

31 August 2022



NSW Government
Department of Communities and Justice
Locked Bag 5000
Parramatta NSW 2124

Sent via email: policy@justice.nsw.gov.au

Dear Policy Team,

RE: HALC Submissions on the draft Crimes Legislation Amendment (Coercive Control) Bill 2022

Thank you for the opportunity to make a submission on the Crimes Legislation Amendment (Coercive Control) Bill 2022 ('the Bill').

The **HIV/AIDS Legal Centre (HALC)** is the only not-for-profit, full-time specialist community legal centre of its kind in Australia. We provide free and comprehensive legal assistance to people in NSW and Queensland with HIV or hepatitis-related legal matters. We also undertake Community Legal education and Law Reform activity in areas relating to HIV and hepatitis.

Positive Life NSW (Positive Life) is the state-wide peer based non-profit organisation that speaks for and on behalf of all people living with and affected by HIV in New South Wales (NSW). We provide leadership and advocacy in advancing the human rights and quality of life of all people living with HIV (PLHIV), and to change systems and practices that discriminate against PLHIV, our friends, family, and carers in NSW.

HALC's work focuses on developing and maintaining an enabling legal environment for people living with HIV (PLHIV), hepatitis and priority populations to promote access to testing and treatment for HIV and hepatitis. HALC's work has involved assisting clients experiencing domestic violence, including coercive control, in a range of matters. This has included assisting clients by:

- obtaining domestic violence orders against an abusive partner; and
- representing clients experiencing domestic violence applying for partner visas to enable them to continue their application for permanent residency through family violence provisions; and
- defending DVO orders where our client is the victim of domestic violence but has been identified by police as the perpetrator; and
- providing support to mitigate or address legal issues arising from domestic violence in areas such as tenancy, debt, discrimination and employment.

We recognise that acts of coercive control are highly correlated with the risk of domestic violence and homicide. We also echo the concerns of other organisation about the criminalisation of coercive control. The criminalisation of coercive control alone will not address the cultural reform required in NSW and Australia to address intimate partner violence and may result in a disproportionate impact on marginalised communities.

We recommend that the government consider other actions to adequately address intimate partner violence including more funding for domestic violence services, education initiatives for police and the judiciary, and further community engagement in developing a holistic response to intimate partner violence in NSW recognising the diversity of responses needed to tackle the issue in different communities. We also suggest education and rehabilitation programs for offenders, including the use of mandatory offender programs.

The NSW government also needs to recognise current state and federal legislative frameworks that can often exacerbate the likelihood and experiences of intimate partner violence. Australia's family law and migration system should be considered in the development of systemic reform to address issues of intimate partner violence.

While little research has been undertaken in Australia on the impact of intimate partner violence on PLHIV, HALC's 30 years of experience in assisting PLHIV in these matters has provided insight into the unique issues faced by PLHIV experiencing intimate partner violence. In the previous financial year, HALC identified approximately 8% of clients that were experiencing or at risk of experiencing family violence.¹

We also recognise that clients and the community we represent come from diverse backgrounds and include:

- people of diverse sexualities and genders
- people from culturally and linguistically diverse backgrounds
- people who use drugs
- sex workers.

As we did not provide initial submissions to the development of the Bill, we would like to take this opportunity to first highlight examples of coercive control experience by PLHIV. Our submissions will also identify our concerns with the Bill in its current form to address these experiences.

Thank you again for the opportunity to contribute to this process.

Kind Regards,



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HIV/AIDS Legal Centre



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¹ 2021/2022 Financial Year, Data extracted from Community Legal Assistance Services System

Background – People living with HIV

It is estimated that there are 11,721 people living with HIV in New South Wales as of 2019. HIV is a virus that affects the immune system and without treatment, most individuals develop severe immune deficiency within 10 years. Combination antiretroviral therapy (ART) has transformed the course of the condition and the life expectancy of a PLHIV has significantly improved. HIV is now a chronic, manageable condition that does not pose a threat to public health. PLHIV who take treatment as prescribed and who achieve and maintain an undetectable viral load, cannot sexually transmit the virus.

Despite these advancements, HIV continues to be a highly stigmatised chronic illness. For some PLHIV, disclosure can have dire consequences leading to concerns about their health and safety due to threats of and/or actual violence. It is for this reason that threats of ‘outing’ a person’s HIV status should be taken seriously by police, lawyers, health practitioners and other support services.

People living with HIV and Coercive Control

PLHIV are often faced with forms of abuse that are related to their health condition and/or their identification as a member of other frequently stigmatised communities such as people of diverse sexualities and genders, people who use drugs, sex workers and people from culturally and linguistically diverse backgrounds.

Stigma can play a significant role in intimate partner violence as both a weapon used by the perpetrator and a deterrent for PLHIV seeking assistance. Stigma is often used to assert power over PLHIV by developing chronic self-doubt and to justify violent behaviours. Stigmatising language and actions have a direct impact on the mental and physical health of PLHIV and can deter PLHIV from accessing testing and treatment.

Similar to people living with disabilities, PLHIV often face unique circumstances that can be taken advantage of by intimate partners due to their reliance on medical support. The *HIV Power and Control Wheel*² demonstrates specific tactics of abuse that an individual may use against a partner living with HIV and include:

- Coercion and threats – threatening to “out” a victim’s HIV status or sexual practices
- Psychological – giving misinformation about HIV to the victim about risks of HIV transmission
- Medical abuse – Withholding or disposing of HIV medication
- Emotional abuse – Shaming the victim because of their HIV status
- Privilege – using a person’s HIV status to guilt them into action or non-action
- Moral and spiritual abuse – Imposing shame and stigma with respect to sexual behaviours/HIV status based on religious teachings and/or social mores
- Using children – threatening to remove children due to the victim’s HIV status and/or past behaviours (e.g. sex work or alcohol and other drug use)
- Isolation – Not allowing the victim to access social or family support, controlling where and when the victim can physically travel including restrictions to medical appointments
- Economic abuse – Refusing to pay for the victim’s medication or medical care, control of finances

² <https://nnedv.org/resources-library/hiv-power-control-wheel/>

People living with hepatitis and/or disabilities may also experience these examples of abuse. Examples of HIV and hepatitis related coercive control experienced by clients of HALC has included:

- partners threatening to disclose and/or disclosing their HIV status to friends, family, employers and government agencies.
- partners using stigmatising taunts related to their HIV status to degrade them. This can lead to clients disengaging from their social life, employment and negatively impact their mental health.
- partners using a client's HIV status to 'justify' threats of violence or actual physical and emotional violence.
- partners threatening to remove children from their care due to their HIV and/or hepatitis status.

partners disclosing a person's hepatitis C status in family law proceedings. PLHIV can also be hesitant to report intimate partner violence to police due to the stigma faced by some PLHIV when disclosing their status to authorities and the trauma in having to relive the events particularly in overly complex reporting procedures. We recommend that the NSW government consider how to introduce reporting mechanisms that allow anonymised reporting, online reporting or reporting of events over time to allow victims to make arrangements to leave partners even where there is no immediate threat to a person's safety.

Migrants living with HIV

Migrants living with HIV and other disabilities can be particularly vulnerable to intimate partner violence where they are relying on a partner to obtain temporary or permanent visas. All applicants for both permanent and temporary visas are required to satisfy the relevant health criteria. The relevant part of the health criteria for people living with HIV is the cost consideration. In some situations, PLHIV may also be dependents on their partner's visa and must still meet the health requirements of the visa.

Only visas with a provision for a waiver of the health criteria (health waiver) can be obtained by PLHIV wishing to obtain permanent residency in Australia. The process of obtaining a health waiver require applicants to demonstrate that the cost of accessing healthcare and community services in Australia is not 'undue' where decision makers balance the defined monetary cost against the applicant's ability to mitigate these costs and the intangible emotional and social considerations that are compelling and compassionate factors.

As a result, PLHIV are faced with limited permanent visa options. Generally, applicants will be required to obtain:

- a partner visa; or
- an employer nomination visa; or
- a protection visa.

PLHIV can often wait anywhere between 2 to 9 years to have a permanent residency visa granted. Throughout this time a lot of pressure and stress can be placed on the relationship, particularly where the reason for delay is due to a person's HIV status. HALC has frequently seen relationships breakdown due to the strain that the migration process places on the couple that have led to current or ex-partners becoming violent and/or controlling.

There are a range of factors that may place migrants living with HIV in a particularly vulnerable situations including where:

- their partner is paying for HIV medication and/or other medical support.
- the client does not have work rights on their visa to financially support themselves or have access to Medicare.
- the client may have faced similar stigmatising, derogatory or violent behaviour from partners in the past.
- the couple may have children and are concerned about the impact a break down in their relationship may have on their visa status and ability to stay in Australia with their children.

Examples of HIV related coercive control experienced by migration clients of HALC has included:

- partners threatening to withdraw their partner visa sponsorship to control their social and financial actions.
- partners threatening to disclose their HIV status to employers.
- partners threatening to disclose their HIV status to government authorities.
- partners blaming our client's HIV status for issues that may arise out of the migration process (e.g. length of the processing time, financial costs of migration agents/lawyers, inability to find employment, putting their life 'on hold').

Although domestic violence provisions under the *Migration Regulations 1994* (Cth) allow PLHIV to continue their visa application if a breakdown in the relationship occurs, this process is not available to all visa applicants or dependents. Due to the restricted number of permanent visas PLHIV can successfully obtain, only PLHIV applying for partner visas can still successfully obtain a partner visa where domestic violence has led to a breakdown in the relationship.

This process can still be extremely problematic for PLHIV who have experienced intimate partner violence. PLHIV will still be required to obtain a 'health waiver' but will now not have the financial backing of their partner to demonstrate their ability to mitigate the costs of their healthcare and community services. For these reasons PLHIV may be concerned about leaving their partner or reporting their partner to police due to the impact of the breakdown on their visa application.

Evidence of domestic violence can also be hard to prove for the purposes of domestic violence provisions where there is an absence of a court order. Apprehended Domestic Violence Orders are instrumental in assisting clients in providing evidence of domestic violence to the Department of Home Affairs. In the absence of a court order, victims are required to relay violence they have faced from their partner in multiple confronting settings.

The federal government needs to recognise the impact of these migration processes on PLHIV and other disabilities if we want to mitigate the likelihood and impact of intimate partner violence. Similarly, we urge the NSW government to also consider what support mechanisms migrants, and in particular migrants living with HIV and other disabilities need to address the issue of intimate partner violence holistically. There is little evidence to date to show that criminalising coercive control deters people from committing such acts and a greater focus should be applied on how to support both victims and perpetrators.

Women Living with HIV

Women account for approximately 12% of PLHIV in Australia. Women living with HIV are disproportionately impacted by HIV related legal issues representing approximately 23% of HALC's clients. Women living with HIV face unique vulnerabilities to HIV-related inequalities that are often complicated by factors such as motherhood, societal pressures and domestic violence. As a minority within the epidemiology of Australia, experiences of intimate partner violence can include:

- psychological abuse where their HIV status is used against them in social situations.
- having their styling/clothing choices and make up criticised as a reason for not socialising because of perceived stereotypes of women living with HIV.
- having their HIV status used against them in terms of negotiation of sex within a coercive relationship.
- having their HIV status used against them to belittle or thwart their attempts to maintain a sense of independence with regard to employment or finances.

Other important factors and recommendations

Priority Populations

As previously noted, HALC has assisted clients from a range of different backgrounds including people who use alcohol or drugs, sex workers and people of diverse sexualities and genders. Similar to PLHIV, these communities often feel stigmatised by wider society including by members of their own families, friends, employers and service providers. For this reason, the unwanted disclosure of a person's sexuality, gender or current/past alcohol or drug use and sex work by an intimate partner can lead to detrimental mental and physical health impacts and safety concerns.

We recognise that individuals are often at different stages of accepting and embracing their identity. The use of these identities can be used by intimate partners to breakdown personal relationships, stigmatise and control actions through unwanted disclosure and by entrenching internalised stigma. We recommend that legislators consider how the bill will be implemented in all communities that are impacted by intimate partner violence and the unique coercive measures that are used in these relationships. We encourage drafters to continue consultation with community organisations that represent the interests of these communities including ACON, Sex Workers Outreach Project (SWOP), Inner City Legal Centre (ICLC), NSW Users and AIDS Association (NUAA) and Positive Life NSW.

Police and Judicial Training

Experiences of coercive control are not homogenous across all members of the Australian community as highlighted above. Law enforcement and judiciary need to be trained on the unique experiences of different communities including:

- people living with HIV
- people living with disabilities
- people of diverse genders and sexualities
- people who use drugs
- sex workers

HALC recognises that women are overwhelmingly more likely than men to experience intimate partner violence,³ a finding that may not apply to people of diverse genders and sexualities. Drivers of intimate partner violence against/by PLHIV are unique and may include the disclosure of sensitive health information to law enforcement and judiciaries. A deterrent to reporting discrimination, privacy and violence faced by PLHIV is often the requirement to disclose their sensitive health information to authorities where this information has been the cause of their legal issue.

Training should be focused on both identifying these unique issues as well as how best to discuss and handle sensitive health information such as a person's HIV status. We recommend this be done through education programs and updating:

- NSW police policy and procedures; and
- Prosecution and sentencing guidelines; and
- NSW Bench Books.

Family Law Proceedings

HALC is aware of perpetrators using family law proceedings as an act of coercive control where health information has been obtained by the perpetrator. For example, HALC represented a client in family law proceedings where our client's hepatitis status had been referred to. Our client had been the victim of coercive control and the perpetrator used family law proceedings to continue to shame and control our client.

The perpetrator had learnt of our client's hepatitis status through a GIPA request of their children's medical records. This information was used by the perpetrator as a self-represented litigant through the family law proceedings to stigmatise our client and to seek orders for the removal of the children from our client's care. Our client then experienced further stigmatising language by the judge who stated, "I want to see evidence that this infected woman does not pose a risk to the children."

HALC has also advised clients where their partners have threatened to disclose their HIV status in open court. Perpetrators make threats of disclosing, or actually disclose a person's HIV/hepatitis status so that victims fear the potential consequences of the disclosure. These disclosures can also expose victims to the use of stigmatising language by legal representatives and judges.

Lawyers and judges should be provided training to assist them identifying these acts as a way to control and exacerbate fear and stigma experienced by PLHIV and/or hepatitis. Acts can include the use of excessive subpoenas and the use and consideration of irrelevant health information.

Although family law matters are within the jurisdiction of the federal government we recommend when training and educating the judiciary, law enforcement and community about coercive control that the NSW government recognise and address these issues.

Coercive Control Exposure Draft Bill

Definition of abusive behaviour

Section 54D of the draft bill outlines the test to be satisfied for a successful prosecution of the proposed offence. Under the proposed legislation a person must have engaged in 'abusive behaviour' as defined under section 54F(1) which includes 'coercion or control of the person against

³ NSW Government (2020), Coercive Control Discussion Paper, p 26.

whom the behaviour is directed.’ Although section 54F(2) outlines a non-exhaustive list of examples of abusive behaviour, we are concerned that some experiences of coercive control used against PLHIV are not adequately captured.

We are concerned the current provisions do not capture situations where intimate partners disclose a person’s HIV status without a pre-existing threat. None of the current examples recognise the damage of this action or the potential safety concerns involved. These actions by perpetrators often rely on controlling their partners through internalised stigma. Unwanted disclosure to family, friends or employers can detrimentally impact the day-to day lives of PLHIV and may lead to safety concerns. Perpetrators may use this action to cause victims to restrict their own actions such as attending social events, family events or work out of fear of stigma and discrimination.

Recognising the role of stigma in intimate partner violence needs to be captured in an example provided under subsection (2) to acknowledge the unique experiences of communities including PLHIV, people living with disabilities and people of diverse genders and sexualities. Currently this act would not fall under examples such as ‘repeated derogatory taunts’ or ‘depriving a person of liberty, restricting a person’s liberty or otherwise unreasonably controlling or regulating a person’s day-to-day activities.’ We recommend an additional example that includes situations where a person is shamed, humiliated or stigmatised impacting their mental health and/or day to day activities.

Reasonable Person Test

To consider the unique circumstances faced by victims of intimate partner violence faced by different communities, judges should apply both an objective and subjective test of ‘reasonableness.’ Currently, this is not captured under section 54D(d).

The current test does not allow a judge to consider the circumstances and context of intimate partner violence faced by the victim. HALC is concerned that an objective test will not consider the unique factors faced by PLHIV who are victims of intimate partner violence, such as internalised stigma and the impact of ‘outing’ someone’s HIV status.

Domestic Violence Orders

Similar to section 54F, we recommend acts that shame, humiliate or stigmatise a person impacting their mental health and/or day to day activities be included under the definition of domestic abuse under section 6A.

We also recommend that section 6A(2)(i) be amended to the wording of section 54F(2)(g) by removing the term ‘unlawful.’