NSW Young Lawyers' submission to the Inquiry into coercive control in domestic relationships

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The Hon Natalie Ward, MLC

Chair, Joint Select Committee on Coercive Control

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The NSW Young Lawyers Criminal Law Committee makes the following submission to the Joint Select Committee on Coercive Control ('the Joint Select Committee') in response to the Inquiry into coercive control in domestic relationships ('the Inquiry')

NSW Young Lawyers

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 16 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

NSW Young Lawyers Criminal Law Committee

The NSW Young Lawyers Criminal Law Committee ('the Committee') is responsible for the development and support of members of NSW Young Lawyers who practice in, or are interested in, criminal law. The Committee takes a keen interest in providing comment and feedback on criminal law and the criminal justice system, and consider the provision of submissions to be an important contribution to the community. The committee aims to educate the legal profession and the wider community about criminal law developments and issues. The Committee also facilitates seminars and programs that help to develop the careers of aspiring criminal lawyers, with the aim of providing a peer support network and a forum for young lawyers to discuss issues of concern. The Committee's members are drawn from prosecution, defence (both private and public), police, the courts and other areas of practice that intersect with criminal law.

Summary of Recommendations

The Committee makes the following recommendations

1. The most appropriate formulation of the concept of coercive control should be based on the formulation by Professor Evan Stark,[1] in a form that is gender neutral;
2. Coercive and controlling behaviour should be distinguished from behaviour present in healthy relationships by reference to the frequency of the behaviour, the intention of the perpetrator and the effect of the behaviour;
3. The Committee is of the view that the existing criminal and civil law does not provide police and courts with sufficient power to address domestic violence, and in particular coercive control. This gap could be addressed by creating an offence of coercive control, which is accompanied by education programs and a number of other non-legislative initiatives;
4. The Committee does not recommend changes to the law of evidence, except to the extent that existing provisions relating to the giving of evidence by a complainant in domestic violence proceedings should also apply to the Committee's proposed offence of coercive control. Nor does the Committee recommend any changes to the prescribed features of aggravation under Section 21A(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW);
5. In order to ameliorate any negative effects of creating an offence of coercive control and avoid over-criminalisation, the Committee has proposed a formulation of an offence that:
    a. Limits the definition of coercive and controlling behaviour (in terms of frequency, mens rea and the effect on the other person) and provides examples of such behaviour to assist police officers, the prosecution and tribunals of fact;
    b. Includes a defence that the accused's behaviour was carried out in the genuine belief that it was in the relevant other person's best interests and such behaviour was reasonable; and
    c. Includes clarifying provisions.
6. The Committee supports the introduction of provision in the *Criminal Procedure Act 1986* (NSW) to allow a Judge to provide a warning that the continuation of relationships despite domestic and family violence is common.

[1] Evan Stark, *Coercive Control: The Entrapment of Women in Personal Life* (Oxford University Press 2007) 15.

Response to discussion questions in the Coercive Control Discussion Paper dated October 2020 (the Discussion Paper)

Question 1 - What would be an appropriate definition of coercive control

In answering this question, the Committee has considered and largely adopted the definition of coercive control formulated by Professor Evan Stark.[2] Professor Stark describes coercive control as a course of conduct aimed at intimidating, isolating, and controlling a victim. This conduct is often based in sex-based inequality, or other forms of privilege that interact with systemic inequalities.[3] While physical and psychological abuse often coincide with coercive control, the essence is that the behaviour targets the ability of persons who are subjected to such behaviour to enjoy the liberties they are legally entitled to, and establishes a pattern of domination that disables the person's capacity to mobilise personal, material and social resources to resist or escape. Coercive control often involves, but is not limited to, acts of surveillance, deprivation of access to amenities and necessities, and the restriction of a person's interaction with others.

Drawing on Professor Stark's research, the Committee is of the view that an appropriate description of coercive control is "a course of conduct by one person that is coercive and controlling and has a serious effect on another person with whom they have or have had a relevant relationship". The Committee is of the view that the terms "coercive" and "controlling" should be given their ordinary meanings. The Macquarie Dictionary defines "coerce" as to "restrain or constrain by force, law, or authority; force or compel, as to do something", and "control" as "to exercise restraint or direction over; dominate; command".

Although coercive control is understood to be primarily perpetrated in heterosexual relationships by men against their female partners, and sociological research points to this trend,[4] the Committee is of the view that any formulation of the concept of coercive control should be gender neutral to recognise that such behaviour can occur in the context of any relationship,[5] and provide protection to all persons who experience such behaviour. A gender-neutral definition avoids discrimination between various types of intimate partner relationships. The Committee acknowledges that this approach may result in an increased scope for female victim-survivors to be mis-identified as aggressors,[6] but is of the view however that careful drafting of any

[2] Evan Stark, *Coercive Control: The Entrapment of Women in Personal Life* (Oxford University Press 2007) 15.
[3] Evan Stark, 'Looking Beyond Domestic Violence: Policing Coercive Control' (2012) 12 *Journal of Police Crisis Negotiations* 199, https://doi.org/10.1080/15332586.2012.725016.
[4] Discussion Paper, 9 [2.9] citing Michael P Johnson *A typology of domestic violence: Intimate terrorism, violent resistance, and situational couple violence* (Northeastern University Press, 2008), Evan Stark *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, 2007).
[5] See, eg, Skeel, Alex 'I stayed with my abusive girlfriend out of fear she would kill me', *BBC* (online, 20 February 2019) <https://www.bbc.co.uk/bbcthree/article/81a8f303-5849-45b8-85a0-e8532b5d948b> (accessed 12 January 2020).
[6] See, eg, Jess Hill, *See What You Made Me Do: Power, Control and Domestic Abuse* (Black Inc, 2019) 211.

offence creating provisions and a targeted training program will assist in ameliorating this risk (see further below in answer to Question 4).

It can be difficult to identify coercive and controlling behaviour in the abstract, as such behaviour is situational and context specific. Therefore, the Committee is of the view that rather than attempting to formulate an exhaustive definition of coercive and controlling behaviour, legislation should provide examples of behaviour that is coercive and controlling. It is particularly important that those examples make clear that a combination of different types of behaviour can create a pattern of conduct that is coercive and controlling. The Committee believes that Professor Stark's identification of the types of coercive and controlling behaviour as referred to in the Discussion Paper is useful in this respect.[7]

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

The exact manifestations of behaviour which is coercive and controlling will vary in the contexts of different relationships. There may be behaviour that in some contexts is part of a broader pattern of coercive and controlling behaviour, but that may be present in otherwise healthy relationships. For example, many (if not all) relationships involve dependence to varying extents by one partner on the other. Alternatively, a person may be isolated by their partner from particular family members or friends for reasons which may not be malicious (for example, a concern about a toxic relationship with the relevant person). Finally, a partner's daily activity may be 'monitored' or 'regulated' for benevolent (as opposed to malicious) purposes, for example if a partner has a gambling or alcohol addiction, or has expressed suicidal ideation. It is important that any definition of coercive control is carefully constrained so as not to capture such behaviour.

The Committee's view is that indicators of abusive behaviour, as opposed to behaviour that may occur at times in healthy relationships, are as follows:

1. **Effect of the behaviour** – abusive behaviour is that which has an effect or effects such as:
    - causing the other person to fear violence;
    - isolating the other person from their family and friends;
    - causing the other person serious alarm or distress;
    - causing a 'substantial adverse effect' on the other person's day to day activities;

[7] Discussion Paper, p. 7 [2.2] citing Evan Stark *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, 2007).

- significantly affecting the other person's psychological and emotional wellbeing;[8]
- creating a pattern of domination that disables the other person's capacity to mobilise personal, material and social resources to resist or escape;[9] and/or
- causing the other person to feel entrapped and/or normalise the behaviour.[10]

2. **Intention of the perpetrator** – this should be an element of the offence. The perpetrator should be shown to either know or ought to have known that the controlling or coercive behaviour will have a serious effect on the other person.

3. **Frequency of the behaviour** - repeated or routine behaviour indicates that it constitutes a pattern of coercive control rather than isolated, infrequent incidents, disagreements or points of contention that may occur in healthy relationships.

Question 3 – Does the existing criminal and civil law provide police and courts with sufficient power to address domestic violence, including non-physical and physical forms of abuse?

The Committee's view is that the current law is deficient in this respect. The *Crimes Act 1900* (NSW) and *Crimes (Domestic and Personal Violence) Act 2007* (NSW) rightly prohibit overt acts of physical and sexual violence. Moreover, in recent years, behaviour causing fear has become the subject of criminal sanction such as by s. 13 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). Irrespective, in the Committee's view the criminal law is inadequate in respect to more nuanced offending that is intended to coerce or control a domestic partner. Examples of such behaviour include, but are not limited to:

- Preventing a domestic partner from contacting family, friends or community;
- Preventing a domestic partner from using the telephone or accessing the internet;
- Restricting and/or monitoring a domestic partner's movements;
- Preventing a domestic partner's access to money (including money that is owned by the partner themselves, or jointly owned); or
- Depriving a domestic partner of shelter, food, medicine or property.

[8] Heather Douglas, 'Do we need an offence of coercive control?' (2018) 144 *Precedent* 18-21.
[9] Evan Stark, (2012) Looking Beyond Domestic Violence: Policing Coercive Control, 12 *Journal of Police Crisis Negotiations* 199 https://doi.org/10.1080/15332586.2012.725016.
[10] Heather Douglas, Molly Harris, & Bridget Dragiewicz, M, Technology-facilitated domestic and family violence: women's experiences', (2019) 59 *British Journal of Criminology,* 551-570. Doi: 10.1093/bjc/azy068.

Section 39 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) mandates the imposition of a final apprehended domestic violence order ('ADVO') upon a plea or finding of guilt for certain "serious offences".[11] In cases where s. 39 is not triggered, persons in need of protection are reliant on Police applications or must institute private applications for ADVOs. The cost and challenges associated with the latter serve as a deterrent to persons in need of protection from making such applications.

At present, some behaviour that could be considered to be coercive and controlling may be prohibited by the terms of an ADVO made for the protection of a person experiencing the effects of coercive control.[12] However, the ADVO itself does not create criminal liability; rather a breach of an ADVO is a criminal offence. The Committee views this situation as unsatisfactory because rather than the coercive and controlling behaviour itself being criminalised, such behaviour is only criminalised to the extent that it forms part of any ADVO conditions that are breached.

As an application for an ADVO can be made by a police officer on behalf of another person, persons who might not necessarily recognise that they are being subjected to a pattern of coercive and controlling behaviour may still be afforded some protection from this behaviour. The difficulty is that this status quo requires the person to come to the attention of police officers who have sufficient awareness of the issue to recognise signs (which can often be quite subtle) of coercive and controlling patterns of behaviour, and for the requirements for making an ADVO to otherwise be satisfied. The criminal law does not currently provide a legislative formulation of such behaviour, and the creation of a coercive control offence may assist in increasing awareness of these signs.

In the federal jurisdiction, the Family Court has the power to make injunctive orders for personal protection in circumstances where proceedings concerning parenting disputes are already on foot.[13] The Family Court also has power to also make injunctions under s. 114 of the *Family Law Act 1975* (Cth) for the personal protection of a party to a marriage/relationship more broadly. The institution of proceedings in the Family Court, for the sole purpose of obtaining a personal protection order, would be costly and time consuming. Such orders are typically made in conjunction with other causes of action, namely orders for exclusive occupation of a property and/or with other parenting orders. The narrow scope for such orders being made diminishes their utility in addressing abusive behaviour across a broader spectrum of domestic relationships.

[11] As defined in section 40 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).
[12] *Crimes (Domestic and Personal Violence) Act 2007*, s 4.
[13] *Family Law Act 1975* (Cth), s 68B.

Question 4 – Could the current framework be improved to better addresspatterns of coercive and controlling behaviour? How?

The Committee is of the view that the gap in the existing criminal law could, at least in part, be addressed by the enactment of a coercive control offence (see further below in response to Questions 7-9). It must not be forgotten, however, that the law is a blunt instrument for achieving change. Whilst the Committee's view is that a new offence should be enacted, this must be accompanied by education programs for police and the courts, as well as further resources for domestic violence support services. The Committee particularly embraces the analysis of the reasons for greater uptake of the coercive control offence in Scotland compared to that in England in Wales as set out in the Discussion Paper at 7.27, namely that investing heavily in educating frontline staff and the general public is an integral part of any strategy to combat coercive control.

Examples of such programs include training police officers at stations to be able to recognise signs of coercive control, including when a person is suffering serious alarm or distress as a result of a pattern of coercive and controlling behaviour. Such training should also be targeted at equipping law enforcement professionals to be able to correctly identify the perpetrator of the behaviour, as there is a risk (as discussed above) that victim-survivors can be misidentified. The Committee notes, for example, that the eight stage relationship progression to homicide was designed by Jane Monckton-Smith to assist professionals such as law enforcement officers to deal with intimate partner violence and assess the risk of intimate partner homicide.[14] The Committee also notes the availability of tools such as Impact of Event Scale- Revised available online through Novopsych, as well as the K-10 Kessler psychological distress scale. The Committee recommends that the viability of training for police officers incorporating such tools (to the extent that such training does not currently exist) be investigated.

Mandatory training for persons working in related areas of law such as family law may better assist in delivery of services and early detection of such behaviours. It is likely that some people experiencing coercive control may not recognise the behaviour they have experienced in their relationship as coercive or controlling, and will rely on others to identify such signals. Other avenues such as marketing to the community may also assist in increasing awareness that such behaviour has been criminalised.

[14] Jane Monckton Smith (2019) Intimate Partner Femicide: using Foucauldian analysis to track an eight stage relationship progression to homicide. Violence Against Women, pp1-31. Retrieved 15 November 2019 from: https://doi.org/10.1177/1077801219863876.

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

The Committee is of the opinion that the *Evidence Act 1995* (NSW) currently provides adequate ways for the courts to receive evidence of coercive and controlling behaviour in criminal proceedings. For example, the admissibility of evidence in criminal proceedings going to the accused's tendency to act in a particular way (eg to abuse his/her domestic partner in a particular way or by certain means), or to have a particular state of mind.[15]

The Committee is also of the view that Chapter 6 Part 4B of the *Criminal Procedure Act 1986* (NSW) adequately facilitates the receipt of evidence in criminal proceedings involving domestic violence through s. 289F, which provides that in proceedings for a 'domestic violence offence',[16] a complainant may give domestic violence evidence-in-chief in part or full by way of a pre-recorded statement ('DVEC'). Section 289F affords appropriate protection to complainants by removing the need for them to recount events before the accused, thereby reducing the prospect of litigation induced trauma. Further, DVECs tend to be made contemporaneously and therefore serve as more reliable testimony. If a specific offence of coercive control is enacted, s. 289F should extend to permit reliance upon DVECs in proceedings relating to that offence.

In respect of family law proceedings, s. 102NA of the *Family Law Act 1975* (Cth) was recently introduced to prohibit cross-examination of litigants in matters where family violence (including coercive and controlling behaviour) is alleged. That provision provides important protections to parties in the sense that it minimises the risk of re-traumatisation. Additionally, the Courts have previously permitted evidence to be given from a separate room or with other measures in place to protect the safety of parties. It is likely that advances in technology and the Courts' increased uptake of technology since the start of the COVID-19 pandemic will assist parties to be more comfortable in making necessary disclosures as they are not necessarily in the same room as the alleged perpetrator.

Similar provisions will exist in s. 289VA of the *Criminal Procedure Act 1986* (NSW) following the recent enactment of the *Stronger Communities Legislation Amendment (Domestic Violence) Act 2020* (NSW), which the Committee welcomes.[17] The Committee also notes a number of protections for complainants in domestic violence offences who are giving evidence, for example s. 289V (which allows for alternative means and arrangements for giving evidence that may restrict visual contact between a domestic violence complainant and an accused, such as the use of AVL facilities or screens), and 306ZQ which allows for the presence of a

[15] *Evidence Act 1995*, s. 97.
[16] *Crimes (Domestic and Personal Violence) Act 2007*, s11(1)(a).
[17] *Stronger Communities Legislation Amendment (Domestic Violence) Act 2020*, s 2(3).

support person. The Committee is of the view that such provisions provide important protections, and should also apply to the Committee's proposed new offence.

Question 6 – Does the law currently allow evidence of coercive control to be adequately taken into account in sentence proceedings? If the answer is no to questions 5 or 6, how could the law be improved to ensure the evidence is admissible and is given adequate weight in civil and/or criminal proceedings?

Evidence of coercive and/or controlling conduct is often adduced organically at trial in the course of a complainant's testimony in respect of other discrete complaints of domestic violence. The law permits reliance on such evidence as a factor relevant to the assessment of the gravity of the subject offending. The fact that a course of criminal misconduct happens to coerce or control a victim is not however a prescribed feature of aggravation under s. 21A(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW). For the reasons set out in answer to Question 13 below, the Committee does not support the codification of coercion and control as an aggravating feature of relevant offences.

Uncharged acts of coercion and/or control (provided they are proved or otherwise agreed as fact) can also be taken into account in a limited way as subjective considerations relevant to an offender's character, remorse, and/or prospects of rehabilitation.

Part 3 Division 2 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) permits 'victim impact statements' to be tendered on sentence. Courts are statutorily obliged to take such statements into consideration. Relevantly, victim impact statements may particularise personal harm, emotional suffering or distress, harm to relationships with others, and/or any economic loss suffered. There is nothing currently preventing a victim from putting before the Court evidence that the subject offending included or resulted in coercive and controlling behaviour.

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

7.1 Disadvantages of creating an offence of coercive control

The Committee's primary concern is that the creation of an offence which is framed too broadly may have the undesirable effect of inappropriately criminalising healthy relationships, or behaviour which, whilst not viewed as "normal", is not harmful considering the dynamics of that particular relationship.

The creation of an offence of coercive control may have a number of further undesirable effects as follows:

1. It has been observed that coercive control laws could disproportionately affect and increase the existing disadvantages experienced by minority communities, particularly First Nations people in Australia who are already overrepresented in the criminal justice system.[18] There is the risk that police over-intervention in intimate relationships, particularly in First Nations communities and other minority community groups, may increase fear of the system rather than encourage victims to seek assistance.[19]
2. The creation of an offence does not necessarily remove other barriers which may prevent victim-survivors from seeking assistance, including concerns about going through the criminal justice system processes, and an inability to access assistance from police officers. Some victim survivors may not wish for the perpetrator to be subject to criminal sanctions, and instead may simply want the behaviour to stop.[20]
3. Victim accounts tend to be 'incident focused',[21] which creates difficulties in presenting an account of extended patterns of abuse (particularly where the abuse does not necessarily involve physical violence). The threshold needs to be focused on the repetitive nature of the behaviour rather than one off incidents, and the incidents need to be viewed in light of the surrounding circumstances.
4. Mis-identification of the true perpetrator is a concern, particularly with an overly incident focused approach and without comprehensive training for police officers and judicial officers. For example, once physical violence has occurred, the person who is subjected to the behaviour may have also been involved in physical violence to some extent (for example, by fighting back) making it difficult to distinguish the victim from the abuser.[22]
5. If the threshold for criminality is set too low, there is a risk that disgruntled ex-partners may attempt to have charges brought against their former partner with improper motives.
6. Issues may also arise if a person subjected to coercive and controlling behaviour believes that the perpetrator will not repeat the behaviour, and therefore does not report the behaviour. The behaviour may also be unreported due to fear of the perpetrator, or because the victim is not aware that the behaviour constitutes a crime. Accordingly, the mere creation of an offence, without other initiatives, may have little practical effect.

[18] Sandra Walklate and Kate Fitz-Gibbon, 'The Criminalisation of Coercive Control: The Power of Law?' (2019) 8(4) *International Journal for Crime, Justice and Social Democracy* 94, 101.
[19] Ibid.
[20] Ibid, p. 102, and sources cited therein.
[21] Jane Wangmann, 'Incidents v Context: How Does the NSW Protection Order System Understand Intimate Partner Violence?' (2012) 34 Sydney Law Review 695, 703.
[22] Ibid.

7.2 Advantages of creating an offence of coercive control

Behaviours referred to in the Committee's response to Question 3 above can be commonly characterised as 'emotional abuse', and are concerningly prevalent in the community. As of November 2016, 3.6 million Australians (2.2 million females and 1.4 million males) reported having been subjected to emotional abuse by a current or previous partner since the age of 15 years.[23] The Committee understands that ongoing emotional abuse is capable of constituting coercion and control and is liable to cause serious harm to the person subject to the behaviour. In the absence of criminal sanctions, there is limited recourse available to those experiencing such behaviour (which is often unreported), and perpetrators go unpunished.

The Australian Bureau of Crime Statistics and Research reports a correlation between emotional abuse and the likelihood of future physical violence. Further, victims of emotional abuse are seven times more likely to be re-victimised.[24] Coercive and controlling behaviour was present in 111 of 112 domestic partner homicides in New South Wales between March 2008 and June 2016,[25] indicating that patterns of abuse tend to increase in frequency and severity over time. Recent high-profile cases also illustrate this pattern,[26] and studies have suggested that intimate partner violence relating to patterns of stalking and coercive control have a propensity to result in intimate partner homicide.[27] There is, in the Committee's view, a need to intervene at the earliest possible stage to prevent the escalation of such behaviour.

Further, the COVID-19 pandemic has resulted in many people spending longer periods of time in their place of residence (including as a result of lockdowns imposed from time to time). The Australian Institute of Criminology found that between February and May 2020, one in ten women who responded to a survey had experienced emotionally abusive, harassing or controlling behaviour during the lockdown. It is anticipated that making coercive and controlling behaviour an offence would alleviate the prevalence of such behaviour, or alternatively increase the rates of reporting.

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[23] *Personal Safety Survey* (Australian Bureau of Statistics, 8 November 2017), Table 27 < https://www.abs.gov.au/statistics/people/crime-and-justice/personal-safety-australia/latest-release>.
[24] Rahman, '*Assessing the risk of repeat intimate partner assault'* (NSW Bureau of Crime Statistics and Research, Contemporary Issues in Crime and Justice Bulletin, Issue 220), 11.
[25] *'NSW Domestic Violence Death Review Team Report'* (NSW Government, 2019), 153 <https://www.coroners.nsw.gov.au/coroners-court/resources/domestic-violence-death-review.html#Reports2>.
[26] See for example media reporting of the murders of Hannah Clarke and Lisa Harnum.
[27] R.E. Dobash & R. P. Dobash, *When Men Murder Women (interpersonal violence),* (Oxford University Press, 2015), cited in Monckton-Smith, J. (2019). Intimate Partner Femicide: using Foucauldian analysis to track an eight stage relationship progression to homicide. Violence Against Women, 1-31. Retrieved 15 November 2019 from: https://doi.org/10.1177/107780 1219863876.

If a coercive control offence is enacted, it will prohibit a range of more subtle actions that, on their own, may appear innocuous or trivial but, taken together, form an abusive course of conduct. In the Committee's view, these behaviours are not sufficiently covered by the current statutory offences of stalking and intimidation.[28]

The criminal law plays an important educative function. The Committee anticipates that a coercive control offence would empower persons experiencing such abuse to take action, including action outside of the criminal law system such as seeking assistance from support services. The creation of an offence may also signal to perpetrators that their behaviour is considered unacceptable by society, and may be the catalyst for changes in behaviour.

A coercive control offence would also provide greater scope for the application of s. 39 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW), providing further protection for persons experiencing domestic violence (see responses to Questions 3-4 above).

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

An argument against the introduction of a coercive control offence is that it sets too low a threshold for criminal liability and therefore opens the proverbial floodgates for litigation. In the Committee's view, the proposed offence set out in answer to Question 9 below safeguards against that possibility by:

1. limiting the definition of coercive and controlling behaviour (in terms of frequency, mens rea and the effect on the other person) and providing examples of such behaviour to assist police officers, the prosecution and tribunals of fact;

2. including a defence that the accused's behaviour was carried out in the genuine belief that it was in the relevant other person's best interests and such behaviour was reasonable; and

3. including clarifying provisions.

These aspects of the Committee's proposed offence are discussed in turn below.

[28] *Crimes (Domestic and Personal Violence) Act 2007*, ss. 7, 8, 13.

8.1 Limiting the definition of coercive and controlling behaviour

The Committee proposes the following limits on the definition of coercive and controlling behaviour.

Frequency

The proposed provision necessitates a pattern of ongoing or repeated coercive or controlling behaviour, which is defined as consisting of at least three instances within a 12-month period. This ensures that one-off incidents are not criminalised (although such behaviour may, by itself, already constitute a criminal offence). By limiting the minimum number of incidents to three, this approach also accounts for the difficulties in particularising specific incidents in a pattern of behaviour that may occur over a substantial period of time.

In drafting this provision, the Committee has drawn on the format of s. 66EA of the *Crimes Act 1900* (NSW), which relates to persistent sexual abuse of a child. An important difference to s. 66EA is that the Committee proposes drafting the coercive control offence so that incidents comprising the coercive and controlling behaviour need to be particularised, proven to the usual criminal standard, and identified by the tribunal of fact where more than three incidents are alleged to form the behaviour. The Committee has taken this approach in recognition that the unique difficulties associated in proving persistent sexual abuse of a child may not necessarily be present in proving an offence of coercive control.

Additionally, it is important that a sentencing judge is aware of the particular acts on which a conviction is based, and that specific consideration has been given to the issues identified by the High Court in *Chiro v The Queen.*[29] These considerations are particularly relevant in the context of the Committee's proposed offence as a range of conduct (some of which is not already criminalised) could form the basis of a conviction of coercive control (see below). Further, the requirement is that the conduct occur on *at least* three occasions in a twelve-month period and there is no upper limit on the period during which the conduct may have occurred. Therefore, it is likely that the objective seriousness would increase if the conduct occurred at a much greater frequency over a twelve-month period, or if the conduct occurred over a number of years.

Mens Rea

Due to the difficulty of assessing intimate relationships, which are so diverse, by purely objective standards, the Committee proposes that the mens rea of the offence includes an objective standard as an alternative to a subjective mental state, adopting the approach taken in England and Wales. The inclusion of an objective

[29] *Chiro v The Queen* (2017) 260 CLR 425

standard safeguards against arguments that the accused did not realise that repeated abusive behaviour was having a significant effect on the relevant other person. To protect the accused however, the 'ought to know' standard should incorporate what a reasonable person *in the same circumstances* as the accused ought to know. For the avoidance of doubt, the Committee recommends that an explicit subsection be included to clarify this standard.

However, the Committee recognises that a "reasonable person in the same circumstances as the accused" is somewhat open-textured. Legal debate has raged in other areas of law as to the idiosyncrasies or characteristics of the accused (or other litigant) that the reasonable person ought to be considered as possessing. The Committee is concerned that, in the context of the proposed offence, a "reasonable person in the same circumstances as the accused" may import purported "gender" or "cultural" norms of relationship dynamics and behaviours which are harmful into the assessment of what a person "ought to know". The Committee has tried to avoid drafting the test in a way which permits undesirable idiosyncrasies to have disproportionate influence over what is intended to be a largely objective test. The same is true of the reasonableness limb of the Committee's proposed defence (see below). However, it is desirable to have a test that permits consideration of an accused's person mental illness or cognitive impairment when assessing what a "reasonable person" ought to know.

There is a fine balance to be struck here. The Committee is of the opinion that "the same circumstances as the accused" is precise enough to permit the latter kinds of considerations without permitting the former.

Effect on the relevant other person

Given the serious consequences of a criminal conviction, the Committee is of the view that proof of actual harm sustained by the relevant other person is essential to ensure that prosecutions under the legislation are justified. The appropriate harm to be proven is that the relevant other person apprehended violence or suffered serious alarm or distress.

The Committee does not propose that the prosecution must prove that the serious alarm or distress is such as to cause substantial adverse effect on the relevant other person's usual day-to-day activities (as required in the English and Welsh models).[30] In the Committee's view, the word "serious" is an appropriate safeguard that ensures that trivial or fleeting impacts are not captured, such as the distress, alarm or injured feelings caused by conflicts that may occur in the course of healthy relationships.

[30] *Serious Crimes Act 2015 (England and Wales)* s. 76(4).

Although one indication that alarm or distress caused to a person is "serious" may be that it has a substantial adverse effect on their usual day-to-day activities, the Committee does not support limiting "serious alarm and distress" in this way. Situations can be envisaged in which alarm or distress may seriously affect a person, for example by causing a significant detrimental impact to their psychological state, without resulting in a perceptive change to their ordinary activities. The Committee notes that criteria for diagnosis of conditions such as major depressive disorder or insomnia disorder in the DSM-5 manual for the assessment and diagnosis of mental disorders refer to symptoms causing "clinically significant distress **or** impairment in social, occupational or other important areas of functioning" (emphasis added).[31] This indicates that clinically significant distress (or distress that would warrant clinical attention) can exist separately from impairment to daily activities.

Relevant relationship

The Committee has defined a "relevant relationship" to confine the application of the offence to persons who are or have been married or in a de facto relationship, and current and former intimate partners (whether or not there has been a sexual relationship). This is to avoid the offence being too broadly applied. The Committee is of the view that where coercive and controlling type behaviour appears in other contexts, such as between other family members, or parents and children, the nature of the issue differs, and should be addressed separately.

Examples of coercive and controlling behaviour

Coercive control has been recognised as taking many forms. Attempting to exhaustively define conduct which amounts to coercive control would, in the Committee's view, make the legislation unduly complex and risk omitting behaviours not anticipated by the legislature that could amount to coercive control in a particular context. Instead, the Committee prefers an approach which provides a non-exhaustive list of examples to aid identification of coercive and controlling behaviour. The Committee proposes that these examples be included as notes to the legislation, which do not form part of the legislation itself.[32] The examples provide a convenient manifestation of the legislature's intention, which would assist in statutory interpretation without the inflexibility of a legislative definition. This is similar to the manner in which s. 4AB of the *Family Law Act 1975* (Cth) describes various behaviours which fall into the broader category of 'family violence', without being overly prescriptive or limiting the behaviours captured by that section. Some of the behaviours included in s. 4AB are

[31] American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 5th Edition: DSM-5 (2013) p 161, 362.
[32] *Interpretation Act 1987* (NSW), s. 35(2).

unreasonably withholding financial support, preventing a party from making or keeping connections with their family or friends, and unlawfully depriving the other party of their financial autonomy and liberty.

The examples included in the Committee's proposed offence are drawn from the Committee's review of the literature regarding coercive control. Although the examples refer to some behaviour which in certain contexts may be appropriately charged as separate offences, the Committee has deliberately refrained from defining coercive control by reference to specific legislative provisions. The list of examples is intended to provide an indication of the kind of behaviour which may form a pattern of coercion and control. Such a pattern may include both behaviour which could be the subject of charges for a discrete offence, and also involve behaviour which is not currently criminalised, such as isolating a person from family and friends. The aim of the proposed structure is not to create a rigid list of existing offences which can be charged together as coercive control. Indeed, such an offence would not have the intended effect of addressing the existing gap in the criminal law.

In circumstances where behaviour which forms a pattern of coercive control could also constitute discrete criminal offences when charged separately, the appropriate charges to be laid will be a matter of discretion for police and prosecutors. The Committee recognises that prosecuting authorities routinely engage in these kinds of exercises of discretion pursuant to appropriate guidelines.

The Committee recommends a maximum penalty of seven years for the offence. This maximum penalty has been formulated by reference to the maximum penalty for the existing offence of stalking/intimidation, which is five years imprisonment.[33] The structure of the Committee's proposed offence means that an incident of stalking/intimidation could (in appropriate circumstances) form one or more of the incidents on which a conviction of coercive control is based. It is therefore necessary that the maximum penalty for coercive control be higher than the maximum penalty for such offences in order to allow appropriate scope for sentencing.

Finally, in accordance with the principle of *autrefois acquit* and the rule against double jeopardy, the Committee expects that conduct for which a person has previously been convicted or acquitted will be not be relied upon to support a subsequent charge of coercive control. Accordingly, the Committee does not propose specific provisions be drafted to prevent reliance on such conduct. If, however, such a provision was considered to be necessary to avoid confusion, the Committee would not oppose its inclusion.

[33] *Crimes (Domestic and Personal Violence) Act 2007* (NSW), s 13.

Inclusion of a Defence

Assessed in accordance with objective criteria, a person's behaviour may appear to be controlling, isolating, or humiliating to another person, despite there being no coercion or control. For instance, a partner may deprive the relevant other person of access to a car in order to dominate the other person and prevent them from accessing outside supports, which would *prima facie* amount to the behaviour intended to be targeted by the offence of coercive control. However, in other situations a partner may do so in order to prevent the other person from engaging in self-destructive behaviour. In the latter situation, provided that the partner was acting reasonably and genuinely believed that their actions were in the best interests of the relevant other person, such conduct should not be criminalised. To cover situations such as these, a defence should be available to an accused person, with the evidential burden on the accused to raise the defence.

The Committee prefers the formulation of the defence as adopted in the English and Welsh legislation which has a subjective requirement that the accused believes that the behaviour is in the relevant other person's best interests, and the objective requirement that such conduct was reasonable in the circumstances.[34] This approach requires that an accused who successfully raises a defence did not have a blameworthy state of mind (as the accused would have needed to genuinely believe that the behaviour was in the other person's best interests), with the objective element preventing an accused from relying on unreasonable behaviour to absolve themselves of liability.

In taking this position the Committee has considered the arguments outlined in the Discussion Paper as to the traumatising effect that may occur if a person comes forward after being subjected to a pattern of abuse, only to be informed that an accused has successfully raised a defence that the accused's behaviour was reasonable.[35] This risk needs to be weighed against the need to ensure that the introduction of a coercive control offence does not result in over-criminalisation. The Committee is of the view that the framing of the defence as proposed appropriately balances these two concerns.

Clarifying provisions

The proposed offence includes a number of subsections (subsections 9-14) which are designed to clarify aspects of the offence. The Committee is of the view that these provisions provide useful guidance to tribunals of fact, and to police and the prosecution when laying and certifying charges.

[34] *Serious Crimes Act 2015 (England and Wales)* s. 76(8).
[35] Discussion Paper at 7.24, p. 29.

Question 9 – If an offence of coercive control were introduced in NSW, how should the scope of the offence be defined, what behaviours should it include, and what other factors should be taken into account?

For the reasons set out in response to Question 8 above, if an offence of coercive control were to be introduced in NSW, the Committee proposes that it be introduced in the following terms:

(1) A person commits an offence under this section if:

a. The person engages in ***a course of conduct*** of controlling or coercive behaviour; and

b. The controlling or coercive behaviour has a ***serious effect*** on another person with whom they have or have had a ***relevant relationship*** ("the relevant other person"); and

c. The person knows or ***ought to know*** that the controlling or coercive behaviour will have a serious effect on the relevant other person.

Note:

Examples of controlling or coercive behaviour may include:

- *assault;*
- *sexual offences;*
- *intimidation;*
- *stalking, whether by physical or digital surveillance;*
- *significant denigration or humiliation;*
- *intentionally damaging or destroying property;*
- *intentionally causing death or injury to an animal;*
- *depriving the relevant other person, or their dependents, of adequate food, nourishment or access to medical treatment;*
- *denying the relevant other person financial autonomy that the relevant other person would otherwise have had;*
- *withholding financial support needed to meet the reasonable living expenses of the relevant other person, or their dependents, at a time when the relevant other person is entirely or predominantly dependent on the person for financial support;*
- *disposing of property owned by the relevant other person, or jointly owned with the relevant other person, or by the relevant other person's dependents, without the relevant other person's consent;*
- *preventing the relevant other person from making or keeping connections with the relevant other person's family, friends or culture;*
- *unreasonably preventing the relevant other person from attending places the relevant other person could otherwise attend; and*

- *unlawfully depriving the relevant other person, or their dependents, of their liberty.*

(2) ***"A course of conduct"*** is behaviour that occurs on at least three occasions within a period of 12 months.

(3) A person will have or have had ***"a relevant relationship"*** with another person if:
   a. They are or have been married;
   b. They are or have been in a de facto relationship, or
   c. They have or have had an intimate personal relationship with the other person, whether or not the intimate relationship involves or has involved a relationship of a sexual nature.

(4) Controlling or coercive behaviour has a "***serious effect***" when it causes:
   a. An apprehension of violence; or
   b. Serious alarm or distress
   to the relevant other person.

(5) A person "***ought to know that the controlling or coercive behaviour will have a serious effect***", where a reasonable person in the same circumstances would know that the behaviour would have a serious effect on the relevant other person.

(6) The penalty for an offence under this section is 7 years imprisonment.

(7) In proceedings for an offence under this section it is a defence for a person to show that—
   a. in engaging in the behaviour in question, the person believed that they were acting in the relevant other person's best interests, and
   b. the behaviour was in all the circumstances reasonable.

(8) A person is to be taken to have shown the facts mentioned in subsection (7) if —
   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.

(9) For the avoidance of doubt, controlling or coercive behaviour does not have to be the same behaviour on each occasion to constitute an offence against this section.

(10) For the avoidance of doubt, controlling or coercive behaviour does not have to be directed toward the relevant other person.

(11) In order for an accused to be convicted of an offence under this section:

a. the tribunal of fact **is** required to be satisfied of the particulars of each occasion of controlling or coercive behaviour alleged;
b. where the tribunal of fact is a jury, the members of the jury are to agree on which occasions of controlling or coercive behaviour constitute the offence;
c. the tribunal of fact **is** required to identify the three or more occasions of controlling or coercive behaviour.

(12) Where the prosecution does not allege more than three occasions of controlling or coercive behaviour, sub-s (11)(b) and (c) do **not** apply.

(13) If on the trial of a person charged with an offence under this section, the tribunal of fact is **not** satisfied that the offence is proven but **is** satisfied that the person has, in respect of any of the occasions relied on to constitute the offence against this section, committed an unlawful act, the tribunal of fact may acquit the person of the offence under this section and find the person guilty of the other individual offence. The person is liable to punishment accordingly.

(14) For the avoidance of doubt, a geographical nexus will exist between the State and a charge pursuant to this section where one or more instance of controlling or coercive behaviour occurs within New South Wales, notwithstanding other instances did not occur within New South Wales.

Question 11. Should the common law with respect to context and relationship evidence be codified within the CPA (or other relevant NSW legislation) to specifically govern its admissibility in criminal proceedings concerning domestic and family violence offences? If yes, how should this be framed?

Following careful consideration, the Committee does <u>not</u> consider it necessary to codify the common law concerning context and relationship evidence in proceedings for domestic and family violence offences. The Committee considers that:

a. the decisions governing the area, insofar as they apply to domestic and family violence offences, are tolerably clear and recent;[36]

b. the effect of the law in the area enables a fair balance to be struck between the interests of an accused person and the community;

c. the majority of domestic violence proceedings are conducted in the Local Court where concerns of unfair prejudice are reduced by way of proceeding without a jury; and

d. the codification of flexible areas of evidence law can produce a disunity of approach that can endure for considerable periods of time.

In respect of the proposed coercive control offence, the Committee is satisfied that the elements of the proposed offence, particularly the requirement to prove a course of conduct, would render context and relationship evidence relevant and admissible without becoming proof of the elements themselves, and that no specific additional provisions would be necessary. The Committee is not concerned that ss. 135 or 137 of the *Evidence Act 1995* (NSW) would work to exclude this evidence inappropriately. The Committee proposes that the offence is a "Table 1" offence (an offence that can be dealt with on indictment by election), and foresees that Local Court Magistrates will be able to restrict their use of proposed context and relationship evidence to its appropriate uses. For those matters on which there are elections, the Committee considers that the standard jury directions will suffice to restrict juries' use of such evidence.

12. Would jury directions specifically addressing domestic and family violence be of assistance in criminal proceedings? If so, what should a proposed jury direction seek to address?

The Committee welcomes the recent commencement of the *Stronger Communities Legislation Amendment (Domestic Violence) Act 2020*, and its introduction of s 306ZR in the *Criminal Procedure Act 1986*. Committee members have identified that the continuation of relationships despite domestic and family violence is common. It has been identified that some in the community may find this counter-intuitive, and may seek to reason that a complainant is untruthful, or that an account is unlikely, in circumstances where a relationship has been continued. The Committee would, accordingly, support the introduction of a provision in the *Criminal Procedure Act 1986* to allow a Judge to provide a warning to counteract such misconceptions.

[36] See, as a recent example, *Johnson v The Queen* (2018) 266 CLR 106 at [18]-[20].

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

The Committee recognises that coercive control can be an important feature of sentencing for domestic violence offences and can significantly affect the assessment of the objective seriousness of offending. However, as set out in the Discussion Paper, current sentencing principles adequately direct attention to these features in sentence proceedings for current offences. Codification of this characteristic as a prescribed aggravating feature in s. 21A(2) of the *Crimes (Sentencing Procedure) Act 1999* may create undue focus on whether the characteristic is "double-counted" in respect of domestic violence offences, particularly intimidation pursuant to s. 13 of the *Crimes (Domestic and Personal Violence) Act 2013*.

The Committee notes the relatively recent inclusion of ss. 4A and 4B in the *Crimes (Sentencing Procedure) Act 1999*. The Committee considers that these provisions are working well to strike a balance between the protection of vulnerable members of the community and an offender.

The Committee has identified a potential area for clarity in respect of its proposed offence, which requires that there is a "serious effect" on the "relevant other person". It may be prudent to note for completeness that s. 21A(2)(g) of the *Crimes (Sentencing Procedure) Act 1999* is still available in respect of sentence proceedings for the proposed offence; that is, that the "serious effect" which is an element of the proposed offence, and "substantial harm" which is an aggravating factor on sentence, are not synonymous. Therefore a sentencing judge would not be double-counting an element of the offence as an aggravating factor if substantial harm was taken into account on sentence. The Committee is not concerned that any other s. 21A factors, aggravating or mitigating, are at risk of being improperly considered to be "inherent" in the elements of the Committee's proposed offence.

15.What non-legislative activities are needed to improve the identification of and response to coercive and controlling behaviours both within the criminal justice system and more broadly?

The Committee is concerned that domestic and family violence should not be framed as a solely criminal justice issue. The Committee supports the view that over-reliance on the criminal justice system to address family and domestic violence can have the adverse consequences set out by No to Violence in their Discussion Paper on Predominant Aggressor Identification and Victim Misidentification.[37] As No To Violence makes clear,

[37] (21 November 2019), 5.

domestic and family violence is a socially and culturally embedded public health issue and all community members play a part in its prevention. As with other criminal justice issues, a failure to identify and support non-legislative intervention often fails to reduce offending.

In addition to the education programs referred to in response to Question 4 above, Committee members also expressed considerable desire to ensure appropriate educative programs are offered, with particular emphasis on programs being available to offenders prior to sentence. These programs should be offered in ways that are sensitive to diverse cultural needs.

However, some members anecdotally identified a low take-up rate of currently offered programs, such as those offered by Family and Community Services. The Committee supports any move to critically examine the reason for poor engagement rates in those programs, including the examination of appropriate incentives. Committee members identified the Traffic Offenders Rehabilitation Program as a widely successful educative and rehabilitative program commonly engaged in by low-level and first-time traffic offenders. Members were particularly complimentary of the way in which that program utilises diverse perspectives and speakers to illuminate the wide-spread effects of traffic offending on the community. The Committee encourages further consideration of how to replicate the program's success in an equally pervasive field of offending.

The Committee also welcomes practical initiatives, programs and services to assist persons experiencing coercive control or concerned friends and relatives. For example, 'Arc' is a readily available mobile phone application that enables users to record instances of domestic violence by way of diary entries and storage of associated multimedia (ie photos, videos and audio). Another example is Vodafone's "Bright Sky" app, which is available in overseas jurisdictions, that provides a subtle way to assess the safety of a relationship, and seek help and support services.[38] The Committee supports further research and development in relation to such apps, including apps that can assist perpetrators of such behaviour in recognising and modifying their behaviour.

[38] See, eg, information about the Bright Sky app and other apps aimed at preventing abuse available online at the Vodafone website at https://www.vodafone.com/about/vodafone-foundation/focus-areas/apps-against-abuse (accessed 2 February 2021).

Concluding Comments

NSW Young Lawyers and the Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

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