



Law Council
OF AUSTRALIA

Inquiry into family, domestic and sexual violence

Supplementary Submission

House Standing Committee on Social Policy and Legal Affairs

28 September 2020

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2020 Executive as at 1 January 2020 are:

- Ms Pauline Wright, President
- Dr Jacoba Brasch QC, President-elect
- Mr Tass Liveris, Treasurer
- Mr Ross Drinnan, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council acknowledges the work of its Family Law Section in the preparation of this supplementary submission.

Introduction

1. On 8 September 2020, the Law Council of Australia (**Law Council**) appeared before the House of Representatives Standing Committee on Social Policy and Legal Affairs (**Committee**) following an invitation to provide evidence to the Committee's inquiry into family, domestic and sexual violence (**Inquiry**).
2. This supplementary submission addresses matters that were raised by the Committee during the Law Council's appearance at the public hearing of 8 September 2020 and which the Law Council verbally took on notice, relating to:
 - legislative approaches to addressing coercive control; and
 - the effectiveness of intervention programs.
3. This submission is ancillary to the Law Council's primary submission to the Inquiry dated 7 August 2020 (**Law Council's Submission**).

Responses to Questions on Notice

Question 1: Coercive control

4. At the hearing of 7 August 2020, the possibility of law reform in the area of coercive control was raised.¹ In the context of this discussion, Ms Claydon MP asked the Law Council whether it had had an opportunity to examine how the United Kingdom (**UK**) or Welsh Parliaments had addressed issues of coercive control, noting they have made it an specific offence.² Ms Claydon asked whether the Law Council is looking at those international jurisdictions and whether it had any comment.
5. The Law Council has summarised below the way that the issue of coercive control has been addressed in England and Wales in recent years. Commentary is then provided on the approach taken.

Coercive control in the England and Wales

Definition of domestic violence to incorporate coercive control

6. In September 2012 and based upon a consultation run by the Home Office, the UK broadened its non-statutory 'cross-government definition' of domestic violence (there being no statutory definition) so that it now refers to 'domestic violence and abuse' and reflects the concept of coercive control.³ This 'inter-Government' definition is heavily linked to 'controlling, coercive or threatening behaviour, violence or abuse' as follows:

Any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or

¹ Evidence to House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, Canberra, 8 September 2020, 31-33 (Ms Sharon Claydon MP, Mr Andrew Wallace MP, Mr Jason Walker, Dr Jacoba Brasch SC, Ms Pauline Wright).

² Evidence to House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, Canberra, 8 September 2020, 33 (Ms Sharon Claydon MP).

³ See, Home Office, Information for Local Areas on the change to the Definition of Domestic Violence and Abuse (March 2013)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/142701/guide-on-definition-of-dv.pdf> ('**Home Office Information**') at 2.

sexual orientation. This can encompass, but is not limited to, the following types of abuse:

- psychological;
- physical;
- sexual;
- financial;
- emotional*

Controlling behaviour is: a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour.

Coercive behaviour is: a continuing act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim.

*The cross-government definition of domestic violence and abuse is not a legal definition and includes so called 'honour' based violence, female genital mutilation (FGM) and forced marriage, and is clear that victims are not confined to one gender or ethnic group.⁴

7. In 2018, the UK Government consulted on a draft Domestic Abuse Bill (**the Bill**) which proposed a statutory definition of domestic abuse, drawing upon the existing cross-government definition as a basis.⁵ Following the Government's consultation, the Bill passed through the House of Commons and was introduced to the House of Lords on 7 July 2020, though has not yet been scheduled for Second Reading.⁶
8. The statutory definition of 'domestic abuse' under section 1 of the Bill states that behaviour abusive if it consists of a range of elements, including controlling or coercive behaviour, as follows:

(1) This section defines "domestic abuse" for the purposes of this Act.

(2) Behaviour of a person ("A") towards another person ("B") is "domestic abuse" if—

(a) A and B are each aged 16 or over and are personally connected to each other, and

(b) the behaviour is abusive.

(3) Behaviour is "abusive" if it consists of any of the following—

(a) physical or sexual abuse;

(b) violent or threatening behaviour;

(c) controlling or coercive behaviour;

⁴ See, *Home Office Information* (n 3) at [12].

⁵ HM Government, *Transforming the Response to Domestic Abuse* Government Consultation (full version) (8 March 2018) <https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation-sign-version/supporting_documents/Transforming%20the%20response%20to%20domestic%20abuse.pdf> at 6.

⁶ See, *Domestic Abuse Bill 2019-21* at <<https://services.parliament.uk/bills/2019-21/domesticabuse.html>>.

(d) economic abuse (see subsection (4));

(e) psychological, emotional or other abuse;

and it does not matter whether the behaviour consists of a single incident or a course of conduct.

(4) “Economic abuse” means any behaviour that has a substantial adverse effect on B’s ability to—

(a) acquire, use or maintain money or other property, or

(b) obtain goods or services.

(5) For the purposes of this Act A’s behaviour may be behaviour “towards” B despite the fact that it consists of conduct directed at another person (for example, B’s child).

(6) References in this Act to being abusive towards another person are to be read in accordance with this section.

(7) For the meaning of “personally connected”, see section 2.

9. Amongst other things, the Bill also seeks to establish the role of Domestic Abuse Commissioner, provides for the protection of witnesses and victims in Court, and deals with the interaction between domestic abuse and certain existing offences.⁷

Coercive control as an offence

10. Coercive control was codified in the UK in December 2015 as the offence of ‘controlling or coercive behaviour in an intimate or family relationship’ under subsection 76(1) of the *Serious Crimes Act 2015* (UK) (**UK Act**):

(1) A person (A) commits an offence if—

(a) A repeatedly or continuously engages in behaviour towards another person (B) that is controlling or coercive,

(b) at the time of the behaviour, A and B are personally connected,

(c) the behaviour has a serious effect on B, and

(d) A knows or ought to know that the behaviour will have a serious effect on B.

11. Subsections 76(2)-(7) go on to define the terms used in subsection 1.

12. The liability which arises from a finding of guilt for an offence under subsection 76(1) is:

(a) on conviction on indictment, to imprisonment for a term not exceeding five years, or a fine, or both;

(b) on summary conviction, to imprisonment for a term not exceeding 12 months, or a fine, or both.⁸

13. The UK Act provides for a defence (except in relation to behaviour that causes the victim to fear that violence will be used against the victim) where the perpetrator (**A**) shows that:

⁷ See, Domestic Abuse Bill 2019-21 at <<https://services.parliament.uk/bills/2019-21/domesticabuse.html>>.

⁸ See, subsection 76(11).

(a) in engaging in the behaviour in question, A believed that he or she was acting in [the victim's] best interests, and

(b) the behaviour was in all the circumstances reasonable.⁹

14. The burden of proof for the defence is relatively low, being that:

(a) sufficient evidence of the facts is adduced to raise an issue with respect to them, and

(b) the contrary is not proved beyond reasonable doubt.¹⁰

Guidance to police and criminal justice agencies

15. Section 77 of the UK Act allows the applicable Secretary of State to issue guidance about the investigation of section 75 offences to 'whatever persons' they consider appropriate. In December 2015, the Home Office used the power under section 77 to issue the *Controlling or Coercive Behaviour in an Intimate or Family Relationship – Statutory Guidance Framework (UK Guidelines)*.¹¹ The UK Guidelines were targeted at policy and criminal justice agencies involved in the investigation of offences, as well as non-governmental and voluntary organisations for use to assist their work.¹²

16. Starting with a reference to the 'cross-Government definition of domestic violence and abuse',¹³ the UK Guidelines provide detailed information to police on how to identify controlling or coercive behaviour, examples of circumstances the offence may apply to, and relevant types of evidence. The document also provides information on the defence.¹⁴

17. Also included in the information in the UK Guidelines is a detailed list of types of behaviour which are associated with coercion or control.¹⁵ The guidelines emphasise that controlling or coercive behaviour can happen from a distance, using social media.¹⁶ They also discuss instances where the offence does not apply or where other offences may (for example, stalking and harassment may apply where the victim and perpetrator are no longer living together but the other elements are met).¹⁷

18. In terms of guidance to police on dealing with victims, the UK Guidelines also list various vulnerabilities that perpetrators may seek to exploit in the context of a victim seeking help, including, for example, ethnicity and immigration status.¹⁸

Scope of offence

19. The Explanatory Notes to section 76 explains that it does not cover behaviour perpetrated by a parent (or person with parental responsibility) against a child under 16, because that behaviour is already covered by the child cruelty offence in section 1 of the *Children and Young Persons Act 1933* (UK).

⁹ See, subsection 76(8).

¹⁰ See, subsection 76(9).

¹¹ Home Office *Controlling or Coercive Behaviour in an Intimate or Family Relationship – Statutory Guidance Framework* (December 2015)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/482528/Controlling_or_coercive_behaviour_-_statutory_guidance.pdf>.

¹² Ibid at [5]-[6].

¹³ Ibid at [12].

¹⁴ Ibid at [8]. See, also, [14] and 10-14.

¹⁵ Ibid at 4.

¹⁶ Ibid at [13].

¹⁷ Ibid at [15][17], [18].

¹⁸ Ibid at [23].

20. The Explanatory Notes also offer the following example of circumstances which the defence is intended to cover:

... circumstances where a person was a carer for a mentally ill spouse, and by virtue of his or her medical condition, he or she had to be kept at home or compelled to take medication, for his or her own protection or in his or her own best interests. In this context, the person's behaviour might be considered controlling, but would be reasonable under the circumstances. The evidential burden will apply to the defence, that is, it will be enough for a defendant to produce sufficient evidence for the matter to be considered by the jury; it would then be for the prosecution to demonstrate to the criminal standard of proof, namely beyond reasonable doubt, that the defence has not been made out.

Use of the offence since codification

21. The Crown Prosecution Service reported in 2019 that 960 offences of controlling or coercive behaviour had been charged and reached a first hearing in 2017-18, and 1,177 in 2018-19.¹⁹
22. The BBC reported that from data received from 33 out of the 43 police forces in England and Wales, only 1,157 cases resulted in a charge between January 2016 and July 2018 despite there having been 7,034 arrests in that period.²⁰ However, sometimes a caution was issued. The same data showed that in the first three years of the offence, there were 235 successful convictions.²¹ Notably, it was observed that case outcome 'varied considerably' depending on the particular area and sometimes an individual was arrested and/or charged more than once.²²
23. In 2016 and 2017 the average prison term for those sentenced under section 76 was 17 months and victims received an average of £413.²³
24. The Government assessed in 2018 that the legislation 'sends a clear message that it is wrong for people to violate the trust of those closest to them and provides better protection to victims trapped in cycles of violent and non-violent abuse.'²⁴
25. In terms of the nature of prosecutions of coercive or controlling behaviour, it was reported that in 2016-17, many related to control through the internet, tracking software and social media.²⁵

Commentary on coercive control in England and Wales

26. The Law Council considers that the treatment of coercive control in England and Wales offers important lessons to the Inquiry.
27. First, the inclusion of the concept in the overarching 'inter-government' definition of domestic violence is proof that it can be included in a uniform definition supported by

¹⁹ Crown Prosecution Service, *Violence against women and girls report*, (2018-19)

<<https://www.cps.gov.uk/sites/default/files/documents/publications/cps-vawg-report-2019.pdf>>.

²⁰ Patrick Cowling, 'Domestic abuse: Majority of controlling cases dropped' (4 December 2018) *BBC News* <<https://www.bbc.com/news/uk-46429520>>.

²¹ Ibid.

²² Ibid.

²³ Ibid.

²⁴ Consult Justice at 6 https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation-sign-version/supporting_documents/Transforming%20the%20response%20to%20domestic%20abuse.pdf at 6.

²⁵ Ibid at 44.

multiple governments, in a legal system very similar to Australia's.²⁶ The proposed new definition of 'domestic abuse' in the Domestic Abuse Bill will, if enacted, add the authority of codification to the already widely accepted non-statutory definition. The appetite for codifying the definition also confirms that majority opinion is in favour of 'controlling or coercive behaviour' remaining a key focus, eight years on from its inclusion in the non-statutory definition.

28. The Law Council suggests that the Australian Government draw upon the working (non-statutory) and proposed (statutory) definitions in England and Wales when consulting on a consistent, uniform definition for all states and territories.
29. Secondly, the consequences of codifying 'controlling or coercive behaviour in an intimate or family relationship' as an offence under the UK Act allow an assessment of the potential outcomes were a similar offence to be enacted in Australia.
30. This is ultimately a matter for the states and territories, however, the Law Council considers the Australian Government is well-placed to facilitate a national dialogue on whether the offence should be created. Such a dialogue could consider available evidence of the prosecution and outcomes of the offence in England and Wales so far, particularly the not insignificant rates of arrest, charging, first hearing and successful convictions, as outlined at paragraphs 21 and 22 above.
31. The data from England and Wales is relevant to the discussion regarding the utility of an offence of coercive control at the hearing of 8 September 2020.²⁷ For example, as stated at paragraph 22 above, there were 235 successful convictions of the offence as at 4 December 2018 (approximately three years after the offence took effect).
32. This figure does not necessarily suggest that it is easy for law enforcement to prove the elements of the offence to the criminal standard of proof. The number of convictions after three years is still significantly smaller than the number of cases which reached a first hearing in 2017-18 alone (960). However, this number of convictions shows that it is possible to prove the offence beyond reasonable doubt and is, in the Law Council's view, high enough to warrant serious consideration of the value of the offence in Australia.
33. Conviction rates are a useful starting point, although further evidence of the impacts and outcomes of the offence would also need to be considered.
34. As a final but related factor, the treatment of coercive control in England and Wales shows how law enforcement might be provided with resources to be able to successfully prosecute an offence.²⁸ The Australian Government may look to the Guidelines, as well as any evidence of their uptake and feedback from their target audience (e.g. police), as an example of educational materials that may be provided in tandem with any legislative reform.

²⁶ See, the Law Council's discussion of this option at Law Council of Australia, Submission to the Inquiry into family, domestic and sexual violence (7 August 2020) at 20.

²⁷ Evidence to House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, Canberra, 8 September 2020, 32-33.

²⁸ Ibid, 33. At the hearing, the Law Council highlighted the need to provide adequate supports for policing and prosecution if the offence of coercive control were to be enacted.

Question 2: Effectiveness of intervention programs

35. At the hearing of 7 August 2020, the Law Council was asked by Dr Webster MP about the effectiveness of intervention programs, and undertook to provide the Committee with a particular body of research that had been undertaken in relation to the utility of intervention programs in Australia.²⁹
36. While there have been a number of studies into the effectiveness of intervention programs, the specific research referred to by the Law Council was that of Dr Ben Jones, a Forensic Psychologist specialising in family law and complex child custody cases. Dr Jones has conducted research into intervention programs and anger management courses and has, on several occasions, presented at Family Law Section forums. The Law Council encourages the Committee to contact Dr Jones should his research be considered valuable.

²⁹ Ibid, 35.