The Law Society of Western Australia
The voice of the legal profession in Western Australia

30 June 2022

Dr Adam Tomison
Director General
Department of Justice
C/- Office of the Commissioner for Victims of Crime

By email: coercivecontrol@justice.wa.gov.au

Dear Dr Tomison

INVITATION TO PARTICIPATE IN CONSULTATION ON LEGISLATIVE RESPONSES TO COERCIVE CONTROL IN WESTERN AUSTRALIA

I refer to the invitation to participate in consultation on legislative responses to coercive control in Western Australia, received from the Office of the Commissioner for Victims of Crime, dated 30 March 2022.

The Office of the Commissioner for Victims of Crime prepared a discussion paper that seeks feedback on the current legislative responses and future responses to coercive control in Western Australia and asked for a response from the Law Society.

The Law Society, therefore, answers the questions in the discussion paper as follows:

1. **Does the Restraining Orders Act 1997 adequately address the nature and impact of coercive control?**

   The principles for consideration of making a Family Violence Restraining Order (s 10B), coupled with the new expanded definition of family violence (s5A) in the Restraining Orders Act do provide a court with powers to address coercive and controlling behaviour in the context of intimate or familial relationships. In addition, section 10G of the Restraining Orders Act gives the magistrate fairly broad powers to address the impact of coercive control which may be subjective in each circumstance and make specific orders accordingly.

   This, coupled with significant penalties for breach of a restraining order, does provide an adequate civil response, with criminal enforcement options for this type of conduct.

2. **Are family violence restraining orders adequately capturing coercive control and patterns of harm in their application:**

   - **through the granting of orders?**
   - **through the prosecution of breaches?**

   The Law Society of WA is not in a position to comment beyond the fact that the relevant provision in section 5A and other provisions in the Restraining Orders Act address the relevant conduct. In doing so, it has the capacity to capture coercive control but it is subject to evidence provided, and the judicial officer's approach inter alia. It is only so effective as the terms of the order, in that they need to be capable of defining the conduct which is prohibited.

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3. **Is there a good level of awareness about the section 300 persistent family violence offence within the family violence sector, WA Police Force, judicial system and the broader community? If not, why do you think that is?**

   The Law Society may only comment that there is a reasonable level of awareness in the legal sector but cannot comment on the level of awareness about this legislation in the community or other sectors.

4. **How is the section 300 persistent family violence offence being charged and prosecuted? Is it capturing ongoing patterns of harm as intended?**

   We note that the offence of persistent family violence in the Criminal Code is limited to certain categories of relationship which are intimate or akin to marriage. It is not as wide in scope as the concept of 'family violence' under the Restraining Orders Act. We also note that amendments to the Evidence Act 1906 (s38 – 39F) appear to provide for reasonable scope for a court considering evidence of family violence, which may be relevant to this offence.

   The offence is structured in a similar way to the offence of persistent sexual conduct (s 321A) as both do not require specificity in the charge or particulars of the offence as to the acts alleged. With respect to the offence under section 321A, there has been considerable judicial commentary on the difficulties encountered in interpretation of this provision and particularly for juries in reaching a decision to convict or acquit for this offence. It remains to be seen how the courts and juries will interpret this provision.

   The Law Society notes that these provisions have only been in effect since late 2020. As yet there has been limited data to review with respect to this offence. We note that a review of the operation and effectiveness of the new family violence provisions will be undertaken in 2023. We await the outcome of this review, with interest.

5. **How are the new evidence provisions in sections 37-39 of the Evidence Act 1906 being used? Are they making a difference for victim-survivors in their experience of court proceedings (whether as accused or victim)?**

   See comments above re: Q4.

   The Law Society is aware of cases where evidence of an expert or another appropriate witness of the incidence of family violence has proved to have been of significant probative value, particularly to protect the interests of the victim-survivor.

   On the other hand, these provisions may have unintended consequences, which result in unfairness to a victim-survivor. The Law Society is cognisant of the possibility that this provision being utilised for an alleged perpetrator to seek to admit evidence that would be unfavourable to the victim-survivor.

   On the whole, the Law Society understands that judicial officers judiciously apply the law, appropriately so that these provisions should be expected to be applied to admit only that evidence which serves the interests of justice in each case.

6. **Can current justice system responses to family and domestic violence in Western Australia capture coercive control adequately? Please provide reasons and/or examples.**

   The Law Society considers that it is unnecessary to introduce a criminal offence of coercive control, particularly where the existing civil restraining order legislation and consequential breach in the criminal justice sphere already deliver targeted prevention and enforcement outcomes for this type of conduct.

7. **Does existing family violence legislation serve the particular needs of vulnerable groups? Why/why not? What improvements are needed in its implementation or application?**

   The Law Society considers it is very important that the law recognises cultural diversity and the particular vulnerabilities of individuals in society. The Law Society acknowledges that these particular laws may not always result in suitable outcomes for some cultural groups, for example in Aboriginal or Torres Strait Islander communities where kinship, social and cultural contexts exacerbate the likelihood of increased interaction with family violence legislation.

   Whilst the court does have some discretion to consider social, cultural and peripheral matters when applying the law, wherever law reforms may disproportionately affect particular cultural groups, it is essential that there is significant consultation with affected groups before the changes are implemented.

   We welcome consideration of these matters in the upcoming review of the operation and effectiveness of recent Family Violence Reform legislation in WA.

8. **Is coercive control a meaningful concept for victim-survivors and the community to understand the nature of family and domestic violence in Western Australia? Should this type of behaviour be called something else or understood differently?**

   It is clear that coercive control is a concept that is complex and difficult to define, due to the range of behaviours potentially relevant, and cultural, social and community norms which modify its context. These difficulties are exacerbated by inconsistencies in legislative approaches to dealing with family violence in Australia. Any approach taken by government should consider and address these issues through extensive consultation.

9. **What responses to coercive control would improve safety for victim-survivors? What responses to coercive control would improve accountability for perpetrators?**

   The Law Society makes no comment on this matter.

10. **How can the justice system improve its ability to recognise and respond to patterns of violence, rather than incidents?**

    Improvements in recognition and responses to patterns of violence, rather than incidents of violence will only be made by systemic and social cultural change, driven by clear policy, education and information to all persons engaged in the criminal justice system.

11. Should the Western Australian Government criminalise coercive control?

The Law Society opposes the criminalisation of coercive control, primarily on the basis that any such offence would likely be incapable of clear definition. Further, it is our view that existing civil responses and consequential criminal law outcomes in family violence legislation already adequately address this type of conduct.

12. If the Western Australian Government criminalises coercive control, how should the risks of adverse impacts for victim-survivors be addressed?

The Law Society makes no comment on this matter.

13. What are alternative options to criminalisation? In what alternative ways can the objects of criminalisation be achieved?

Irrespective whether coercive control is criminalised, social and systemic changes to family violence are needed to address family violence. These will necessarily involve changes in all aspects of the socio-political, legal and legislative landscape in Western Australia and should not be limited to one element of society.

14. What community-based responses could help to address coercive control?

The Law Society has no further comment.

15. Is there anything else you would like to say about responding to coercive control in Western Australia?

The Law Society has no further comment at this time but looks forward to further engagement during the statutory review.

If you have any queries please contact Mary Woodford, General Manager Advocacy and Professional Development on 9324 8646 or mwoodford@lawsocietywa.asn.au

Yours sincerely

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