

Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023

Submission to the Legal Affairs and Safety Committee

24 October 2023

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input the Legal Affairs and Safety Committee's inquiry into the *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023* ('the Bill').
2. The ALA is opposed to the option of legislation to criminalize coercive control. While the ALA acknowledges the seriousness of coercive control and supports all, particularly Aboriginal and Torres Strait Islander women, who experience and speak up against it, the ALA is opposed to a carceral solution as the most appropriate option to deal with this social issue.
3. We draw the Committee's attention to the breadth of any definition of coercive control, the limited capacity of police officers and law enforcement to identify instances of this pattern of behavior and the many risks for mistaken identification that this offence poses to First Nations women who are already overly incarcerated.²
4. In this submission, we will outline the likely consequences of the creation of a new criminal offence for "coercive control" based on research of domestic-violence management under law enforcement, the risk of misidentification posed to Aboriginal and Torres Strait Islander communities and the racialization of offences and finally, the necessity of a non-carceral response.

The Impact of Criminalisation on Victim-Survivor Safety

5. Whilst there is significant evidence of the nature and extent of coercive control, the ALA believes it's important to recognise that those outside the specialist family violence sector possess a limited understanding of how best to deal with it while prioritising the victim-survivor's safety concerns and ensuring access to safety for at-risk women.
6. With Tasmania currently being the only jurisdiction to have criminalised 'coercive control'³ and NSW on the path to criminalisation in June 2024, research shows the use of these

² Misha Ketchell, "Carceral feminism and coercive control: when Indigenous women aren't seen as ideal victims, witnesses or women", *The Conversation*, (News article, 25 May 2021) <<https://theconversation.com/carceral-feminism-and-coercive-control-when-indigenous-women-arent-seen-as-ideal-victims-witnesses-or-women-161091>>.

³ Felicity Cadwell, "New DV offence of coercive control set to become law in Queensland", *Brisbane Times*, (News Article, 2 December 2021) <<https://www.brisbanetimes.com.au/national/new-dv-offence-of-coercive-control-set-to-become-law-in-queensland-20211202-p59e3k.html>>.

offences (of economic abuse, and emotional abuse and intimidation) has been limited due to a number of factors including:⁴

- a. Incidents need to be reported within 12 months of their occurrence;
- b. The legislative drafting suffers from lack of clarity concerning understandings of reasonableness in relation to each of these behaviours;
- c. There are difficulties in operationalising emotional abuse in the legal context;
- d. There are overlaps between the offences in terms of what is included/excluded;
- e. There are overlaps between these offences and other offences on the statute books, arguably making both redundant.⁵

7. In addition, we note that the intended use of this law is likely to be effected by unintended consequences of using the law to protect women in abusive relationships,⁶ as well as the complexity of a problematic history with the law for Indigenous women⁷ as well as barriers experienced by women from ethnic minorities.⁸ The experience of victim-survivors (and in particular women) engaging with the criminal justice system is inextricably linked to a wide range of variables including socioeconomic status, ethnicity, and cultural background.⁹ Consequently, intervention by the criminal law on behalf of women in abusive relationships has impacted how and if they engage with the law in their protection.¹⁰
8. The ALA notes that one of the major hurdles of engaging in the criminal justice process for victim-survivors is fear: fear of their partner, fear of the system and fear of what they might lose by exposing themselves to the criminal justice process (e.g., their role as mothers to their children). There is ample evidence that avoiding the criminal justice process is a measure of self-protection from further abuse, known as 'legal systems abuse', where

⁴McMahon, Marilyn & McGorrery, Paul. (2017). Criminalising emotional abuse, intimidation and economic abuse in the context of family violence: The Tasmanian experience. *University of Tasmania law review*. 35.

⁵ Ibid 35(2): 1–22.

⁶ See Tolmie J (2018) Coercive control: To criminalize or not to criminalize? *Criminology & Criminal Justice* 18(1): 50–66.

⁷ Blagg H (2016) *Crime, Aboriginality and the Decolonisation of Justice*. 2nd edn. Sydney: Federation Press.

⁸ Gill AK and Harrison K (2016) Police responses to intimate partner sexual violence in South Asian communities. *Policing* 10(4): 446–455.

⁹ Walklate, Sandra; Fitz-Gibbon, Kate, "The Criminalisation of Coercive Control: The Power of Law?" (2019) 41; 8(4) *International Journal for Crime, Justice and Social Democracy* 94.

¹⁰ Hanna C (2009) The paradox of progress: Translating Evan Stark's coercive control into legal doctrine for abused women. *Violence against Women* 15(12): 1458–1476.

perpetrators use the legal system to further assert control over their partners (see, e.g., research on protection orders and the criminalisation of women victims.¹¹ Additionally, such abuse can also contribute to the criminalisation of women, adding to their concerns about engagement with legal processes at all.

9. We note these concerns have persisted, decades of policy activity notwithstanding. Responding to these concerns is not solely about training criminal justice professionals to respond more appropriately to women living with violence, though without a doubt, more could be done in this respect. In addition, the nature of abusive relationships means that criminal sanction may not be the most appropriate form of intervention or that which is welcomed by victim-survivors themselves. Well-documented research suggests that if a woman herself has asked for help or support, she likely just wants the behaviour of her partner, both violent and non-violent in all of its intimidating and fear-inducing manifestations, to stop.¹² At other times, psychological bonds known as ‘trauma-bonds’ in abusive relationships can mean that love still matters.¹³ As such, wanting undesirable behaviour to stop does not necessarily equate with wanting a partner’s behaviour to be subjected to criminal sanction.
10. The ALA submits that too many preconditions are required for an offence of coercive control in order for the law to operate in the way that it is intended. Introducing coercive control as a standalone offence presumes that women will have access to police, that police will have access to the required evidence, and the legal frameworks of the inherently masculine criminal court system will be open to their experiences of a pattern of abuse.¹⁴
11. It would be remiss for this inquiry not to consider the added barrier to attaining proper care and safety for those against whom the state has tended to commit acts of violence against and control over; our Indigenous population and particularly, Indigenous women. Beliefs and presuppositions about Indigenous communities and those that are ‘linguistically and culturally diverse’, places particular groups of people in the police line of sight from the outset. The ALA notes ample evidence of domestic violence interactions with police regularly

¹¹ Douglas H and Nancarrow H (2014) Perils of using law: A critique of protection orders to respond to intimate partner violence. In Johnson H, Fisher BS and Jaquier V (eds) *Critical Issues on Violence against Women: International Perspectives and Promising Strategies*: 77–90. London: Routledge.

¹² Kirkwood C (1993) *Leaving Abusive Partners*. London: Sage.

¹³ Kuennen T (2014) Love matters. *Arizona Law Review* 56(4): 977–1015.

¹⁴ *Ibid.*

leading to criminalisation and incarceration for Indigenous women.¹⁵ In this context, the breadth of the definition of ‘coercive control’, and the difficulty demonstrating it and documenting it, makes any legislation to criminalise it an incredibly powerful weapon in the criminalisation of Indigenous women.

Misidentification

12. In 2017, Australia’s National Research Organisation for Women’s Safety (ANROWS) responded to a recommendation of the Queensland Domestic Violence Death Review and Advisory Board in its 2016-17 Annual Report. The Advisory Board reported that in just under half (44.4%) of all cases of female deaths subject to the review, the woman had been identified as a respondent to a domestic and family violence (DFV) protection order on at least one occasion.¹⁶
13. Aboriginal and Torres Strait Islander women are statistically more likely to be labelled as perpetrators of domestic violence on protection orders.¹⁷ The inadequacy of a law enforcement response in DV cases generally is illustrated in the common scenario;

“The research shows that the likelihood of a woman being inappropriately identified as a perpetrator is increased by factors such as misperceptions about victim behaviour, resourcing and time constraints, as well as organisational culture and procedural requirements. For example, when attending an incident of DFV, the priority for police is to make the scene safe by determining who is the aggressor and who is the victim very quickly. This approach leads to a tendency to focus on single incidents of violence when assessing who is most in need of a protection order, rather than considering the history of an abusive

¹⁵ Nancarrow, H., Thomas, K., Ringland, V., & Modini, T. (2020). Accurately identifying the “person most in need of protection” in domestic and family violence law (Research report, 23/2020). Sydney: ANROWS.

¹⁶ Ibid.

¹⁷ Eden Gillespie, ‘Queensland police misidentify domestic violence victims as attackers, inquiry told’, *The Guardian* (News article, 19 July 2022) <<https://www.theguardian.com/australia-news/2022/jul/19/queensland-police-misidentify-domestic-violence-victims-as-attackers-inquiry-told>>; Charmayne Allison and Sandra Moon, ‘Victim survivors fear NSW coercive control legislation could be used against them’, *ABC News* (News article, 27 July 2022) <<https://www.abc.net.au/news/2022-07-27/domestic-violence-survivors-respond-to-draft-bill/101256732>>.

relationship and the overarching pattern of coercive control. Women who have “fought back” are therefore at greater risk of being misidentified as a perpetrator.”¹⁸

14. The ALA is deeply concerned that criminalisation of coercive control may further exacerbate the risk of misidentification of victims and perpetrators, particularly where policing and prosecution rely on the testimony of parties in the context of a controlling relationship. The conceptual and evidential challenges for criminal prosecution¹⁹ are also important to note as well as the increased risk of victim-survivors being subjected to secondary victimisation through the criminal justice processes.²⁰

15. In addition to evidentiary challenges, there is evidence suggesting that police themselves pose a risk to victims of coercive control in those early stages of intervention for a number of reasons including prejudicial and racist views and cultures of misogyny identified during recent hearings concerning the Queensland Police Service in its dealing with domestic violence victims.²¹ It is well-documented that victim-survivors are hesitant to come forward to police, particularly Indigenous women whose relationship with law enforcement is fraught with a colonial past and the trauma flowing therefrom; decades of mistreatment, mistrust, and ongoing racism.²² Additionally, many Indigenous women are concerned about authorities removing their children or about their own criminal records. The risk of harm and danger is compounded once a woman attempts to leave a relationship characterised by domestic violence.²³

¹⁸ ANROWS, ‘Study highlights gap between intentions and outcomes of domestic violence law and strategies for systems reform’, Australia’s National Research Organisation for Women’s Safety Limited (Media release, 25 November 2020) <<https://www.anrows.org.au/media-releases/study-highlights-gap-between-intentions-and-outcomes-of-domestic-violence-law-and-strategies-for-systems-reform/>>

¹⁹ Tolmie J (2018) Coercive control: To criminalize or not to criminalize? *Criminology & Criminal Justice* 18(1): 54.

²⁰ Heather Douglas, ‘Legal systems abuse and coercive control’ (2018) 18(1) *Criminology & Criminal Justice* 85; Charlotte Bishop and Vanessa Bettinson (n 13) 6; Sandra Walklate, Kate Fitz-Gibbon and Jude McCulloch, ‘Is more law the answer? Seeking justice for victims of intimate partner violence through the reform of legal categories’ (2018) 18(1) *Criminology and Criminal Justice* 120.

²¹ Reported by Eden Gillespie and presented by Laura Murphy-Oates, ‘Queensland police whistle-blowers speak out about domestic violence’, *The Guardian* (Podcast, 26 July 2022) <<https://www.theguardian.com/australia-news/audio/2022/jul/26/queensland-police-whistleblowers-speak-out-about-domestic-violence>>.

²² *Ibid.*

²³ Willis M 2011. Non-disclosure of violence in Australian Indigenous communities. *Trends & issues in crime and criminal justice* no. 405. Canberra: Australian Institute of Criminology.

Racialisation of offences

16. The ALA submits that the benefit of criminalising intimate partner violence (and coercive control by association), comes at a greater cost for women of colour given the hyper incarceration of Aboriginal and Torres Strait Islander women and the proportion of misidentification of victims as perpetrators and associated homicide cases.²⁴
17. Following a recommendation in the *2017 Annual report of the Queensland Domestic and Family Violence Death Review and Advisory Board*, ANROWS found that women whose deaths were linked to DFV often had their own police records showing they had been identified as a perpetrator of domestic and family violence prior to their death (a large proportion of those victims were Aboriginal or Torres Strait Islander).²⁵ Significantly, in nearly all of the DFV-related deaths of Aboriginal people, the deceased had been recorded as both respondent and aggrieved prior to their death.²⁶
18. The ALA acknowledges the research on intimate partner violence and how it is dealt with through law enforcement is stark for Aboriginal and Torres Strait Islander women in particular. First Nations organisations and communities have repeatedly identified the role of racism in victim-misidentification by police.²⁷ In its submission to the NSW Joint Select Committee on Coercive Control, the Wirringa Baiya Aboriginal Women’s Legal Centre aptly noted:

[if an] Aboriginal woman is uneasy or unable to persuade a police officer that she is the primary victim of physical violence [under the current law] what hope, or incentive is there

²⁴ Sisters Inside, ‘In no uncertain terms’ the violence of criminalising coercive control. Joint statement: Sisters Inside & Institute for Collaborative Race Research’, *Sisters Inside* (Submission to Queensland Women’s Safety and Justice Taskforce, 17 May 2021) <<https://www.sistersinside.com.au/in-no-uncertain-terms-the-violence-of-criminalising-coercive-control-joint-statement-sisters-inside-institute-for-collaborative-race-research/>>.

²⁵ Nancarrow, H., Thomas, K., Ringland, V., & Modini, T. (2020). Accurately identifying the “person most in need of protection” in domestic and family violence law (Research report, 23/2020). Sydney: ANROWS.

²⁶ Ibid 82.

²⁷ Wirringa Baiya Aboriginal Women's Legal Centre Inc, Submission No 142 to Parliamentary Joint Select Committee, *Crimes (Domestic and Personal Violence) Amendment (Coercive Control – Preethi’s Law) Bill 2020* (19 February 2021); Victorian Aboriginal Legal Service, ‘Addressing Coercive Control Without Criminalisation Avoiding Blunt Tools that Fail Victim-Survivors’ (Policy Paper, January 2022).

to persuade a police officer that she has experienced ongoing psychological and economic abuse [under the new law]?²⁸

19. Concerningly, recent research found that almost a third of Aboriginal and Torres Strait Islander women killed in domestic violence homicides had been previously identified by police as domestic violence perpetrators.²⁹ This research also identified police were likely to describe them as “uncooperative” or “unwilling” to work with police and that such terminology was used to describe victims in almost three quarters of domestic violence homicides where police had previously been involved in relation to domestic violence.³⁰ In many cases police used this language to justify their decision to not provide protection or assistance for Aboriginal and Torres Strait Islander women when they experienced abuse.
20. Therefore, the ALA strongly urges the Queensland Government to address these issues before proceeding to implement coercive control as an offence. We support alternative responses to criminalisation of coercive control and urge the Government to consider alternative forms of intervention that make it safer (rather than more risk-laden) for victims to leave environments they recognise as dangerous.³¹
21. The ALA believes that such responses outside criminalisation must be prioritised if indeed victim safety is the forefront of addressing this social issue. Additionally, culturally tailored interventions are vital to ensuring that Aboriginal and Torres Strait Islander women are not disproportionately targeted by these laws. The ALA believes that these objectives are paramount in light of research that suggests a new coercive control offence may have very little impact on the ability of police to identify true perpetrators of this behaviour at the point of intervention and where the situation could escalate to homicide or serious violence.³²

²⁸ Wirringa Baiya Aboriginal Women's Legal Centre Inc, Submission No 142 to Parliamentary Joint Select Committee, *Crimes (Domestic and Personal Violence) Amendment (Coercive Control – Preethi's Law) Bill 2020* (19 February 2021).

²⁹ Emma Buxton-Namisnyk, *Domestic Violence Policing of First Nations Women in Australia: 'Settler' Frameworks, Consequential Harms and the Promise of Meaningful Self-Determination*, *The British Journal of Criminology*, 2021.

³⁰ *Ibid.*

³¹ *Ibid.*

³² Nancarrow, H., Thomas, K., Ringland, V., & Modini, T. (2020). *Accurately identifying the “person most in need of protection” in domestic and family violence law* (Research report, 23/2020). Sydney: ANROW; Ben Smees, ‘Queensland police misidentified women murdered by husbands as perpetrators of domestic violence’, *The Guardian* (News article, 3 May 2021) < <https://www.theguardian.com/australia->

The Necessity of a Non-Carceral Response

22. Coercive control is a complex and pernicious form of abuse, which the family violence sector in Queensland has already identified and has been working to address for many years. In terms of addressing the issue of coercive control in society, the ALA believes in the critical role of support services in providing community-based, independent guidance on the most appropriate approach to patterns of behaviour known as ‘coercive control’.
23. Rather, we contend that specialist family violence services are in the best position to support women in relationships characterised by coercive control and that investment in welfare support services is critical to ensuring victim-survivor safety. In our view, criminalisation of coercive control is an ineffective way of educating communities on an issue that is entrenched in social and cultural attitudes on this issue. In this light, the ALA notes the Royal Commission which concluded that “education, training and embedding best practice and family violence specialisation” would be more effective than the introduction of new offences.³³ The creation of a new offence cannot be separated from cultural and attitudinal change; the ALA believes that training and education (while vital) are inadequate on their own in building capacity and capability of law enforcement and police officers to recognise and respond appropriately to patterns of abusive behaviour.
24. We echo the following, outlined by Domestic Violence Victoria, as indicators of system readiness before the introduction of a new offence is considered to minimise unintended consequences arising:³⁴
- a. Demonstrated/measurable attitudinal and cultural change in the way coercive control is understood within the justice system which would be reflected in a departure from the current incident-based approach to seeing family violence as a pattern of abuse behaviour.

[news/2021/may/03/women-murdered-by-husbands-labelled-perpetrators-of-domestic-violence-by-queensland-police](https://www.ala.org.au/news/2021/may/03/women-murdered-by-husbands-labelled-perpetrators-of-domestic-violence-by-queensland-police)>.

³³ State of Victoria (2014-2016). Royal Commission into Family Violence: Report and recommendations, Vol III. Parl Paper No 189.

³⁴ DVRCV, ‘Responding to Coercive Control in Victoria – Broadening the conversation beyond criminalisation’ (Research Paper, May 2021) <[file:///ghfs01/ALA\\$/Users/ALA-nadia/Desktop/PAP_202105_Responding-to-Coercive-Control_FINAL.pdf](file:///ghfs01/ALA$/Users/ALA-nadia/Desktop/PAP_202105_Responding-to-Coercive-Control_FINAL.pdf)>.

- b. Evidence that policies and procedures have been put in place in the broader justice system that are leading to a reduction in misidentification.
 - c. Extensive consultation with victim-survivors as “in considering how effective an additional criminal justice response would be and to ascertain whether it will result in safer outcomes for victim-survivors it is crucial to consider victims-survivors’ experiences of the criminal justice system”.³⁵
 - d. Sufficient funding and resources for specialist family violence services and victim support services to ensure that all victim-survivors can access the support they need throughout the criminal process.
 - e. Additional funding and resources so all victim-survivors have access to free legal advice, information and representation so they can make informed decisions about their safety.
25. Above all, it is the firm position of the ALA that governments must listen and respond to First Nations women’s’ lived experiences, advocacy, and evidence-based concerns before proceeding down this path. The ALA recognises that First Nations women will continue to suffer the “unanticipated consequences” of these new laws. The pursuit of a “tough on domestic violence” stance continues to risk significant harm to its most marginalised victims.

Conclusion

26. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the Legal Affairs and Safety Committee’s inquiry into the *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023* (‘the Bill’).
27. The ALA is available to provide further assistance to the Committee on the issues raised in this submission.



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³⁵ Douglas, H. (2018). Legal systems abuse and coercive control. *Criminology & Criminal Justice*, 18(1), 84–99.