

Ms Kati Kraszlan
Commissioner for Victims of Crime
8 August 2022

Legislative Responses to Coercive Control in Western Australia

Introduction

Women's Legal Service Western Australia (**WLSWA**) welcomes the opportunity to make this submission to the Government of Western Australia in response to the *Legislative Responses to Coercive Control in Western Australia Discussion Paper* (the **Discussion Paper**).

WLSWA is a not-for-profit community legal centre funded to provide statewide legal services to women who live with disadvantage in Western Australia. WLSWA provides legal advice and casework in the areas of family law, family and domestic violence, care and protection proceedings and criminal injuries compensation for victims of family and domestic violence and/or sexual assault. WLSWA also promotes women's human rights to be upheld, and fosters legal and social change through a range of strategic activities, including law and policy reform.

WLSWA has been working directly with victim-survivors for 20 years, providing general assistance, education and advocacy in partnership with key sector organisations. Our clients' experiences and voices directly influence our response to the terms of reference (**Terms of Reference**).

WLSWA welcomes the Government's decision to consult broadly on the legislative response to coercive control and we are particularly heartened to see investment into the recommendations made by First Nation controlled organisations. We encourage further consultation with communities facing intersecting marginalisation and a continued commitment to understanding the complex realities of victim-survivors and the very nuanced and silent way that coercive control manifests. Prioritising the recommendations of the front-line and victim-survivors is necessary to ensure that legislation will service those it intends to protect.

WLSWA raises concern over the risks of creating new legislation in respect of a behaviour that is intangible to the untrained eye. For this reason, our submission focuses on the concerns of criminalisation and the need for a holistic, social response along with broad education aimed at increasing our coercive control literacy. **Attached** to this submission is a response to the specific Terms of Reference.

WLSWA is acutely aware that we are dealing with endemic levels of domestic and family violence to which psychological abuse underscores. This creates an assumption across society that the introduction of law to criminalise coercive control is both timely and progressive. However, we suspect the criminalisation of coercive control without significant re-education will do little to protect victim-survivors and could in fact embed further trauma and disadvantage. This is particularly so for First Nations communities and

culturally diverse minorities who face inherent complications and increased vulnerabilities with seeking protection from, and redress, in the law.

Interaction with state enforcement for our First Nations communities is inherently problematic. These communities risk discrimination particularly over behaviours that are difficult to identify and are likely to fuel and complicate other social and potentially legal matters such as child protection and family law.

It is beyond the scope of this submission to adequately address all of the complexities faced by First Nation victim-survivors in family and domestic violence. We will raise, in part, our concern that a legislative response could have unintended and negative impacts for First Nation communities but will defer to specialist Aboriginal Community Controlled Organisations for further substantive responses.

Coercive control

Coercive control is an insidious and unrelenting form of violence that has a lasting and cumulative impact on families, women and children. It has been the subject of policy research and legal discourse and inquiry in Australia, the United Kingdom and Scotland, and although there is no formal definition of coercive control, it is understood to capture patterns of wide-ranging behaviour that involves intimidation, isolation and psychological abuse.

Australia has come some way in understanding coercive control; its multifaceted nature and the consequences on autonomy and liberty. There is broad acknowledgement that we are failing to protect women and a recognition that coercive control is a known predictor of (almost all) intimate partner homicides, a major aspect of most intimate violent relationships and most always based on misuse of power. In NSW alone, between 2008-2016, 111 out of 112 domestic violence homicides featured a relationship of coercive and controlling behaviour.¹

Despite our growing knowledge, our literacy of coercive control and patterns of passive domestic violence is weak. We still do not have a definition of coercive control held in common language and a shared understanding of the victim-survivor experience. The Victorian Royal Commission into Family Violence (2015) (the **Commission**) noted that a critical gap in the Victorian justice system's response, was the absence of a shared understanding of family violence as coercive control, which, the Commission considered would lead to victim-survivors being ignored or disbelieved. This is an important recognition of the impact of our lack of shared literacy.

WLSWA note that even with a unified definition our front-line legal systems will be unable to adequately address coercive control in the absence of widespread training. The police, judiciary and legal stakeholders are, at this stage, unable to consistently and appropriately identify the signs of coercive control. This blind spot must be expected as coercive control is an inexplicable and haunting experience that is held in the confines of intimate partner relationships. To the external eye, victim-survivor compliance may seem voluntary and subtle messages of control unseen. It is this nuance to coercive behaviour that creates the inherent complexities in forming an effective legislative response. Coercive and controlling behaviour often involves subtle cues and messages held between perpetrator and victim-survivor. These covert messages are deeply weighted to the victim-survivor but invisible to the onlooker.

¹ NSW Government, *NSW Domestic Violence Death Review Team Report 2017-19* (2020) Recommendation 27.1
https://www.coroners.nsw.gov.au/documents/reports/2017-2019_DVDRT_Report.pdf.

In *re JK [2021]*, Justice Poole of the England and Wales High Court (Family Division) opined on the difficulty of identifying coercive control: *‘[some] specific instances of behaviour will not constitute abuse themselves and may appear to be relatively trivial if looked at in isolation but are in fact important evidence of a pattern of abuse, or the effects of abuse, when set alongside other findings.’*²

Similarly in *F v M [2021]*, Justice Hayden of the England and Wales Family Court referred to coercive control as a *‘particularly insidious type of abuse, [which] may not easily be captured by the more formulaic discipline’*.³ He further noted, *‘what is really being examined in domestic abuse of this kind is a pattern of behaviour, possibly over many years, in which particular incidents may carry significance which may sometimes be obvious to an observer but to which the victim has become inured’*.⁴

WLSWA recommends that any new legislation must be buffered with broad scale and accountable re-education of all stakeholders who enforce, prosecute and apply law⁵, accompanied with targeted front-line support. These social measures would work towards creating an environment where new law could be implemented with less risk. Without such measures, legislation could result in unintentional misuse, misidentification of victim-survivors and could possibly create further barriers to accessing justice.

WLSWA also raises concerns about the difficulty in breaking down patterns of behaviour into elements of an offence, especially when that behaviour is imperceptible to those outside the intimate relationship or immediate family.

CALD experience of domestic violence and coercive control

WLSWA recognise that many culturally and linguistically diverse (CALD) victim-survivors are not comfortable reporting physical and sexual violence, let alone coercive and controlling behaviour. Extensive consultation is needed to identify the unintended, and potentially negative, consequences of the proposed reforms on these victim-survivors who face intersecting disadvantages that include language barriers, misunderstood cultural and religious practices, unfair immigration processes, social isolation and fear of contact with state authorities.⁶ These deeply entrenched barriers directly impact their ability to engage with domestic violence responders and must be considered in any social and legal response.

The term “culturally and linguistically diverse” is also problematic, as it risks homogenising all cultural and ethnic minorities into a single group.⁷ In reality, CALD victim-survivors have vastly different lived experiences depending on whether they are a first or second-generation migrant or a refugee who has

² [re JK \[2021\] EWHC 1367 \(Fam\) at \[26\]](#).

³ *F v M [2021]* EWFC 4 at [113].

⁴ Ibid.

⁵ State of Victoria, Royal Commission into Family Violence: Summary and recommendations, Parliamentary Paper No 132 (2014–16), p.27.

⁶ Annabelle Allimant and Beata Ostapiej-Piatkowski (2011), Supporting women from CALD backgrounds who are victim/survivors of sexual violence: Challenges and opportunities for practitioners, Australian Institute of Family Studies, p. 11 < ACSSA Wrap 9: Supporting women from CALD backgrounds who are victims/survivors of sexual violence: Challenges and opportunities for practitioners (aifs.gov.au)> and Victorian Government Department of Health, Home Relationships Family violence – culturally and linguistically diverse victim-survivors (Web Page) < Family violence – culturally and linguistically diverse victim-survivors - Better Health Channel>.

⁷ Jenny Maturi and Jenny Munro, Refugee and migrant women are often excluded from mainstream domestic violence services and policy, *The Conversation* (online, 25 July 2022) < [Refugee and migrant women are often excluded from mainstream domestic violence services and policy \(theconversation.com\)](#)>.

fled a conflict.⁸ This can influence how CALD victim-survivors experience violence and/or engage in society and access support. Overwhelmingly, the literature confirms that CALD victim-survivors' experiences of physical and sexual violence and coercive control exist on a dual paradigm, that is, victim-survivors are as much concerned with the repercussions of disclosure on family and community, as they are with formal processes for reporting violence.⁹ Again, this understandably perpetuates their reluctance to engage in state-led domestic violence response.

WLSWA has provided legal assistance to many CALD women, living with coercive control, and who are very reluctant to report or leave a violent relationship because of the wide-ranging cultural consequences of this. For this reason, WLSWA recommends that the specialised responses and supports needed by migrant, refugee and CALD women are designed in close consultation with women who have this lived experience.

Perpetrator accountability

WLSWA attend the Coercive Control Workshop jointly hosted by CLWA and the Commissioner's Office on 29 June and noted that the majority of victim-survivor submissions already received supported the criminalisation of coercive control despite its difficulties. One of the recurring themes was the need to ensure perpetrators are held to account. We note and agree Dr. Dina McMillian that *'the push to make coercive control a crime [offers] the "strongest denunciation" of these harmful behaviours while prompting the wider community to gain a shared understanding'*.¹⁰ Although we encourage this position, we are conscious of the inherent risks of criminalisation and urge the Government to work to understand the critical needs of vulnerable communities to ensure safe, effective and accessible law.

WLSWA is also aware that accountability can be considered, at times, from various non-punitive angles. Numerous front-line domestic violence organisations advocate for intervention and prevention programs as a way of responding to perpetrator accountability. Intervention programs need to involve an integrated and multifaceted response, that is part of a broader systemic approach to family and domestic violence. We recommend that community programs run concurrently to any criminal legislative response in order to address the realities and complexities of family violence. Programming must be based in trauma informed response.

We refer to Michael Salter in *Managing Recidivism Amongst High-Risk Violent Men* (2012) who noted that *'combining sanctions in ways that are both punitive and reintegrative, useful for offenders, as well as [victim-survivors], [and] supported by the range of stakeholders involved in the domestic violence response,'* may be the most palatable, and acceptable response for the community.¹¹

Economic support in front-Line response

WLSWA recognises that victim-survivors ability to respond to controlling relationships is highly complex, inherently risky and will likely carry economic hardship. It is critical that Government provide substantial front-line social and economic support to address compounding disadvantage for victim-survivors.

⁸ Muslim Women Australia, Submission No. 86 to the NSW Government, Coercive Control in Domestic Relationships, 29 January 2021, p. 5 < [Submission - 86.pdf \(nsw.gov.au\)](#) >.

⁹ Ibid.

¹⁰ Dr. Dina Mc Millian (2021), Criminalising coercive control: a complex discussion, Judicial Officers' Bulletin, p. 1 < https://www.judcom.nsw.gov.au/wp-content/uploads/2021/07/Dina_art.pdf>.

¹¹ Salter, M. *Managing recidivism amongst high risk violent men*. Sydney: Australian Domestic & Family Violence Clearinghouse, 2012, p. 18.

WLSWA recommend that the Government review financial supports available to victim-survivors and their families. We note in her report *The Choice Violence or Poverty: Domestic Violence and its Consequences in Australia Today* (2022) (the **Report**), Anne Summers says that current systems are failing to provide adequate social and economic support leaving women in a position of accepting poverty if they escape violence. The Report confirmed that in 2016, 48.1% of single women with children under 18 years lived on a gross equalised household income of between \$0-480 per week. This is the lowest quintile in Australia.¹² The Report also confirmed that access to secure and affordable housing is the most critical factor of support¹³ to avoid victim-survivors falling into poverty.

Homelessness caused by domestic violence is closely tied to a lack of financial autonomy. The dynamics of an abusive and coercive relationship often means that a victim-survivor's finances and assets are tied-up with their partners, they are more likely to take time out of the workforce to care for children and/or work part-time, and they are paid less than their partners.¹⁴ The Report has noted that 75% of the 99,700 women who 'moved out of home after the relationship with their most recently violent previous partner ended left behind property or assets'.¹⁵ It was further noted that although 60% of the 187,500 single mothers who had experienced domestic violence had employment, many reported facing considerable financial stress.¹⁶ We are also aware that post separation, the perpetrator (often the higher income earner) will avoid child support payments as a way to exert continued control over the victim-survivor.

WLSWA recommend a re-thinking of Federal payments for single mothers, to bring their income in line with other Federal support payments. As noted by Anne Summers '*[rather] than providing security or even much of a safety net for single mothers, the system creates, and then perpetuates, poverty and disadvantage*'.¹⁷ She further noted that '*[we] are spending millions of dollars each year on prevention and awareness campaigns, urging women to leave violent partners, but condemning far too many women to life on the edge of a financial cliff if they are brave enough to leave*'.¹⁸

Overseas jurisdictions

Coercive control was introduced as a standalone criminal offence in the United Kingdom (**UK**) and Scotland (2015 and 2019 respectively). To date, there is very little academic reporting on its effectiveness as it is a relatively new offence in both jurisdictions. We understand that the UK and Scottish Legislation was drafted with the view of shifting from incident-based concepts of domestic violence to one that criminalises conduct that denies victim-survivors their autonomy.¹⁹

As the Commissioner's Office is aware, seven years after coercive control was criminalised in the UK, low numbers of the offence are being recorded, charged and successfully prosecuted. Convictions of coercive

¹² Anne Summers AO PhD (2022), *The Choice Violence or Poverty: Domestic violence and its consequences in Australia today*, The Paul Ramsay Foundation, p. 59 < <https://paulramsayfoundation.org.au/wp-content/uploads/2022/07/TheChoice-violence-or-poverty-web.pdf>

¹³ Also see: Royal Commission into Family Violence (2016) v2 p38.

¹⁴ House of Representatives Standing Committee on Social Policy and Legal Affairs, *Inquiry into family, sexual and domestic violence* Parliament of Commonwealth of Australia, p. 145 < [Inquiry into family, domestic and sexual violence \(apo.org.au\)](https://www.apo.org.au/inquiry-into-family-domestic-and-sexual-violence) >

¹⁵ Anne Summers AO PhD (2022), as above n 8, p. 11.

¹⁶ Ibid.

¹⁷ Ibid, p. 77.

¹⁸ Katina Curtis, *Violence or poverty: The dire choice faced by nearly half a million women*, *The Sydney Morning Herald* (Online, 7 July 2022) < [Anne Summers' study of domestic violence finds single mothers leave violence for poverty \(smh.com.au\)](https://www.smh.com.au/news/violence-or-poverty-the-dire-choice-faced-by-nearly-half-a-million-women-20220707) >.

¹⁹ Australia's National Research Organisation for Women's Safety. *Defining and responding to coercive control: Policy brief* (ANROWS Insights, January 2021, Sydney, p.2 [Coercive-Control-Policy-Brief-ANROWS-Insights-1.0.pdf \(netdna-ssl.com\)](https://www.netdna-ssl.com/wp-content/uploads/2021/01/Coercive-Control-Policy-Brief-ANROWS-Insights-1.0.pdf) >.

control typically occur where there is evidence of physical abuse, or the offence is raised in other substantive matters such as family contact proceedings. It is rare that coercive control is a standalone charge.²⁰ We note in a review of UK judgments only 16% of coercive control cases (recorded over an 18-month period) resulted in a charge, compared to 32% of domestic violence cases where there were charges for actual bodily harm.²¹ The Court of Appeal has even pointed out that more specific factual allegation(s) of assault should be selected for trial because of their ‘*potential probative relevance*’ to the alleged pattern of behaviour (for example, an allegation of sexual assault).²² This highlights the judiciary’s recognition of the inherent problems with proving coercive behaviour in the absence of physical abuse.

The Scottish legislation has taken on a more comprehensive approach to the criminalisation of coercive control. The legislation contains an objective limb which puts the focus on perpetrators, as opposed to victim-survivors.²³ In short, the course of conduct will be abusive if a ‘*reasonable person*’ would consider it likely to cause the victim-survivor to suffer physical or psychological harm.²⁴ There is also a lower evidential burden.²⁵ The Scottish legislation also includes ex-partners, recognising the insidious way in which control is often exerted post-separation.²⁶ Despite the more considered approach there is still uncertainty as to the effectiveness of the legislation in deterring perpetrators and protecting victim-survivors. In the interim, figures published by the Scottish government reveal that convictions for non-sexual crimes of violence rose by 21% from the previous year in 2019-2020.²⁷ Moreover, over 206 convictions for coercive control were secured, which equated to a conviction rate of 84%.²⁸ However, nearly two-thirds of perpetrators only received community sentences; as Chief Executive of Scottish Women’s Aid, Marsha Scott, queried: ‘*Are children and women [really] safer? How many of these cases involve repeat offences, and to what extent do community orders reflect the supposed seriousness with which Scotland takes domestic abuse?*’²⁹ This response aligns with the voice of victim-survivors in Western Australia who called for adequate perpetrator accountability.

WLSWA considers that it is too soon to draw substantive conclusions as to the capacity, appropriateness and consequences of the UK and Scottish legislation. We will watch with interest the Scottish Legislation review in 2023.

WLSWA are concerned about the potential re-victimisation of victim-survivors through cross examination. We note law that attempts to manage the risks such as section 44C of the *Restraining*

²⁰ Lucy Hadley, ‘The Serious Crime Act 2015 & Coercive Control: Overcoming Challenges of Identification and Evidence’, (Paper presented at the Westminster Insight Conference).

²¹ Charlotte Barlow, Kelly Johnson and Sandra Walklate, Coercive control cases have doubled – but police still miss patterns of this domestic abuse, *The Conversation* (Online, 24 July 2018) < [Coercive control cases have doubled – but police still miss patterns of this domestic abuse \(theconversation.com\)](https://www.theconversation.com/coercive-control-cases-have-doubled-but-police-still-miss-patterns-of-this-domestic-abuse)>.

²² *re H-N and Others (Children)* [2021] EWCA Civ 448 at [59].

²³ Heidi Andriunas (2021), Evaluating The Consequences Of Criminalising Coercive Control In The Australian Capital Territory, 18(2) *Canberra Law Review* 172.

²⁴ *Domestic Abuse (Scotland) Act 2018*, s 1(2)(a) and New South Wales Government, *Coercive Control Discussion Paper*, 13 October 2020, p. 14 < <https://www.crimeprevention.nsw.gov.au/domesticviolence/Documents/domestic-violence/discussion-paper-coercive-control.pdf> >.

²⁵ Scott, M. (2020). The making of the new “gold standard”: The Domestic Abuse (Scotland) Act 2018, p. 181 in Australia’s National Research Organisation for Women’s Safety, as above n 4, p. 6.

²⁶ *Domestic Abuse (Scotland) Act 2018*, s 1(1)(a) and s 11.

²⁷ Gina Davidson, Rape convictions fall by 8%, but Scottish domestic abuse law living up to ‘gold standard’, *The Scotsman* (Online, 18 May 2021) < [Rape convictions fall by 8%, but Scottish domestic abuse law living up to ‘gold standard’ | The Scotsman](https://www.scotsman.com/news/crime/rape-convictions-fall-by-8-but-scottish-domestic-abuse-law-living-up-to-gold-standard-1-1378793)>.

²⁸ *Ibid.*

²⁹ *Ibid.*

Orders Act 1997 (WA), which prevents an unrepresented respondent from directly cross-examining a person with whom they are in a family relationship or imagined personal relationship. Similarly, since 2019 the Family Court of Western Australia has banned personal cross-examination where allegations of domestic violence are raised. A self-represented litigant is not allowed to cross-examine the other party where either party has been charged or found guilty of a criminal offence involving violence, or a threat of violence, to the other party, there is a final violence restraining order in place, or the Family Court has made a personal protection injunction for the personal protection of one party from another.³⁰

However, Booth et al., (2019) have found marked differences in the application of these “bans”, particularly where application is “discretionary”.³¹ Booth et al., argue that there is a *‘disjuncture between the concerns and interests of victims of domestic and family violence on the one hand and those of adversarial legal processes on the other’*.³² From a legal perspective, cross-examination is fundamental to the tenant of a “fair trial”. For many victim-survivors, however, confronting their perpetrator in the courtroom is often perceived as an extension of the violence, and the *‘legal proceedings become a site for further abuse rather than justice’*.³³ The authors identify a *‘sliding scale’* in terms of the way protections against cross-examination are articulated and invoked.³⁴ For example, the Victorian Royal Commission into Family Violence (2015) found countless failures in the Family Court to enforce rules against cross-examination of a victim-survivor by their perpetrator.³⁵

Further, in Women’s Legal Services Australia’s (2015) survey of women’s experiences of being directly cross-examined in family law proceedings, the majority of respondents described feeling *‘unsafe, re-traumatised and intimidated, and suffered physical symptoms of stress leading up to and following the court event including panic attacks, weight and hair loss, “being physically sick”, sleeplessness and post-traumatic stress disorder’*.³⁶ We note also that defense counsel have also been conditioned to seize upon inconsistencies in a victim-survivors testimony during cross-examination, to undermine her credibility and suggest that her account(s) of violence should be dismissed. This method of *‘impeachment is one of the most damaging, as well as one of the most commonly employed’*.³⁷ These well entrenched defense methods have long lasting traumatic impacts on victim-survivors. WLSWA would consider that any new law must work against secondary victimisation through inappropriate court defense examination through either policy or code.

³⁰ Legal Aid Western Australia, Family Violence Cross-Examination Ban (Web Page, 24 February 2022) < [Family Violence Cross-Examination Ban | Legal Aid WA](#)>.

³¹ Tracey Booth and Jane Wangmann (2019), Family Violence, Cross-Examination and Self-Represented Parties in the Courtroom: The Differences, Gaps and Deficiencies, Vol 43(3), *UNSW Law Journal* < [Booth, Tracey; Kaye, Miranda; Wangmann, Jane --- "Family Violence, Cross-Examination and Self-Represented Parties in the Courtroom: The Differences, Gaps and Deficiencies" \[2019\] UNSWLawJl 39; \(2019\) 42\(3\) UNSW Law Journal 1106 \(austlii.edu.au\)](#)>.

³² Ibid.

³³ Ibid.

³⁴ Ibid.

³⁵ Angela Lynch, Janet Loughman and ‘Eleanor’, ‘Intimate Partner Sexual Violence and Family Law’ in Louise McOrmond-Plummer, Jennifer Y Levy-Peck and Patricia Eastale (eds), *Perpetrators of Intimate Partner Sexual Violence: A Multidisciplinary Approach to Prevention, Recognition and Intervention* (Routledge, 2017) 153, 161; Louise Ellison and Vanessa E Munro, ‘Taking Trauma Seriously: Critical Reflections on the Criminal Justice Process’ (2017) 21(3) *The International Journal of Evidence and Proof* 183.

³⁶ Women’s Legal Services Australia, Submission to Attorney-General’s Department, Family Law Amendment (Family Violence and Cross-Examination of Parties) Bill 2017 (2017).

³⁷ Louise Ellison and Vanessa Munro (2016), Taking Trauma Seriously: Critical Reflections on the Criminal Justice Process, Vol 21(3), *International Journal of Evidence and Proof*, p. 23 < [ResearchGate](#)>.

Concluding remarks

We would like to reiterate our position for the need for a social response along with broad education aimed at increasing our coercive control literacy before changes in legislation to criminalise coercive control occur.

To mitigate unintended and far-reaching consequences of the criminalisation of coercive control, we need integrated and safe whole-of-system responses, alongside perpetrator accountability, and prevention and early intervention strategies.

As well as cultural reform and knowledge and skill development within the police force and judiciary, we need more specialist services for women impacted by family violence, including legal and health. We also need to consider alternative approaches to redressing coercive control outside of the legal system.

We need mechanisms to ensure the ongoing centring of victim-survivors insights in the evolution of policy design and service development. And we need to amplify the voice of groups of victim-survivors who will be most vulnerable to changes in legislation.

WLSWA would again like to thank the Commission for this opportunity to contribute to a submission in response to the Discussion Paper. Please do not hesitate if you require additional information.

Kind regards

A handwritten signature in black ink, appearing to read 'Jennie Gray', with a stylized flourish at the end.

Dr Jennie Gray

Chief Executive Officer