

EMBOLDEN SA INC:

SUBMISSION ON THE DRAFT *CRIMINAL LAW CONSOLIDATION (COERCIVE CONTROL) AMENDMENT BILL 2023*

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About Embolden

Embolden is the statewide peak body of organisations working to respond to and eliminate domestic, family and sexual violence in South Australia. Our members provide services that promote women and their children's safety and wellbeing, and work to prevent and respond to violence against women. We lobby and advocate for women's right to respect, safety and self-determination, and represent providers of specialist services in the domestic, family and sexual violence and related sectors, including services that work with men who use violence against women and Aboriginal specialist services.

Acknowledgement of Country

We acknowledge and respect Aboriginal peoples as the state's first peoples and nations, and recognise Aboriginal peoples as traditional owners and occupants of land and waters in South Australia. Sovereignty has never been ceded. It always was and always will be Aboriginal land. We recognise that Aboriginal peoples' spiritual, social, cultural and economic practices come from their traditional lands and waters, that they maintain their cultural and heritage beliefs, languages and laws, which are of ongoing importance, and that they have made and continue to make a unique and irreplaceable contribution to the state. We acknowledge that Aboriginal peoples have endured, and continue to endure, injustices and dispossession of their traditional lands and waters. We continue to pay respect to the resilience and strengths of Ancestors and Elders past, present and those emerging.

This submission has been developed in consultation with, and is submitted on behalf of, Embolden's member organisations:

- Bramwell House, The Salvation Army
- Ceduna Regional Domestic Violence and Aboriginal Family Violence Services, Centacare Catholic Country Services
- Coober Pedy Regional Domestic Violence and Aboriginal Family Violence Service, Uniting Country SA
- Cross Border/APY Lands Aboriginal Family Violence Service, NPY Women's Council
- 54 Reasons
- Fleurieu and KI Domestic Violence Service, Junction SA
- Kornar Winmil Yunti Aboriginal Cooperation
- Mt Gambier and Limestone Coast Domestic Violence Service, Centacare Catholic Family Services
- Murray Mallee and Adelaide Hills Domestic Violence Service, Centacare Catholic Family Services
- No to Violence
- Nunga Mi:Minar
- OARS Community Transitions
- Port Augusta Regional Domestic Violence and Aboriginal Family Violence Service, Uniting Country SA
- Relationships Australia (SA)
- Riverland Domestic Violence Service, Centacare Catholic Family Services
- Whyalla Regional Domestic Violence Service, Centacare Catholic Family Services
- Women's Legal Service SA
- Women's Safety Services SA
- Yarredi Services
- Yarrow Place, SA Health
- Yorke and Mid North Domestic Violence Service, Uniting Country SA
- Zahra Foundation Australia

A note on the language used in this submission

Throughout this submission, people who use coercive control are referred to as perpetrators and people who have experienced or are experiencing coercive control are referred to as victim-survivors.

While Embolden acknowledges that coercive control can be used by or against people of all genders, this submission at times refers to men and women, reflecting that coercive control is most often perpetrated by men against women and in heterosexual relationships, overwhelmingly so.

Overarching comment

Embolden commends the State Government for the introduction of a Bill to criminalise coercive control. Coercive control is often a significant part of a person's experience of domestic and family violence (DFV) and the criminalisation of these behaviours is fundamentally important in bridging the current gap between the criminal law and victim-survivors' lived experience.

While Embolden supports several aspects of the draft Bill, we hold significant concerns that some elements of the Bill risk criminalising behaviours that are not coercive control as it is understood within DFV literature and practice and indeed, as it is most frequently perpetrated and experienced in relationships in which gender-based violence is occurring. As specified in the National Principles to Address Coercive Control in Family and Domestic Violence ([National Principles](#)), perpetrators exert power and dominance over victim-survivors using patterns of abusive behaviours over time that create fear and deny liberty and autonomy. Coercive control is grounded in a broader cultural context of gender inequality and in intimate partner relationships is most often used by cisgender men against women (both cisgender and transgender) who are their current or former partner, and their children. The tactics used by perpetrators of coercive control may include sexual violence. Additionally, as National Principle 3 makes clear, gender inequality often intersects with other forms of discrimination and inequality – including the ongoing impacts of colonisation

and racism for Aboriginal women – to inform the prevalence of coercive control, perpetrator behaviours and the severity of impacts for victim-survivors.

In Embolden's view, the Bill as it currently stands risks promoting a 'false equivalence' narrative in relation to men's and women's conduct in abusive relationships. This raises the likelihood that women experiencing coercive control will be misidentified as the perpetrator and relatedly, the likelihood that the new law will be weaponised by perpetrators against their partner, including in family court proceedings. In this submission, we outline these concerns in more detail and make some recommendations to address them. We also provide comment on other sections of the Bill, including recommending that the scope of relationships covered be expanded to better recognise the experiences of Aboriginal and culturally and linguistically diverse people, and children and young people.

Potential downsides of standalone coercive control legislation

The experience of Scotland in implementing the *Domestic Abuse (Scotland) Act 2018* points to the benefit of creating an overarching domestic abuse offence, under which a course of conduct can comprise both behaviours already criminalised under existing legislation (e.g. physical assault) and coercive and controlling behaviours. A standalone coercive control Act risks reinforcing a hierarchy of harms, where already criminalised 'physical' behaviours – which are also easier to evidence - are considered more serious and the coercive control offence is ultimately under-utilised, as has happened in England and Wales. Embolden is also aware that Dr Marsha Scott, CEO of Scottish Women's Aid, holds the view that Scotland's umbrella approach has been a factor in Scotland's relatively high conviction rates under their Domestic Abuse Act.

Scope of relationships covered by the Bill

Embolden endorses the Bill's inclusion of former partners through Section 20C(1)(b): 'the person is or was in a relationship with the other person'. We know that a significant proportion of women and other victim-survivors experience coercive control at the hands of

ex-partners and that separation is a significant risk factor for severe and fatal physical violence.

The Bill's exclusion of coercive control between people in relationships other than intimate partnerships may **not adequately reflect the experience of Aboriginal and culturally and linguistically diverse people and communities**, who are more likely than other groups to experience abuse from other co-resident family members, including extended family/kinship group members.

In relation to **children and young people**, the National Principles state:

Often coercive control is considered in the context of adult relationships only. However, children and young people are victim-survivors of abuse in their own right and may be directly targeted, coerced to participate in abusive behaviours or witness violence towards another family member.

Embolden's view is that, given the individual and inter-generational impacts of domestic abuse on children and young people, children who witness domestic abuse of any kind should be considered victim-survivors in their own right and this should be reflected in legislation. In the absence of this, Embolden advocates that the 'child aggravation' element included in the Criminal Law Consolidation (Abusive Behaviour) Amendment Bill (2021 Bill) - where penalties are greater for behaviour directed at a child, that makes use of a child or is witnessed by a child - be reconsidered for the current Bill. While the inclusion of a 'child aggravation' provision falls short of legislative recognition of children as victim-survivors in their own right, if appropriately enforced it has the potential to contribute to improved outcomes of family court processes relating to child contact/custody for children and women experiencing domestic abuse, where decisions can currently be made without adequate consideration of the perpetrator's offending.

Definition and scope of behaviours covered by the Bill

Embolden supports:

- that the Bill's definition of behaviour includes an omission or a threat to engage in behaviour. As the perpetration of coercive control is about the exercise of power and control through fear, including threats to engage in behaviour is critical; and
- the potential inclusion of retrospective behaviours in the course of conduct presented in evidence, which avoids unnecessarily restricting the Bill's utility for victim-survivors.

In relation to 'behaviour that has a controlling impact' outlined in Section 20B(3): while Embolden appreciates that the behaviours referenced are not intended to be exhaustive (i.e. it is 'without limitation'), we note that this section is less comprehensive than Section 54F (Meaning of 'abusive behaviour') of the NSW *Crimes Legislation Amendment (Coercive Control) Act 2022*. Is there a risk that Section 20B(3) would inadvertently provide loopholes for perpetrators?

Additionally, Embolden has received feedback from members that the examples of behaviour provided in Section 20B(4) should not be included in the legislation. These examples – with amendment, as discussed below – might more appropriately be included in guidance accompanying legislation rather than in the legislation itself.

Embolden notes for consideration the approach taken under Scotland's Domestic Abuse Act in relation to 'What constitutes abusive behaviour' (Section 2), defined principally in relation to the likely effect on the victim-survivor, from the view of a 'reasonable person'. Under Scotland's Act, abusive behaviour includes that which is 'violent, threatening or intimidating' and has as its purpose, or is reasonably likely to have, one or more of the following effects:

- making the victim dependent on or subordinate to the perpetrator;
- isolating the victim from friends, relatives or other support;
- controlling, regulating or monitoring the victim's day to day activities;
- depriving or restricting the victim of freedom of action; or
- frightening, humiliating, degrading, or punishing the victim.

Definition of course of conduct

Embolden queries whether 'course of conduct' is adequately defined in the draft Bill.

Scotland's legislation specifies that a 'course of abusive behaviour' requires the behaviour to be evidenced on 'at least two occasions'. Is there a risk that a defence could be put forward that the alleged perpetrator's behaviour doesn't constitute a course of conduct, in the absence of such a definition? Further, a course of conduct requirement of 'at least two occasions' may mitigate the risk that a victim-survivor who has retaliated against a habitually abusive partner will be charged under the legislation.

We suggest that Scotland's definition is preferable to that within the NSW legislation, which refers to behaviours engaged in 'either repeatedly or continuously, or both repeatedly and continuously'.

In addition, in Embolden's view, SA should adopt NSW's approach that 'course of conduct' can include behaviour engaged in within another jurisdiction.

Embolden considers the evidence requirements outlined in Section 20C (5) to be reasonable and balanced.

Impact or effect on victim-survivors

Embolden acknowledges the rationale behind the language 'controlling impact' in Section 20B(2), as stated in the Government's comparison between the current Bill and the 2021 Bill. However, we hold concerns that this language, alongside some of the examples outlined in Section 20B(4), may result in the criminalisation of behaviours that are not coercive control, as it is understood within DFV literature and practice, and by those with lived experience. Essentially, our view is that this Bill does not adequately reflect the gendered dynamics of power, control and fear that characterise coercive control and which drive the significant harms experienced by victim-survivors. Evidence shows that coercive control in heterosexual relationships is a highly gendered phenomenon, in which the exercise of power and control through fear is grounded in a broader cultural context of gender inequality. Although recognising that there will be rare instances where coercive

control is perpetrated by a woman against a man, Embolden is concerned that the language of the Bill could see it promote a 'false equivalence' between men's and women's conduct in heterosexual relationships, which serves to undermine the intended effect of the Bill i.e. to promote the safety of victim-survivors. A false equivalence narrative may also raise the likelihood that victim-survivors will be misidentified as perpetrators, with [Research by ANROWS](#) suggesting an already elevated risk of misidentification for Aboriginal women. Relatedly, Embolden is concerned that the Bill as it is currently framed could be weaponised by perpetrators against their partners, including in family court matters. For this reason, should the examples outlined in Section 20B(4) be retained, **Embolden strongly recommends that the example provided in Section 20B(4)(d) that references 'disappointed or upset' children be removed.** Embolden also suggests that the example provided in Section 20B(4)(j) be amended or removed.

In determining whether behaviours in relationships constitute coercive control as it is understood within the DFV context, a critical question is: what would happen if the person to whom the apparently controlling behaviour is directed did not comply? Where the answer to this question is more aligned with 'there'd be rows and/or the relationship would break down, perhaps messily and painfully' than with 'the victim or another person would be at significant risk of physical or psychological harm', this is not coercive control. **It is vitally important that South Australia's legislation recognises that gendered dynamics of power are at the core of coercive control as it is understood within the DFV context and that legislation does not inadvertently criminalise behaviours that are not coercive control.**

In light of this, rather than the 'controlling impact' outlined in the draft Bill, Embolden recommends that consideration be given to reflecting the impact of coercive control on victim-survivors in line with existing coercive control legislation, i.e. England and Wales, Scotland and NSW:

England and Wales - 'Serious effect' on the victim means that the perpetrator causes the victim to fear that violence will be used against them on at least two occasions or causes

them serious alarm or distress which has a substantial adverse effect on their usual day-to-day activities.

Scotland – a reasonable person would consider the course of behaviour to be likely to cause the victim physical or psychological harm, with psychological harm including fear, alarm and distress.

NSW Section 54D(d) - a reasonable person would consider the course of conduct would be likely, in all the circumstances, to cause any or all of the following, whether or not the fear or impact is in fact caused— (i) fear that violence will be used against the other person or another person, or (ii) a serious adverse impact on the capacity of the other person to engage in some or all of the person's ordinary day-to-day activities.

Finally, in relation to the impact on victim-survivors, Embolden supports the Bill's 'reasonable person' provisions:

- Section 20B (2) – reference to 'reasonable person' in relation to whether a person's behaviour will be taken to have a controlling impact
- Section 20C (1)(d) – offence requires that 'a reasonable person would consider the controlling impact on the other person resulting from the course of conduct to be serious'

Reasonable person provisions are preferable to a legislative requirement that prosecutors prove a prescribed impact on victim-survivors (e.g. physical or psychological harm), as such requirements add to the burden of evidence (therefore potentially reducing the likelihood of successful prosecution) and may deter victim-survivors from seeking legal recourse.

Perpetrator intent

For a person to be guilty of coercive control, the Bill requires that the person intends to have a controlling impact on the other person or to cause serious apprehension or fear in the other person (Section 20C(c)).

Embolden suggests that the impact of the behaviour on the victim-survivor (as considered from the perspective of a 'reasonable person') is more important than the intent of the

perpetrator. The requirement to prove that a perpetrator intended to have a particular impact on the victim may create an unnecessary barrier to successful prosecution of coercive control offences. Embolden suggests that consideration be given to Scotland's approach, which requires that the perpetrator intended to cause harm or was 'reckless' with regard to harm caused. Although Scotland's Act references physical or psychological harm, there is the option to include reference to the perpetrator being 'reckless' as to the controlling impact of their behaviour (if this language is retained in the Bill).

Once an offence is proved

Penalties: The maximum penalty under the Bill is 7 years. This is higher than England and Wales' standalone coercive control offence (maximum penalty five years) and in line with NSW. Consultation with Embolden's members suggests two somewhat opposing views on sentencing. On the one hand, a significant maximum penalty of 7 years is supported given the potential risks to victim-survivor safety of perpetrators being incarcerated for only short periods of time. On the other hand, concerns have been raised that a high maximum penalty may have a chilling effect on reporting and charges under the offence, especially for less severe offending. This may effectively reduce the Bill's effectiveness as an early intervention tool to disrupt coercively controlling relationships before abuse escalates and victim-survivors are further entrapped and disempowered.

An important consideration is how the *Intervention Orders (Prevention of Abuse) Act 2009* could be more effectively applied as an early intervention approach to coercive control, to sit alongside criminal justice responses. Embolden's 2021 [Position Paper on Coercive Control and the Law in SA](#) discusses the potential negative impacts for victim-survivors of criminal justice processes and the potential value of civil approaches in addressing coercive control. Aboriginal people have also raised concerns, both in SA and in other jurisdictions, about the risk of increased incarceration of Aboriginal men and have called for alternative, cultural avenues for redress for perpetrators, particularly where this is supported by family and community. On balance, Embolden supports the Bill's proposed maximum penalty but

recommends consideration of the application of Intervention Orders and alternative justice approaches to addressing coercive control.

In the context of implementation, it will be important that sentencing outcomes, as well as broader impacts of sentencing approaches, are monitored and reported on through the review process. Scotland's experience points to the risk of a gap between legislation and practice in sentencing. A significant proportion of charges under Scotland's overarching *Domestic Abuse (Scotland) Act 2018*, which has a maximum penalty of 14 years, are dealt with in Sherrif Court, which can impose a maximum sentence of 12 months.

Requirement for court to consider a protective order: Scotland's Domestic Abuse Act requires judges to consider a protective order, as a default, where someone is found guilty of an offence under the Act and to provide rationale in circumstances where a protective order is not issued. Dr Marsha Scott has said that this provision has received positive feedback from victim-survivors in Scotland. In relation to implementation, it will be critical for the safety of victim-survivors that breaches of protective orders are effectively and consistently prosecuted.

Commencement and review

Commencement date: while not suggesting that the Act's commencement date should be specified in the Act itself, Embolden takes this opportunity to recommend a significant 'lead in' time for commencement. There is a high risk that inadequate preparation – including inadequate training of police and judiciary, resourcing of services to enable them to effectively respond and establishment of comprehensive monitoring mechanisms – will result in the Act having minimal positive impact and potentially unintended negative outcomes.

Scope of review – Embolden suggests that required elements for the review of the legislation be reflected in the Act, including the requirement for the review to consider whether the Act has caused an increase in the misidentification of people experiencing coercive control as the perpetrator.

Overarching recommendations for implementation

Although not a comment on the provisions in the Bill per se, Embolden takes this opportunity to make the following overarching recommendations in relation to implementation of coercive control legislation, in line with expert and community feedback already provided to the State Government.

- The introduction of coercive control legislation, and/or other action to address coercive control, should be overseen by a high-level strategic committee to drive a whole-systems approach to implementation planning, execution and monitoring. Specifically, it is recommended that the committee:
 - includes membership from service systems beyond criminal justice and women's safety, as well as lived experience representation;
 - engages with diverse stakeholders, including but not limited to; young people, older Australians, people who are Aboriginal and/or Torres Strait Islander, culturally and linguistically diverse, LGBTIQ+, living with disability and living regionally or remotely;
 - commits adequate resources across relevant systems to drive successful delivery of all planned actions; and
 - ensures effective inter-governmental engagement to leverage opportunities for national cooperation
- The overseeing committee develops a comprehensive framework for monitoring the outcomes of coercive control legislative reform and other initiatives. Specifically, that the outcomes framework:
 - reflects cross-sector agreement on key evaluation measures, including monitoring of potential unintended negative impacts for victim-survivors (for example; an increase in criminalisation of women, changes in victim-survivor help seeking);
 - identifies and drives the development of data sources;

- commits to an appropriately resourced research agenda, in partnership with tertiary institutions, with a focus on victim-survivor experiences and emerging systemic issues and impacts (within and outside the justice system); and
- engages with national monitoring, evaluation and research initiatives.

It is critical to note that the introduction of coercive control legislation is likely to prompt an increase in demand for specialist DFV services, which are already experiencing the impacts of ongoing under-funding. Successful implementation of coercive control legislation will require that frontline specialist services are adequately resourced to enable them to effectively inform system and practice reform, including data collection required to monitor outcomes, alongside meeting increased demand for direct services. In the absence of this, there is a risk that South Australia's coercive control legislation will fail to live up to its promise to the South Australian community.