress the measures in item 4 independently of any legislative reform.

Background

1. Criminalising coercive control has gained international traction in recent years and nationally in the past several months. In response, Yvette Berry MLA, Minister for the Prevention of Domestic and Family Violence, has referred the matter to the Domestic Violence Prevention Council (DVPC) for inquiry and advice.
2. The *Family Violence Act 2016* (ACT) ('Family Violence Act') currently includes in the definition of family violence coercive behaviour, meaning that a family violence order can be made to address coercive control. However, there is no stand-alone criminal offence for coercive behaviour that occurs outside a family violence order.
3. Additionally, whilst 'coercion' is broadly included in the definition of family violence in the Family Violence Act, the Act provides no explicit definition for what may be considered as coercive behaviour. Broadly, coercive control is taken to be a pattern of behaviour, where the perpetrator uses tactics such as emotional and economic abuse to control and dominate the victim. The perpetrator may control or limit the victim's access to money, friends, family and support in order to limit the victim's freedom and make them dependant on the perpetrator for their basic needs.
4. Internationally, the UK (England and Wales) and Scotland have created stand-alone offences for coercive control, with the Scottish model and implementation of the offence cited as the 'gold standard' for the criminalisation of coercive control. In Australia, no jurisdictions have implemented a criminal offence for this behaviour, however Tasmania has had laws criminalising emotional and financial abuse since 2004. Commentary has suggested that these laws have been underutilised since introduced. However, all Australian jurisdictions are currently considering criminalising coercive control. In the 2021-22 budget, the Federal Government has committed \$4.7 million in funding to the Commonwealth Attorney-General's Department to develop policies to strengthen justice responses to sexual assault, sexual harassment and coercive control. This work will be done in close consultation with all States and Territories.
5. This paper considers whether there is a gap in the ACT's legislative framework relating to coercive control and what enhancements can be made to improve outcomes for victims of these behaviours.

Current Framework

6. Under the current family violence framework, criminal charges can be pursued for coercive or controlling behaviour under a two-step process. As coercion is included in the definition of family violence, a family violence order can be sought and granted under Part 3 of the Act for coercive behaviour. A number of conditions can be placed on the subject of the order to prevent them from causing further harm to the victim. A breach of the order is then an offence under s 43 of the Act, attracting a maximum penalty of five years imprisonment. The coercive behaviour itself is not criminalised unless that behaviour is restricted in the family violence order.
7. The complexity of the two-step approach has created a number of hurdles for victims, support services, police and prosecutors when attempting to address coercive behaviour. Anecdotally, members of the DVPC Advisory Board advised that many victims are unaware that coercive control is family violence and that they are being victimised by this behaviour.

Victims are consequently not seeking out help or support for coercive behaviour until it escalates further into more well understood forms family violence, such as physical violence.

8. Similarly, police and prosecutors experience difficulties enforcing breaches of family violence orders for coercive control as the behaviour is not easily identifiable and may seem innocuous when perceived in isolation.
9. The issues that exist under the current two-step process cannot be entirely eliminated by the creation of a specific criminal offence for coercive behaviour. However, criminalising the behaviour through a stand-alone offence could provide opportunity for the ACT to clearly identify what coercive control is and increase community and law enforcement awareness of this form of family violence.
10. Given the insidious and often well-hidden nature of coercive control, this influences the paucity of policing and prosecution data regarding coercive and controlling behaviours, despite the DVPC Advisory Board being acutely aware that these behaviours are occurring across the ACT community. The Board notes that strengthening the research base will guide policy development in relation to the best approach to coercive control, including any development of a potential stand-alone offence. This research base may more likely be stronger from a qualitative perspective rather than quantitative, focusing on victim-survivors experiences.

Characterisation of Coercive Control

11. The clear identification and characterisation of what coercive control is and how it manifests in a relationship is critical to any reform to target this behaviour. A coercive control offence would capture the continued repetition and/or escalation of a pattern of coercive behaviours, rather than individual incidents in isolation. Coercive or controlling behaviour does not relate to a single incident, it is a purposeful and systemic pattern of incidents that occur over time in order for one individual to exert power, control or coercion over another.
12. The Scottish *Domestic Abuse (Scotland) Act 2018* is often referred to as the 'gold standard' for coercive control legislation, carrying penalties ranging from 12 months to 14 years. In this Act, coercive control is characterised as behaviour that:
 - a. Makes B (victim) dependent on, or subordinate to, A (offender); or
 - b. Isolates B from friends, relatives or other sources of support; or
 - c. Controls, regulates or monitors B's day-to-day activities; or
 - d. Deprives B of, or restricts B's, freedom of action; or
 - e. Frightens, humiliates, degrades or punishes B.
13. Behaviour displayed on only one occasion would not amount to repeated or continuous behaviour. Courts would likely look to an evidence of a pattern of behaviour established over a period of time rather than one or two isolated incidents. However, legislation should not be overly prescriptive but rather allow for each case to be considered on its merits. Legislation should not set a number of incidents in which controlling or coercive behaviour must be displayed in order to be proven, nor should legislation specify a particular timeframe within which two incidents must occur.
14. With appropriate and thorough training for agencies and services, criminalising coercive control would increase the likelihood of early intervention in family violence situations. This

results in another tool being available to police and prosecutors to charge an alleged offender, potentially before a further escalation of physical violence. For many family violence related deaths, there is often an escalation of coercive control behaviours without physical violence prior to the death. These behaviours are often not reported to support agencies or police, and may not be perceived by the victim as coercive or indicative of a family violence relationship.

15. It is noted that there was significant consultation with the family violence sector and the community in Scotland in developing the scope of their offence. Similarly consultation to develop a shared understanding and definition of coercive control for the purposes of criminalisation will be vital to its success.

Information Sharing

16. The Advisory Board acknowledges that each agency and service has a role to play to minimise and respond to family violence. However, in order for a coercive control offence to be successful, broad-scale information sharing procedures will need to be established across agencies to provide police and prosecutors with a full understanding of a coercive relationship, and increase the likelihood of successful prosecution.
17. Police are often involved in responding to individual incidents, whereas the collection of information from across the system will enable the painting of a 'picture' of a potential pattern of behaviour. Research shows that perpetrators of coercive behaviour are usually quite skilled at evading and coercing victims to avoid police interactions. Typically, police involvement occurs later in the continuum of violence, with coercive behaviours largely occurring undetected by police in the community in private settings, or perhaps only known to the victim and support agencies. Information from other sectors, such as health, education, family violence support agencies, and child protection would assist in corroborating a charge of coercive control.
18. It is also often the case that involvement of police can result in an escalation of violent behaviour. It is therefore essential to ensure that police are able to access and use information from other sectors to be aware of evidence of patterns of coercive behaviour prior to engagement with the alleged offender, to promote victim safety and swift police responses.
19. However, the Advisory Board acknowledge that there are risks associated with creating broad-scale information sharing mechanisms across agencies and governments. Currently, victims of family violence or coercive behaviour seek out support services as they may not feel comfortable approaching police. This discomfort may be attributable to a number of factors including fear of repercussions from the alleged offender, doubt the matter will be properly investigated, or general distrust of police.
20. Victims may therefore feel reluctant seeking support from independent services if they know there is a likelihood the matter will be referred to police. These victims will then become further isolated within the controlling relationship.
21. These risks can be mitigated to an extent by the development of cross-agency prosecution practice guides and/or policies. Collaboration between ACT Policing, the DPP, ACT Government, and support agencies will ensure that effective and victim-focused inter-agency procedures are established to facilitate the investigation of a coercive control

offence and provide the victim with the best possible outcome. For example, prosecution practice guides or policies could set out that information from support services could potentially only be shared with police or prosecutors with a victim's consent. Further safeguards can be explored as necessary to ensure that victim safety is paramount.

22. In recent years, an expansion of family violence information sharing between agencies has already occurred, allowing for a more targeted and intervention-based response to family violence. In 2020, ACT Policing, Youth Protection Service, Domestic Violence Crisis Service, Victims Support ACT, the Victims of Crime Commissioner and the Coordinator-General for Family Safety collaborated to bring services together and facilitate the sharing of information regarding perpetrators and victims. Creating a coercive control offence would not alter these pre-existing arrangements, but rather build on them to ensure that coercive behaviours are captured in this information exchange.

Evidential and Prosecutorial Issues

23. The experience in the United Kingdom (see '*United Kingdom Experience*' below) suggests that the majority of coercive control cases face evidential difficulties. Research indicates that cases resulting in charges of coercive control incorporated evidence from multiple sources including:
- a. Previous convictions for family violence;
 - b. Admissions of guilt;
 - c. Substantial physical evidence (e.g. criminal damage or a physical injury);
 - d. Presence of surveillance technology (e.g. in cars or mobile phones); and
 - e. Police body worn camera footage.
24. Notably, coercive behaviour in a family violence situation is likely to be made up of a number of seemingly minor actions, which when taken individually would not amount to an offence. Police and prosecutors will have to establish a clear pattern of behaviour that, when taken as a whole, establishes coercive behaviour.
25. Any legislation developed will have to include clear definitions of what coercive behaviour is and how particular actions can collectively amount to a coercive pattern. Establishing clear physical and fault elements for the offence will remove uncertainty and allow police to gather appropriate evidence and prosecutors to clearly establish the elements of the offence.
26. Across the United Kingdom, there are published prosecutorial guidelines on their public-facing website, explaining what coercive behaviour is, how effective evidence can be gathered, and how prosecutors can select the most appropriate charge. The criminalisation of coercive behaviour in the ACT would benefit from similar guidance for police and prosecutors to ensure that admissible and relevant evidence is gathered and presented.
27. Building and establishing a pattern of behaviour to ensure successful prosecutions will place an additional burden on a number of directorates and support agencies. The exact impact on resources will depend on the form that the amendments take, however there may be a need for additional funding from the ACT Government to ensure the effective implementation of any amendments.

Aboriginal and Torres Strait Islander communities

28. Aboriginal and Torres Strait Islander communities are at particular risk of unintended consequences from the criminalisation of coercive control. Members of the Aboriginal community in the ACT have noted that Aboriginal women have been incorrectly labelled as perpetrators in many instances, which has resulted in devastating impacts for families and communities.
29. Earlier this year the Aboriginal Legal Service, in a submission to the New South Wales Joint Select Committee on Coercive Control, also emphasised the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system and raised the concern that the criminalisation of coercive control may be unjustly applied to Aboriginal and Torres Strait Islander victims. This submission ultimately recommended that further cultural training for police and the creation of holistic services to support Aboriginal and Torres Strait Islander peoples.

Intersectionality

30. There are specific types of coercive control behaviours relevant for certain communities within the ACT. It is important that the varying types of coercive control across intersectional communities are appropriately captured in how the legislation can be generally interpreted. Understanding intersectionality and violence is crucial to improve the outcomes for these groups. This includes but is not limited to:
 - a. Aboriginal and Torres Strait Islander communities (including the higher rates of violence experienced);
 - b. Cultural abuse (e.g. dowry abuse, trafficking, or manipulation of a visa situation);
 - c. Abuse experienced within LGBTQIA+ communities (e.g. threatening of 'outing' the victim); and
 - d. Abuse experienced by those with disabilities (e.g. technological abuse).
31. Early engagement with these communities will be important to ensure that their needs are captured within a coercive control offence. This can be further supported by education campaigns to inform these specific communities and the broader public of what coercive behaviour is, how to identify it and how to respond to it. Collaboration with community leaders will identify the best way in which to convey this information to members of those communities. Working with these leaders will also give them the tools necessary to identify and respond to coercion within their respective communities.
32. The Advisory Board notes that a key challenge will be building trust and establishing positive relationships with communities and individuals who may have a historic distrust of police and/or government. For example, Aboriginal and Torres Strait Islander peoples have been historically overpoliced and experienced discrimination and violence at the hands of police. LGBTQIA+, culturally and linguistically diverse, and disability communities may also have historic distrust of these institutions.
33. These concerns were emphasised by the submissions received by the New South Wales Joint Select Committee on Coercive Control earlier this year. For example, the submission of Muslim Women Australia, whilst broadly supportive of criminalising coercive control, emphasised that early collaboration with vulnerable groups and extensive training for police, prosecutors and the judiciary would be critical to ensuring the success of any new offence.

34. The Advisory Board recommends, should the decision be made to criminalise coercive control, that particular steps be taken to ensure there are no unintended consequences. Consequently, the Advisory Board recommends that prior to pursuing legislative reform, the ACT Government commence extensive consultation across the family violence sector, the broader ACT community, and in particular communities including Aboriginal and Torres Strait Islander, LGBTIQ+, culturally and linguistically diverse and disability communities. This consultation should include considerations of the concerns raised by communities, organisations and individuals in relation to the proposal to criminalise coercive control, and look at alternatives to criminalisation where necessary. This early engagement with communities and community leaders will be a critical first step in mitigating distrust and creating an effective regime for all victims.

Risks

35. Whilst criminalising coercive control is intended to target tactics used by family violence offenders, there is a risk that some defensive behaviours undertaken by victims could be misinterpreted as coercive. For example, a victim may funnel money away to escape a coercive relationship, but the behaviour of diverting money could be seen as an attempt to financially control the offender. Any new offence will need to consider protections and defences to prevent the victim being wrongfully charged. Appropriate wording of the offence, clarifying that a pattern of behaviour is required to establish a coercive relationship, will further protect victims and prevent them from being wrongfully charged. This is an additional potential unintended consequence, also requiring more consultation with communities. Indigenous victims being wrongly identified as a perpetrator is a consistent identified risk raised by the Board that must be addressed.
36. Criminalisation of coercive control, whilst a positive next step, may not result in an immediate reduction of family violence incidents or a significant use of the new offence. If the amendments are constructed in an unclear manner, victims, police and prosecutors will not be confident in reporting or pursuing the charge. As this paper argues, early consultation across community groups, a clearly defined offence, thorough training across sectors and extensive education campaigns will support the introduction and continued use of the offence. These factors have been identified as critical in Scotland's development of the offence.
37. The introduction of any new offence creates the risk that offender tactics will develop so as to go undetected by police. Particularly in the case of family violence, the advancement of technology has enabled offenders to adapt and create new ways in which to control their victim. Any offence introduced should be adaptable to respond to these changes or provide a review mechanism of the legislation to identify improvements to the offence. A coercive control offence could be progressed along with other reforms in the family violence space, including restrictions on the civilian use of tracking devices and the introduction of a police issued safety notice scheme, to ensure that a holistic approach to legislative reform is progressed.

Alternatives to Legislative Reform

38. Criminalisation of coercive control is an important potential reform warranting further consideration from government and the community. Whilst it is not necessarily a legislative

gap, criminalisation may act as an additional tool that will allow for other improvements and reforms in the family violence space to occur.

39. However, there are differing views within the Advisory Board and within the broader community as to whether the criminalisation of coercive control is the most effective mechanism to improve family violence outcomes. The following improvements to the existing family violence regime could be implemented as an alternative to legislative reform:
- a. Further exploration of the existing coercive control provision in the family violence order scheme and why this provision is rarely used;
 - b. Increased public education drives regarding family violence to assist victims in identifying early signs (including that of coercive control) and seeking support;
 - c. Increased funding to respond to family violence incidents for services and agencies;
 - d. Development of further cross-government procedures and training for family violence to provide a holistic response to family violence; and
 - e. Ongoing implementation of recommendations from the 2020 Review of the Implementation of the *Family Violence Act 2016* (ACT).
40. Each of the above alternatives to legislative reform can also be considered in conjunction with legislative reform. Indeed, the successful implementation of a coercive control offence would occur only if the above options are considered and introduced in unison, or potentially before the introduction of a new offence. The Advisory Board in particular notes the recommendations arising from the 2020 review and the significant impact that the implementation of these recommendations will have on the family violence framework.
41. Indeed, Scotland's journey to criminalisation took approximately five years, in close consultation with communities to draft the offence fit for their specific context. The Advisory Board recommends that should Government pursue the criminalisation of coercive control in the ACT, such reform is viewed in terms what is needed to improve the response to family violence holistically.

Jurisdictional Approaches

42. Across Australia, a number of jurisdictions are currently considering whether the criminalisation of coercive control is necessary to improve outcomes for victims. In addition to the previously mentioned the NSW Inquiry, which has yet to release its final report, NSW also currently has a Bill before its parliament which draws on existing offences to characterise coercive control.
43. The Queensland Government has also announced that that it will be conducting an inquiry in the criminalisation of coercive control. Federally, the Commonwealth Government's funding commitment to strengthen response to coercive control will see close collaboration between the States and Territories on the issue.
44. The Advisory Board recommends that the experiences and results from the State Inquiries and the Federal focus on coercive control be considered closely by the ACT Government if criminalisation is pursued.

United Kingdom Experience

45. The experience of overseas counterparts throughout the UK, notably England and Wales, has been that police and prosecutors are reluctant to pursue charges for coercive control or charges are often dropped if initiated. This reluctance is largely attributed to a combination of lack of confidence in evidence and a lack of training in identifying both coercive control and family violence generally. This overall experience supports our current early policy position that clear evidential requirements be established and supported by extensive training and education campaigns.
46. The English and Welsh experience particularly emphasises that to effectively use a coercive control offence, police officers require training to support a shift in thinking away from typical 'incidents' towards ascertaining particular contexts and patterns of behaviour.
47. Research in the UK also suggests that victims are less likely to report coercive control than they are physical violence. Community education about the role of police in coercive control situations and the ability for police to intervene may assist in building community confidence in reporting generally for family violence, as well as any new coercive control offence.
48. When England and Wales criminalised coercive control, supporting guidance was also released to guide prosecutions. The offence in s 76 of the *Serious Crimes Act 2015* (punishable with a maximum prison sentence of five years) is narrower than the current Bill before NSW Parliament. The Home Office (UK) indicates there are plans for a statutory government definition of domestic abuse that will cover psychological, physical, sexual, economic, and emotional abuse, most of which are covered by the NSW Bill. Since the introduction of the offence in the UK, there has been a focus on utilising the offence to prevent violence from turning physical.
49. However, for the first two and a half years of the new law, the majority of cases were dropped without a charge. Data obtained by the BBC from 33 police forces in England and Wales, for January 2016 to July 2018, showed there were 7,034 arrests, but only 1,157 cases ended with someone being charged. 4,837 cases were dropped by police or prosecutors. The Home Office said there had been 235 successful convictions since the law was introduced.
50. The outcome of cases varied considerably in different areas, and in some instances individuals may have been arrested more than once, or charged more than once.
51. Since the introduction of the coercive and controlling offence in December 2015 until approximately 2018, there was 235 successful convictions and a three-fold increase in the number of defendants proceeded against. However, more recent data suggests that the offence is being utilised more frequently by police, which could indicate more confidence by police to pursue a charge.
52. The experience in England and Wales suggests that, to enable uptake of a coercive control offence upon its commencement, police training and support is necessary to ensure members feel confident to charge alleged perpetrators. Scottish prosecutors have also reported that police and judicial resourcing and training has been integral their successful conviction rates.
53. The Scottish characterisation of a coercive control offence differs from that of the rest of the UK. Scotland's development of the offence relied heavily on close consultation with stakeholders, including victims and support services. This consultation saw the development

of an offence that focused on the behaviour and actions of the perpetrator, rather than the actual harm caused to the victim.

54. The Scottish legislation was also supported by broad-scale training for police and the Scottish Women's Aid ahead of the commencement of the legislation. An extensive public awareness campaign was also implemented, informing all members of the community about the new offence and how to seek support in a coercive family violence situation. This dedicated education regime allowed all sectors, including the community, support services and law enforcement to understand the offence before it came into force and then utilise it appropriately once enacted.