# Criminalisation of Coercive Control

## Issues paper

AWAVA

Australian Women Against Violence Alliance

Australian Women Against Violence Alliance

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Phone: 1800 937 638

Email: info@awava.org.au

Website: www.awava.org.au

Authors:

Pam Rugkhla, Policy Officer;
Tina Dixson, Acting Program Manager

Contact for the issues paper:

Tina Dixson, Acting Program Manager
1800 937 638
pm@awava.org.au

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## About Australian Women Against Violence Alliance

Australian Women Against Violence Alliance (AWAVA) is one of the six National Women's Alliances funded by the Australian Government to bring together women's organisations and individuals across Australia to share information, identify issues and contribute to solutions. AWAVA's focus is on responding to and preventing violence against women and their children. AWAVA's role is to ensure that women's voices and particularly marginalised women's voices are heard by Government, and to amplify the work of its member organisations and Friends and Supporters. AWAVA's members include organisations from every State and Territory in Australia, representing domestic and family violence services; sexual assault services; services for women in the sex industry and women's legal services; as well as organisations representing Aboriginal and Torres Strait Islander women; young women; women educators; women who have experienced incarceration and other groups. AWAVA's contract manager is the Women's Services Network (WESNET).

## Notes on terminology

### Domestic and family violence

Domestic and family violence is understood as any behaviour that occurs in family, domestic or intimate relationships that is physically or sexually abusive; emotionally or psychologically abusive; economically abusive; threatening or coercive; or is in any other way controlling that causes a person to live in fear for their safety or wellbeing or that of another person. Domestic and family violence is one of the manifestations of sexual and gender-based violence against women that is driven by gender inequality, which operates on many levels from social and cultural norms to economic and structural injustices.

### Sexual and gender-based violence

Sexual and gender-based violence refers to any act that is perpetrated against a person's will and is based on gender norms and unequal power relationships. It encompasses threats of violence and coercion. It can be physical, emotional, psychological, sexual, economical or technological in nature, and can take the form of a denial of resources or access to services (UNHCR, 2020).

### Victim/survivors and perpetrators

In accordance with the gendered nature of family and domestic violence[1], the use of 'victim/survivor' refers to women and their children and the use of 'perpetrator' refers to men. Where we use 'women' we refer to both transgender and cisgender women. Because of the gendered nature of this violence and the interconnected misogyny, homophobia and transphobia that drive it, we also address violence against non-binary people and other people born with female-assigned bodies. We recognise that a smaller number of men would also experience family, domestic and sexual violence in their lifetime.

## List of abbreviations used

| | |
|---|---|
| ADVO | Apprehended Domestic Violence Order [2] |
| AHRC | Australian Human Rights Commission |

[1] See ABS, Crime victimisation, Australia, 2012–13 cat no 4530.0 December 2014 http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4530.0main+features100022012-13; Royal Commission into Family Violence, in the terms of reference also states: "Family violence is the most pervasive form of violence perpetrated against women in Victoria. While both men and women can be perpetrators or victims of family violence, overwhelmingly the majority of perpetrators are men and victims are women and children".

[2] This is the term used to describe domestic and family violence protection orders in NSW. Different terms are used to describe these orders in different jurisdictions: Family Violence Intervention Orders (VIC); Family Violence Orders (ACT); Domestic Violence Orders (NT and QLD); Intervention Orders (SA); Family Violence Orders (TAS); and Family Violence Restraining Orders (WA).

| | |
|---|---|
| AIHW | Australian Institute of Health and Welfare |
| ALRC | Australian Law Reform Commission |
| ANROWS | Australian National Research Organisation for Women's Safety |
| AWAVA | Australian Women Against Violence Alliance |
| CALD | people from culturally and linguistically diverse backgrounds |
| DV VIC | Domestic Violence Victoria |
| DVRCV | Domestic Violence Resource Centre Victoria |
| LGBTIQ | people who are lesbian, gay, bisexual, transgender, intersex and/or queer |
| NATSIWA | National Aboriginal and Torres Strait Islander Women's Alliance |
| NSW | New South Wales |
| Royal Commission | Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability |
| TAS | Tasmania |
| UNHCR | United Nations High Commissioner for Refugees |
| VIC | Victoria |
| WLST | Women's Legal Service Tasmania |
| WLSV | Women's Legal Service Victoria |

# Introduction

Coercive control is an umbrella term that refers to an ongoing pattern of controlling and coercive behaviours that pervade an individual's daily life with a devastating impact (Fitz-Gibbon et al, 2020). These behaviours may include physical, sexual, psychological, financial and emotional abuse and intimidation, used as tactics by a perpetrator to gain power, control and dominance over a victim/survivor (NSW Government, 2020). A key to the understanding of coercive control is that it is typically a course of conduct made of up of a series of incremental incidents where a single act may appear trivial, but together they form a broader pattern of abusive behaviours that serve to reinforce and strengthen the control and dominance of one person over another over time (Douglas, 2018).

The abuse can occur in person as well as online and may involve the use of systems to inflict abuse. While the legislative attention on coercive control has centred largely on intimate partner violence, it is important to note that these patterns of behaviours can be present across a range of non-intimate partner relationships where individuals are in close contact, including in caregiving roles. For this reason, in this paper, we are using the term 'domestic and family violence' interchangeably with 'sexual and gender-based violence' to highlight that coercive control remains an issue in both intimate and non-intimate relationships. Where 'domestic and family violence' is used more frequently, it highlights gaps in existing research on coercive control in non-intimate relationships.

Coercive control is a serious form of abuse in its own right and has also shown to be a predictor of intimate partner homicide. The analysis of 112 intimate partner homicides that occurred in NSW between 10 March 2008 and 30 June 2016 revealed that in 111 (99%) of those cases, coercive and controlling behaviours towards the victim were practiced by the perpetrator (NSW Domestic Violence Death Review Team, 2020). Public attention to the increased reporting of violence against women and the high number of intimate partner homicides, along with ongoing advocacy by the women's safety sector have led policy makers to explore the issue of criminalisation of coercive control in Australia more closely.

In order to produce this paper, AWAVA's team undertook a literature review and held meetings with our Advisory group members to better capture positions on the issue within our membership. Being a member-based alliance and representing 25 specialist women's services from every state and territory, our role is to ensure that our policy positions reflect the joint positions and benefit all members. While there is a consensus among our members and other experts on violence against women that coercive control is a serious and foundational part of sexual and gender-based violence against women, there are diverse views on how best to prevent, address and respond to it. Differences in legal, historical and policy contexts between jurisdictions as well as intersectional lived experiences of violence among diverse groups of women are among the reasons for different stances on the criminalisation of coercive control. This paper provides an outline of the current political and legislative landscape along with existing evidence. Concerns from women's organisations and gaps in evidence are identified and recommendations for the ways forward are tabled to inform future policy and legislative process on this issue. We also note that compared to other issues there is still a lack of literature and research on the issue.

# Summary of arguments on the criminalisation of coercive control

## Shared positions

- Coercive control is an umbrella term that refers to an ongoing pattern of controlling and coercive behaviours used by perpetrators that pervade an individual's daily life with a devastating impact.
- Gender inequality drives sexual and gender-based violence against women.
- The justice system needs to recognise violence and coercive control as a pattern of abuse and not just as being an incident-based behaviour.
- A do-no-harm approach has to be taken to ensure that evidence is examined to avoid unintended harm, especially for marginalised groups.
- Comprehensive consultation and evaluation on the legislation is required.
- Substantial cultural change in police responses to violence is required.
- Cultural and attitudinal change needs to occur across the criminal justice system.
- The justice system needs to ensure its efficacy and safety for victims/survivors.
- Beyond criminalisation, an appropriately funded, holistic response to family and domestic violence across the whole system is required.
- Intersectional primary prevention, community education and awareness raising on what constitutes violence, as well as relevant legislation and rights of victims/survivors, is critical.
- Jurisdictional contexts matter.

## Proponents of criminalisation

Criminalisation of coercive control may:

- Ensure the law more accurately reflects the lived experience of victim-survivors of domestic and family violence encompassing physical and non-physical forms of violence over time.
- Expedite law and systems changes to align with community expectations and needs.
- Help the police to prosecute cases and overcome current gaps in the law.
- Improve accessibility of civil protection schemes for victim-survivors of non-physical forms of abuse.
- Send a message to communities that non-physical forms of domestic and family violence are just as serious as physical forms of domestic and family violence and that this harmful behaviour will not be tolerated.
- Improve access to victims of crime compensations schemes.
- Prevent death and harm to women and children.
- Provide important validation to victim-survivors of domestic and family violence about the criminality of the violence they have experienced.

## Opponents of criminalisation

- There are existing civil laws in some jurisdictions that can be utilised to address coercive control (however, these civil laws are currently underutilised).

- There is limited evidence of successful prosecutions where coercive control crimes have been introduced internationally.
- Criminalisation requires that the prosecution prove each element of the offence beyond a reasonable doubt, which is a very high standard of proof compared to the "balance of probabilities" test in civil proceedings such as applications for protection orders.
- Criminalisation may have disproportionate negative impact on marginalised groups.
- There is limited evidence that coercive control offences are improving victim/survivor safety and perpetrator accountability.
- The offence could be misapplied and result in the criminalisation of victim/survivors.
- Police and judicial systems are currently not responding well to domestic and family violence and these issues need to be addressed before introducing more offenses.

## Gaps and concerns

- Questions remain on how to ensure that diverse groups of women, especially those faced with compounded discrimination and marginalisation, are not adversely impacted.
- Burden of proof may be too onerous, with compounded impact for some diverse groups of women (e.g. women with intellectual disability)
- There are concerns about the scope of the legislation and how it might exclude some forms of sexual and gender-based violence (e.g. violence against women with disabilities in institutional settings).
- There are concerns around institutionalisation, incarceration and removal of children from women with disabilities, Aboriginal and Torres Strait Islander women and women from migrant and refugee backgrounds in particular those on temporary visas.
- Gaps are present in the evidence regarding misidentification and criminalisation of victims/survivors.
- Questions remain about how effectively current laws on coercive control and related matters i.e. intimidation and stalking are being used in Australia.
- There is need for ongoing dedicated training for law enforcement officers and those in the justice system on domestic and family violence.
- Gaps remain on evidence to suggest that criminalisation is effective in preventing or reducing the prevalence of sexual and gender-based violence in the community.

## Existing legislation and its uptake

Currently in Australia, there is no consensus on how coercive control should be addressed in the law nor is there a single national definition of family and domestic violence. Descriptions of non-physical violent behaviours that are associated with coercive control such as 'emotional abuse', 'financial abuse', 'controlling behaviours', 'threats', 'intimidation' and 'stalking' are present in civil laws across the States and Territories. In Victoria, coercive control is recognised in the Family Violence Protection Act 2008 (VIC) and is central to the justice system response to family violence. In September 2020, a coercive control bill was put forward in NSW Parliament and a Joint Select Committee on Coercive Control was established on 21 October 2020.

Tasmania is the only Australia State to criminalise non-physical forms of family violence such as economic abuse and emotional abuse or intimidation in the Family Violence Act 2004 (TAS). This legislation covers current and previous intimate partners and victims/survivors are not required to provide proof on harm. The maximum sentence is 2 years. In conducting research on the implementation of these offences, Barwick, McGorrery and McMahon observed that the uptake was slow and low (Barwick et all , 2020). In the first three years of the offence being introduced, no charges were laid. By the end of 2017, 73 charges had been finalised across two offences, with 34 guilty pleas, 6 convictions after hearing, 2 dismissals after hearing and the remainder withdrawn as part of plea negotiations or because police were unable to proceed (Barwick et all, 2020). It has been observed that the low numbers could be explained by a lack of dedicated training for law enforcement officers and those in the justice system (Bettison, 2020), a lack of community awareness and that the offences as originally enacted contained a statutory limitation period for initiating proceedings of 6 months, increased to 12 months in 2015 (WLST, 2020).

Discussions on whether to criminalise coercive control in Australia often draw on the experiences of the enforcement of this legislation in Scotland, England, Wales, and Ireland. The Scottish model, introduced in 2018, covers domestic abuse[3] by intimate partners and previous intimate partners, where victims/survivors do not need to provide proof of harm and the maximum penalty is 14 years (Bettison, 2020). Approximately 18,500 officers and police staff in Scotland received online training on domestic abuse and the new offence of coercive control, and 14,000 of them received training in person (BBC News, 2020). More than 400 cases were recorded by the Scotland police in the first three months after a new domestic abuse law was introduced (BBC News, 2020). By 2019, 190 cases were reported to the Crown Office resulting in 13 convictions (BBC News, 2020). Data provided by Women's Safety NSW also suggests that in Scotland since March 2019 there has been 1300 offenses recorded[4].

Women's Safety NSW (2020b) also has argued that there is overseas evidence suggesting the following:

- Prosecutions for coercive control offences are growing substantially each year.
- The new offence may also be relied upon by victim-survivors of domestic and family violence to appeal convictions of assault or murder/manslaughter.
- Criminalising coercive control is increasing public awareness and understanding of domestic and family violence.
- More victim-survivors are proactively coming forward to seek safety and support as a result of their understanding of domestic and family violence.
- The offence has driven an increase in understanding of domestic and family violence throughout police, crown prosecutors and the judiciary.

Both the English and Welsh model introduced in 2015, and the Irish model introduced in 2019, cover coercive or controlling behaviour by persons in an intimate relationship or persons living together, provided they are members of the same family or have previously been in an intimate relationship,

[3] Terminology is used as in the text of legislation.

[4] https://www.copfs.gov.uk/media-site-news-from-copfs/1902-domestic-abuse-and-stalking-charges-in-scotland-2019-20

victims/survivors are required to prove harm and where the maximum penalty is 5 years (Bettison, 2020). Evaluation data from England shows lower uptake than in Scotland, with 16% of coercive control cases (over an 18-month period until 2018) resulting in a charge (which is low when compared to other domestic abuse-related offences) (Johnson & Barlow, 2018).

Securing evidence of coercive control has been reported to be a problem for police officers, with many cases resulting in no further action due to "evidential difficulties" (UK N8 Policing Research Partnership, 2018). The data suggests that collecting evidence of the offence is the most problematic issue for police officers. The research found persistent examples where officers were investigating "incidents", such as assault, as isolated events rather than looking for a pattern of abusive behaviour, as outlined in the coercive control legislation (UK N8 Policing Research Partnership, 2018). The evaluation report from the N8 Policing Research Partnership recommended that significant resourcing and financing at both force and national levels was required for further learning opportunities to equip police forces to identify, respond to and investigate coercive control, and for domestic abuse to be prioritised across all police forces and agencies (UK N8 Policing Research Partnership, 2018). The difference in uptake between the Scottish and the English and Welsh models had also been attributed to the fact that while in Scotland community consultations and awareness of the issue were extensive, the same cannot be said about the English and Welsh models (Bettison, 2020).

## Arguments in support of the criminalisation of coercive control

Proponents of the criminalisation of coercive control argue that criminalisation will achieve the recognition of the experiences of violence as a pattern of abuse, improve women's safety and perpetrator accountability, "provide women with better opportunities for recourse of the suffering they have endured" (InTouch, 2021) and increase community awareness about how unacceptable this behaviour is.

Women's Safety NSW, in their submission to the 2020 Inquiry into Family, Domestic and Sexual Violence, regards "the criminalisation of coercive control as necessary if Australia is to achieve a substantial reduction in violence against women and domestic homicide" (Women's Safety NSW, 2020a). According to Women's Safety NSW it would be seen as a step in the right direction towards accurately capturing the fuller picture of violence that victims/survivors face as well as recognising its gravity in the eyes of the law. It is also believed that the legislation would be used to provide further protection for victims/survivors. In their Position Paper, Women's Safety NSW states that "criminalising coercive and controlling behaviours would enable authorities to intervene and stop offenders without needing to wait for abuse to escalate into physical or sexual violence" (Women's Safety NSW, 2020b).

Women's Legal Service Tasmania (WLST) sees the introduction of the legislation to be critical in setting a strong cultural message and as a gateway for further reforms in shifting the definition of violence from being incident-focused to recognising a pattern of abuse. WLST states that it "is of the view that inaction arising from a fear that a particular course of action may not succeed in increased protection for women, only further fails those women. […] Limiting direct criminalisation to the physical aspects of family violence legitimises the hierarchy of violence which inappropriately regards nonphysical forms of violence as less severe" (WSLT, 2020).

Women's Safety NSW also states that the current laws and the legal systems that are incident-focused are inadequate at protecting victims/survivors who experience extended periods of abuse and can misidentify victims/survivors as the primary aggressors. Similarly, No To Violence stated that poor assessment for coercive control and the use of reactive force are among the reasons for police wrongfully naming victims/survivors as the perpetrator of violence (No to Violence, 2020). By revising the law in NSW to include coercive control as a pattern of abuse, Women's Safety NSW believes that:

> "it would help to reduce the misidentification of victims as primary aggressors, as it would allow retaliatory or resisting violent behaviour to be understood in the context of a wider pattern of abuse. This would facilitate the detection of true perpetrators by police and courts and prevent victims who act in self-defence or in response to prolonged mistreatment from being wrongly subjected to criminal charges and ADVO proceedings" (Women's Safety NSW, 2020b).

InTouch too has argued that "criminalising this serious and destructive behaviour would protect women and children and will provide women with better opportunities for recourse for the suffering they have endured" (InTouch, 2021). Additionally, criminalisation of coercive control could result in having better access to Victims of Crimes Compensation Scheme. Currently coercive and controlling behaviours not being a crime are excluded (InTouch, 2021).

Women's Safety NSW has also argued that criminalisation of coercive control will improve accessibility of civil protection schemes for victim-survivors of non-physical forms of abuse and make evidence of non-physical forms of domestic and family violence directly relevant for the purposes of admissibility (2020b).

Community consultations held by No To Violence have identified that there may be positive impacts of the criminalisation of coercive control for some specific cohort. For example, for LGBTIQ+ people this may normalise help seeking and validate the experiences of domestic and family violence.[5]

An important point which the proponents for the criminalisation of coercive control have consistently made clear is that the change in legislation alone is not enough. In 2021 Position Paper, InTouch argues:

> "Without implementing a whole of system change, the impact of criminalising coercive control will be detrimental to its intent" (InTouch, 2021).

The change needs to be accompanied by system reforms, adequate resourcing to specialist women's and family services as well as community-controlled organisations, training and a whole-of-government approach and commitment (Women's Safety NSW, 2020b; McGorrery & McMahon, 2020). The introduction of the new legislation would therefore provide an impetus for further discussions and reforms.

## Arguments against the criminalisation of coercive control

It is agreed that coercive control is a central element of a pattern of abuse and must be recognised in the law. However, others argue that criminalisation may not be the right approach to prevent and address it. Women's Legal Service Victoria has developed a Policy Brief stating that while coercive control belongs in the law as a form of domestic and family violence, criminalisation does not offer a flexible and nuanced approach to dealing with the issue and could lead to adverse outcomes.

> "Instead, Women's Legal advocates that the existing and complementary civil and criminal legislative environment in Victoria strikes the right balance to account for the socio-legal complexities of family violence" (WLSV, 2020).

The relationships between the perpetrators and the victims/survivors can be complex and cases can often involve children. Therefore, a justice system that is able to adapt to the needs of families could offer better outcomes than the incarceration approach of the criminal system (Fitz-Gibbon et all, 2020). On the issue of criminalisation having the ability to provide more protection to the victims/survivors, Women's Legal Service Victoria argues that there are already civil laws and existing capacity for authorities to intervene (WLSV, 2020).

[5] This information has been obtained during the consultations run by No To Violence. Final report is forthcoming.

Concerns have also been expressed how the criminalisation would work in instances where a victim/survivor is returning to the perpetrator:

> "inTouch also understands the complexities and the challenges that may arise for women who choose to reunite or stay in the relationship with someone who is subjecting her to coercive control. We believe some women may choose not to disclose the abuse for fear of criminalising her current or former partner – with concerns regarding the consequences of a conviction and criminal record (InTouch, 2021)".

The same concerns may be heightened for women on temporary visas where their partner who uses violence is also on a temporary visa and may face deportation because of their conviction.

Monash Gender and Family Violence Prevention Centre also points out that the legislation may not solve existing problems associated with family and domestic violence as the justice system is already strained, under resourced and struggling with inconsistency in application (Fitz-Gibbon et all, 2020). Introducing a new offence without solving the current inability of existing laws to respond effectively to violence could further exacerbate the delays and complications in the justice system that could lead to increased barriers and higher levels of attrition for the victims/survivors going through the system (ANROWS, 2020).

Therefore, the position for those who argue against criminalisation is that if significant investment is made in the whole prevention and response system, there may be no need for the criminalisation of coercive control. Questions have also been raised regarding the potential negative impact on the victims/survivors. There are concerns that criminalisation could further impair help-seeking for all women, and further compound help-seeking for women who are marginalised. Opponents of the criminalisation also offer exploring other avenues to achieve justice beyond the criminal system such as through restorative justice.

## Gaps in evidence and potential challenges

The purpose of this section is to highlight that many gaps and challenges both current and historic remain that impede access to safety and justice for victims/survivors. Regardless whether the use of coercive control is criminalised or not, there is a shared acknowledgement that systemic reforms are needed in the justice system. Not only at present coercive control is not sufficiently addressed within the family law system, the overall responses to the allegations of family violence are not dealt with appropriately (AWAVA, 2020a).

it is unequivocal that coercive control as a phenomenon underpinning domestic and family violence must be addressed. Both proponents and opponents of reforms to criminalise coercive control agree that there are many systemic issues within the justice system that at present impede effective access to safety and justice for victims/survivors. The difference in views on the criminalisation of coercive control predominantly lies in two domains: a) 'how' and 'where' in law coercive control should be reflected and b) what comes first: legislative reform or systems' change. In all arguments are guided by the unquestionable commitment to ensuring safety and justice for victims/survivors.

### Absence of an agreed national definition of domestic and family violence

Currently, there is no nationally agreed definition for family and domestic violence. Without a nationally recognised definition, a crime that is committed in one state may not be recognised in another. Aside from presenting a patchwork approach to justice, there are also practical issues in upholding ADVOs across the States and Territories.

There are also questions regarding the inclusivity of the definition of domestic and family violence in terms of its ability to capture all forms of sexual and gender-based violence against women and not just intimate partner violence. For example, current UK legislation on coercive control, often used as a model in Australian discussions, focuses on intimate partner violence. However, coercive control can occur in a wide variety of relationships beyond intimate partnerships. Women with disability, for example, are at a greater risk to be subjected to violence and control by their carers and service providers and these experiences of violence often go unrecognised and unaddressed (DPOs Australian & NWA, 2019). Similar patterns can also be seen with older women exposed to elder abuse (Council of Attorneys-General, 2019).

Additionally, questions are raised about how a current justice system that is geared towards an incident-based approach can shift to a pattern-of-behaviour-based approach in order to define, capture and address coercive control. In order to respond to coercive control as a form of violence, a fundamental shift in the way police, prosecutors and judges see family and domestic violence is required. This means seeing family and domestic violence "not as a series of separate events but more the way victims experience it: cumulatively, and comprehensively" (McGorrery & McMahon, 2020).

Recommendation 1:

**That the Australian, States and Territories Governments, in consultation with specialist women's and family violence services, establish a consistent national definition of family and domestic violence, in which coercive control is recognised as a pattern of abuse. This could form a part of the development of the next National Plan to Reduce Violence against Women and their Children.**

## Recognition of differing contexts between jurisdictions

While evidence from other jurisdictions can help inform the process of seeking a progressive, safety-first approach to addressing coercive control in Australia, some AWAVA members have also cautioned that there are contextual differences between these jurisdictions that have implications on how coercive control could be addressed. Unlike Australian jurisdictions, Scotland, England and Wales previously had few laws to respond to family and domestic violence, which could explain the high increase in reporting following legislative introduction. The legislation is also newly introduced, and in Scotland and Ireland, has not yet been thoroughly evaluated.

Another contextual difference between the UK and Australia is that Australia has a history of colonisation and dispossession that underlies and contributes to the ongoing violence against, and over-policing of, Aboriginal and Torres Strait Islander women (NATSIWA & AWAVA, 2020). Aboriginal and Torres Strait Islander women are the fastest growing prison population, being more likely to be imprisoned than that non-Indigenous men and women, and often for petty offences (Baldry & Cunneen, 2014). A study of Aboriginal women in NSW prisons found that almost 80% were victims/survivors of domestic and family violence (Lawrie in Taylor & Putt, 2007). Criminalisation of coercive control could therefore have an impact on Aboriginal and Torres Strait Islander women, particularly victims/survivors of violence, in a way that is unique and has not been captured by the UK experiences.

Tasmania is the only State in Australia to have criminalised coercive control (in the form of emotional abuse, intimidation and economic abuse in the context of family violence), however, there have been very low numbers of convictions and there is currently limited data available on how this has impacted the Indigenous populations.

There are also contextual differences among States and Territories. In the Tasmanian experience, Women's Legal Service Tasmania observed that introducing the legislation on its own without comprehensive training of the police force and justice system professionals, as well as community

engagement on this issue, led to low reporting and sentencing on this offence in the initial period of its legislative introduction (WLST, 2020).

In Victoria, unlike NSW, coercive control as a pattern of abuse is clearly defined in family violence law (Family Violence Protection Act (2008)). Following the Victorian Royal Commission into Family Violence, Victoria is already undergoing significant reforms in the area of family and domestic violence and efforts are underway to address the gaps and challenges identified as a result of the Royal Commission. Women's Legal Services Victoria believes that in the absence of conclusive evidence of its efficacy and potential for adverse impact, Victoria is already making steps in the right direction without needing to criminalise coercive control (WLSV, 2020).

**Recommendation 2:**

**That the Australian, State and Territory Governments undertake an extensive consultation and co-design of laws, plans and policies on family and domestic violence with diverse groups of women (particularly those who are victims/survivors) and with specialist women and family violence services considering the criminalisation of coercive control.**

## Changing the legislation alone is not enough: a whole system approach is required

There is a general consensus that the introduction of any new legislation alone, without systems reform, education and adequate funding, would have little impact and could lead to adverse outcomes for victims/survivors. The justice system is often criticised for being slow moving, complicated, at times expensive and taking an incident-based approach to family and domestic violence (WLSV, 2020). Effective responses to coercive control require a fundamental shift in the way the whole of the justice system recognises and addresses family and domestic violence (McGorrery & McMahon, 2019).

Critical lessons from the Tasmanian experience reveal that comprehensive implementation support is key to the success of any reform (WLST, 2020). Women's Legal Service Victoria advocates for the focus to be placed on continual commitment to "addressing systemic barriers and professional learning needs to justice stakeholders, exercising their existing responsibilities to assess for and respond to coercive control and family violence in all its forms" (WLSV, 2020). Domestic Violence Victoria and Domestic Violence Resource Centre Victoria also recommend that "in-depth and comprehensive analysis is required […] including a consideration of current limitations in criminal justice responses to family violence and an exploration of perpetrator accountability mechanisms and intervention programs that sit outside of a justice response, centred on victim-survivor safety (DVVIC & DVRCV, 2020)."

ANROWS has proposed the use of the social entrapment framework to illustrate the pattern of behaviours and the complexity of violence. This framework consists of the following:

- documenting the full suite of coercive and controlling behaviours;
- examining the responses of family, community and agencies; and
- examining structural inequities.

A social entrapment framework can help to integrate different evidence of disadvantage and barriers to help-seeking to better understand the actions of a person experiencing coercive control (ANROWS, 2020a). Once the gaps in the systems are identified, there need to be funding commitment attached to address them.

Proponents of reforms towards criminalisation also argue for the need to ensure broader systemic changes and see the introduction of this offence as instead a way to address behaviours currently being outside of the scope of law. It has been argued that the introduction of the offense will ensure that the evidence of coercive control is admissible in courts. Women's Safety NSW has argued that the

introduction of the offence may drive policy and practice changes in police, courts and other services responding to victim-survivors of domestic and family violence, increasing the accessibility of services and the appropriateness of responses (Women's Safety NSW, 2020b).

## The importance of primary prevention

In addition to systems' reforms it is imperative that the work on the intersectional primary prevention is ongoing and constituent across states and territories. It has been well-established that sexual, domestic and family violence is preventable, and primary prevention initiatives are an integral part of the holistic efforts to end sexual and gender-based violence against women. Community awareness about what constitutes violence as well as the existence and scope of legal provisions is critical in order for laws on family and domestic violence to have the necessary levels of uptake to be effective (WLST, 2020).

Women's Legal Service Tasmania has observed that "prior to the passage of the Family Violence Act 2014 (TAS), there was a widespread community perception that family violence is primarily limited to physical assault [and] as a result of this lack of awareness, few complaints are brought by victims, resulting in a reliance on police identification of potential offending when responding to other incidents" (WLST, 2020). Therefore, community awareness raising on what constitutes violence and the provision of the law is an essential component for prevention and response, as well as an important component for introduction of future legislations and the promotion of engagement with the justice system.

Recommendation 3:

That the Australian, State and Territory Governments ensure ongoing funding and resourcing for intersectional primary prevention activities including community awareness-raising and attitudinal change in relation to all forms of sexual and gender-based violence.

## Potential impacts on diverse groups of women

Available data on the impact of family and domestic violence does not sufficiently capture experiences of women who are already experiencing compounded discrimination in Australia and have a history of marginalisation, especially when dealing with police and other systems such as child protection. There remains a lack of data about the experiences of sexual and gender-based violence in Australia in relation to particular cohorts of women, including Aboriginal and Torres Strait women; women with disability; women from culturally and linguistically diverse (CALD) backgrounds; older women; women working in the sex industry; women living in rural and remote areas; and lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) people, including those in same-sex relationships (DPOs Australia & NWA, 2019; AWAVA, 2020b). At present there is a lack of research on the potential impacts, both positive and negative, of criminalisation of coercive control on diverse groups of women in Australia.

Recommendation 4:

That the Australian Government undertakes research and data collection about prevalence, reporting rates and experience within the justice systems in relation to sexual and gender-based violence against women from diverse backgrounds, including qualitative and quantitative research on their experiences of coercive control.

### Additional barriers for victim/survivors seeking justice

There are concerns that the criminalisation of coercive control could increase barriers for women who are already disadvantaged in accessing and navigating justice systems. The imposition on the prosecution to provide the burden of proof in criminal cases is more onerous than in civil cases. In criminal law, the court must be satisfied "beyond reasonable doubt" that the violence had occurred – a far higher threshold that must be reached. Where coercive control cannot be proven "beyond reasonable doubt", prosecution is unsuccessful (WLSV, 2020). The burden of proof in the prosecution of criminal offending requires substantial involvement from a victim/survivor and potentially intense level of cross-examination (WLSV, 2020).

Disability advocates have raised concerns that the pressure for carrying the burden of proof could become an adverse barrier for women with disability, especially for women with intellectual disabilities. Women with disability are often not believed when reporting violence, and are often denied the right to effective access to justice (DPOs Australia & NWA, 2019). Research has found that women with disability have experienced discriminatory attitudes, including refusal to investigate allegations of violence; treating crimes of violence as 'service incidents'; failing to make reasonable adjustments; and assuming that a prosecution will not succeed because the court may think a woman lacks credibility (DPOs Australia & NWA, 2019). Similar challenges could also be faced by elderly women, migrant and refugee women and those women who speak limited English.

Others have argued that criminalising coercive control "will not disqualify a person from accessing civil protections", instead it would mean imposing a criminal standard to the crime.[6]

Researchers from Queensland University who interviewed frontline workers from refugee settlement organisations have found that current domestic and family violence legislation is already having unintended negative impact on refugee and migrant women (Maturi & Munro, 2020). Issues include refugee and migrant women becoming targeted by their community when involving the police; visa restrictions which render them unable to access social services without their spouse; language barriers which can lead to women being misidentified as perpetrators' and systemic racism and xenophobia. Researchers were concerned that without system reforms, the introduction of the coercive control legislation could further exacerbate these unintended consequences for refugee and migrant women, especially in their ability to seek help (Maturi & Munro, 2020).

Aboriginal and Torres Strait Islander women fear reporting their experiences of violence and seeking help because of the ongoing social and cultural marginalisation, racism, and lack of culturally sensitive services, as well as the extremely high rates of the removal of their children (ANROWS, 2020b). The Australian Human Rights Commission in partnership with Indigenous women groups has recommended community-led and community engagement strategies over increased powers of law enforcement (AHRC, 2020).

LGBTIQ+ people also experience significant barriers with reporting their experiences of violence to police. It is common that perpetrators 'claim that the police, justice system, and/or intimate partner and family violence support services are not culturally safe for LGBTI people and therefore will not help the victim" (National LGBTI Health Alliance, 2020).

On the other hands, those in favour of criminalisation argue that creation of an offence would inform the understanding of what constitutes domestic and family violence, thus improving access and police responses. It has also been argued that the introduction of this offense could help validate the experiences of violence and provide language for describing the complexity of these experiences (Women's Safety NSW, 2020b).

[6] Feedback on the draft paper provided by Women's Safety NSW.

Recommendation 5:

That the Australian Government works with State and Territory Governments and specialist women's and family violence services to review Federal, State and Territory family and domestic violence strategies, with a view to identifying and removing barriers to justice for diverse groups of women. This process should be co-designed with diverse cohorts and specialist women's and family violence services.

## Over-criminalisation and misidentification of marginalised women as perpetrators

Criminalisation of any given activity has consistently shown to have adverse negative impact on marginalised populations. When the police and courts are granted additional powers without increased understanding, they are not well equipped to make sound judgement (ANROWS, 2020c). Particular concerns have been raised about how the criminalisation of coercive control and increased interactions with the police could impact on groups of women who are disproportionately subjected to discrimination and mistreatment from the police and authorities, including Aboriginal and Torres Strait Islander women; women with disability; women working in the sex industry; women with substance abuse; women with mental illness; migrant and refugee women and LGBTIQ people.

There is also a risk of children being removed when marginalised women are in contact with the police or other authorities. Data from the AIHW indicates that Indigenous children are removed at 10.2 times than non-Indigenous children (AIHW, 2019). The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability found that removal of children has been a widespread experience for parents with disabilities (Royal Commission, 2020).

ANROWS has raised concerns that victims/survivors may not present to police as the "typical" or "ideal victim" when they have an animosity towards, and pre-existing mistrust of, the police. This is particularly true for Aboriginal and Torres Strait Islander women (ANROWS, 2020a). Violence against Aboriginal and Torres Strait women intersects with the treatment of Aboriginal and Torres Strait Islander children, including high rates of child removal; police violence; incarceration; the power and discretion of police to decide charges; and differing responses to Aboriginal and Torres Strait Islander women's disclosure of violence as compared with those of non-Indigenous women (ANROWS, 2020a). Misidentification of female victims as primary aggressors is particularly acute in the Aboriginal and Torres Strait Islander communities (ALRC, 2017). If not accompanied by significant and far-reaching changes in police culture and meaningful system reforms, criminalisation of coercive control could lead to further over-criminalisation of Aboriginal and Torres Strait Islander and other marginalised groups of women.

There is a concern that criminalisation of coercive control alone, alongside increased police powers but importantly without widespread training and systemic reforms, may have an adverse impact of victim/survivors (InTouch, 2021). Increasing misrepresentation of evidence by perpetrators compounded by existing police prejudices may lead to misidentification of the primary perpetrator (WLSV, 2020). Monash Gender and Family Violence Prevention Centre has presented findings that victims/survivors have experienced problematic responses by the police including fear of gender bias; discrimination; not being believed; fear that the abuse will escalate following police intervention; or that they will be blamed for the abuse committed against them (Monash Gender and Family Violence Prevention Centre, 2020). Women's Legal Service NSW also cautions that identifying primary aggressors can be complicated and not straight forward as "women who have often been silenced and whose extensive histories of victimisation become invisible the moment they are deemed to have committed an offence" (Snell, 2020).

During the No To Violence consultations it has been expressed that criminalisation may result in more Indigenous men and women being incarcerated. Removal of men may negatively impact on children and perpetuate the impacts of the colonisation and Stolen Generation.[7]

Therefore, careful consideration is needed on how evidence would be gathered, how victims/survivors would be cross-examined and protected, and how charges would be decided. While there has been international evidence to suggest that in the context of the UK concerns regarding the misidentification of primary aggressors have been unwarranted (McGorrery P, McMahon M., 2019), it is important to recognise the history and impacts of colonisation in the Australian context. This means more Australian evidence is required. In addition, it is essential that any new reforms are progressed alongside the investment into better training of police and the cultural shifts in their understanding of the experiences of violence.

Recommendation 6:

**In developing new policies and legislation that will impact marginalised groups, the Australian Government undertakes a substantial intersectional gender analysis and engages these communities in co-design to ensure that proposed policies and legislation do not create further obstacles for diverse groups of women to live their life free from violence.**

Recommendation 7:

**That police are supported with clear policies and efficient procedures that emphasise the importance of identifying the person most in need of legal protection in the context of a pattern of coercive control.[8]**

Recommendation 8:

**That the Australian, State and Territory Governments ensure sufficient resourcing and guidance for judicial officers to enable consistent understandings of when and how they may strike out or dismiss inappropriate applications.**[9]

## Training for police and the justice system professionals

Improvement to police, police prosecutors, DPP prosecutors, judicial officers and institutional responses have been consistently cited as a much-needed requirement regardless of the policy position of the criminalisation of coercive control. It has also been named as a necessary precondition to the effective operation of any such legislation (McGorrery & McMahon, 2019).

Successful operation of an offence of coercive control rests heavily upon victims/survivors and the police being willing and able to work collaboratively with one another – a relationship that is often problematic (Monash Gender and Family Violence Prevention Centre, 2020). This requires that officers are to be well educated on the gender dynamic of violence; to be free from prejudice against marginalised groups; and to move away from assessing an isolated "incident" and rather interpret abuse as a series of interrelated events (Monash Gender and Family Violence Prevention Centre, 2020).

[7] This information has been obtained during the consultations run by No To Violence. Final report is forthcoming.

[8] ANROWS, 2020c

[9] Ibid.

Effectively educating frontline police will require a long-term commitment to specialist training and an overhaul of police culture (ANROWS, 2020a).

Recommendation 9:

That the Australian Government ensures thorough, mandatory training and ongoing professional development on the nature and dynamic of sexual and gender-based violence, trauma-informed practice, accessibility, cultural competency and inclusion to all relevant law enforcement personnel and justice system officials.

### Evidence, monitoring and evaluation

Central to the requirements to any changes to the legislation is the need for research, community consultation and co-design to ensure a do-no-harm approach. Just as the rest of Australia has leaned heavily on the monitoring and evaluation from Tasmania as well as from Scotland, England, Wales and Ireland, systematic data collection, monitoring and evaluation of experiences from diverse groups of women will help to inform further improvements to the justice system and beyond. These documents should be transparent and made available for collective learning across jurisdictions.

Recommendation 10:

That the Australian Government appropriately tracks progress, monitors and evaluates impacts of family and domestic violence legislation, publishes evaluation results, and budgets adequate funding for data collection, monitoring and evaluation.

## Conclusion

Research and positions on the potential impacts of criminalising coercive control is evolving and further work is required to translate existing evidence to Australian contexts. It is without a doubt that the justice system needs to be improved in order to serve victims/survivors better, validate their experiences, understand the ongoing and complex nature of domestic and family violence and provide avenues for justice.

Given the diversity of jurisdictions and their contexts, and diverse women's lived experiences with violence, extensive consultation and co-design processes with diverse groups of women is required in examining an introduction of any new legislation. This would require tailored victims/survivors-centred and do-no-harm approaches that are informed by comprehensive evidence, examination of existing structures and processes and consultations with those who have gone through the systems and those who have worked in them.

Regardless of whether coercive control is criminalised or not, it is essential that identified gaps and concerns such as ensuring ongoing, well-resourced and intersectional primary prevention activities, improved responses across systems (migration, family law, social security etc) as well as comprehensive and compulsory training for police must be addressed. Laws and policies must be informed by evidence, developed in co-design with communities and its implementation must be monitored and evaluated. A whole-of-system approach is required to address family and domestic violence, and a national definition of violence is central to this. Moreover, adequate and sustained funding and resourcing is

needed to ensure training for staff and engagement with the community at large on what constitutes violence and the laws and services to support victims/survivors.

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