

# Defining and responding to coercive control

## PURPOSE

This policy brief aims to assist policymakers developing legal or policy and practice frameworks to prevent or respond to coercive control in relation to domestic and family violence (DFV). It addresses three considerations emerging from current debates on this topic. The first is the need for consistent definition of coercive control and its relationship to the definition of DFV in policy and legislative settings, Australia-wide. The second key consideration, criminalising coercive control, necessitates making an assessment of whether the existing evidence base supports the creation of a specific offence. The third involves reforming the culture of response to DFV, in and around the legal system and in other settings. In considering changes to the way we define and respond to coercive control, it is also necessary to keep front of mind the barriers that diverse groups of women face in our existing justice system, and mitigate risks and unintended consequences of legislative and policy change.

## DEFINING COERCIVE CONTROL

Coercive control is a course of conduct aimed at dominating and controlling another (usually an intimate partner, but can be other family members) and is almost exclusively perpetrated by men against women (Johnson, 1995; Nancarrow, 2019; Pence & Dasgupta, 2006). Evan Stark (2007) argues in his book, *Coercive Control: How Men Entrap Women in Personal Life*, that it is not violence per se but the assault on autonomy, liberty and equality that makes intimate partner violence (IPV) particularly insidious. Coercive control is intrinsic to a particular manifestation of male power, where the man uses non-physical tactics and/or physical tactics to make the woman subordinate and maintain his dominance and control over every aspect of her life, effectively removing her personhood. The attack on the woman's autonomy can involve strategies like physical, sexual, verbal and/or emotional abuse; psychologically controlling acts; depriving the woman of resources and other forms of financial abuse (see for example Cortis & Bullen, 2015); social isolation; utilising systems, including the legal system, to harm the woman (for more on systems abuse see Kaspiw et al., 2017); stalking; deprivation of liberty; intimidation; technology-facilitated abuse; and harassment.

The idea of patterns of subjugation and terror, or fear and control, in intimate relationships has been around for a considerable length of time (see for example Dobash & Dobash, 1979; Herman, 1992; Jones, 1994; Pence & Paymar, 1993). However, the work of Stark (2006; 2007) marked a significant moment in the development of the theory of coercive control as it brought to a wider audience the work of previous theorists including Ann Jones, Del Martin and Susan Schechter and, helpfully, broke down the concept of coercive control to "an attack on autonomy, liberty and equality" (Stark, 2006, p. 1023). The concept of coercive control is useful because it helps to articulate the ongoing, repetitive and cumulative nature of IPV.

Physical violence is not always present in coercive control (Buzawa, Buzawa, & Stark, 2017). When physical violence is utilised, it is often routine, minor and frequently repeated, rather than taking the form of isolated episodes of violence during fights (Stark, 2007). In examining female victims killed by a former intimate partner between 2000 and 2019, the NSW Domestic Violence Death Review Team (NSW DVDRT) found "a number of its cases were not preceded by an evident history of physical abuse—instead homicides were preceded by histories of other forms of coercive and controlling behaviour" (2020, p. 68). Despite the evidence showing coercive control is a risk factor for homicide, there is a strong tendency in legal and other settings to construct a hierarchy of violence, where physical violence and sexual violence sit at the

top and forms of non-physical abuse sit below them. The non-physical behaviours are consequently viewed as less harmful or traumatic—if they are recognised as violence or abuse at all.

A hierarchical understanding of violence is also reflected in the community, as shown in the [National Community Attitudes towards Violence against Women Survey](#) (NCAS) results. The 2017 NCAS found that while most Australians understand violence against women as involving a continuum of behaviours, they are more likely to recognise forced sex and obvious physical violence than they are to understand social, emotional and financial forms of abuse and control as forms of violence against women (Webster et al., 2018). Victims/survivors can also be within the cohort of Australians who struggle to identify non-physical forms of abuse as violence against women. In its most recent report, the NSW DVDRT found that some victims in the cases they examined “did not always identify that what they were experiencing was domestic violence and abuse, instead believing that their experiences were part of ordinary relationship dynamics” (2020, p. 69).

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Coercive control diminishes the woman’s ability to exercise her agency and autonomy—the very things that would enable her to leave the relationship—resulting in entrapment. Entrapment is described by Buzawa et al. as “the most devastating outcome of partner abuse”, sitting alongside significant impacts to the victim’s perception, personality, sense of self, sense of worth, autonomy and feeling of security (2017, p. 106). While the 2017 NCAS demonstrates that the majority of Australians have a good level of knowledge about violence against women and support gender equality, nearly one in three Australians (32%) believe that women who do not leave a relationship in which violence is occurring hold some responsibility for the abuse continuing (Webster et al., 2018). In addition, just over one in six Australians (16%) do not agree that it is hard for women to leave violent relationships (Webster et al., 2018). By developing a clearer understanding of the pervasive nature of coercive control, Australians would be better able to recognise that there may not be periods where abuse ceases and women can realistically contemplate leaving (Elliott, 2017).

#### KEY CONSIDERATION 1:

## Harmonise definitions of domestic and family violence and its relationship to coercive control

Responding to coercive control more effectively requires a consistent definition of DFV across legislative and policy settings, Australia-wide.

The system-wide harmonisation of definitions of DFV across Australia has been recommended for a considerable length of time, including by the National Council in its report *Time for Action: The National Council’s Plan for Australia to Reduce Violence against Women and their Children 2009–2021* (Commonwealth of Australia, 2009). This revision needs to define DFV as encompassing a wide range of behaviours, paying particular attention to non-physical tactics, to help address the over-reliance on hierarchies of violence. The infrastructure to measure the success of this work is already in place, with survey instruments such as NCAS set up to monitor shifts in Australian attitudes to violence against women. The revised definition of DFV must set the context for how to understand coercive control—that is, as a gendered, overarching context for DFV behaviours, rather than a tactic or an example of a DFV behaviour. The definition should also make clear that physical and non-physical aggression between family members is not necessarily coercive control. This is particularly important to avoid misidentification of victims of coercive control as perpetrators, because they have resisted or retaliated against their abuser. It is also relevant in regard to aggressive physical and non-physical behaviour that is not intended to deny personhood, but may be associated with other factors such as mental health and complex trauma (Campbell, Richter, Howard, & Cockburn, 2020).

## DEFINITIONS OF DOMESTIC AND FAMILY VIOLENCE IN AUSTRALIAN LEGISLATION

Australia’s DFV legislation has prioritised the safety, protection and wellbeing of victims/survivors and their children via the provision of civil domestic violence protection orders (these have different names in different jurisdictions). Orders can be applied for by the victim/survivor, or on their behalf by police. These extraordinary powers given to police were designed to overcome the “gendered dynamics of power and control in couple relationships” (coercive control) by allowing police to act in the interests of the woman’s safety, even against her wishes (Nancarrow, Thomas, Ringland, & Modini, 2020, p. 47). Domestic violence protection orders are a hybrid civil/criminal response: contravention of the order is what draws offenders from civil law into the criminal justice system, which has a focus on deterring or, as required, punishing antisocial acts (Douglas & Fitzgerald, 2018).

The 2010 Inquiry into family violence, jointly conducted by the Australian Law Reform Commission (ALRC) and the NSW Law Reform Commission (NSWLRC), recommended that domestic violence be contextualised as “violent or threatening behaviour, or any other form of behaviour that coerces or controls a family member or causes that family member to be fearful” (ALRC & NSWLRC, 2010, p. 246). This definition—while not entirely faithful to Stark’s (2007) gendered notion of coercive control—was adopted into the *Family Law Act 1975* (Cth) in 2011. The Act then lists examples of this behaviour, which include assaults, stalking, denying financial autonomy and repeated derogatory taunts (*Family Law Act 1975* [Cth], s 4AB).

The definition places coercive control as an overarching context for abuse, framing family violence as behaviour that coerces or controls

a family member, or which causes that family member to be fearful (*Family Law Act 1975* [Cth], s 4AB). As Nancarrow (2019, p. 80) explains, the “definition in the *Family Law Act 1975* requires coercive control or fear to establish various behaviours as family violence”, and in doing so, it purposefully excludes interpersonal violence or abuse that is not intended to dominate and control and which may be characterised as fights. This is significant because of its potential to avoid inappropriate application of the quasi-criminal domestic violence law, disproportionately affecting women and especially Aboriginal and Torres Strait Islander women (Nancarrow, 2016, 2019; Nancarrow, Thomas, Ringland, & Modini, 2020).

Despite the Commissions’ recommendation and the clear construction of the definition of DFV in the *Family Law Act 1975* (Cth), civil law definitions of DFV continue to vary across states and territories. Some jurisdictions, including Victoria and Queensland, have opted to directly “include coercive control and fear in a list of behaviours, as opposed to viewing it as an overarching context for abuse” (Backhouse & Toivonen, 2018, p. 2). The Victorian *Family Violence Protection Act 2008*, for example, recognises that family violence can involve coercion and emotional, psychological and economic abuse, as well as patterns of abuse over an extended period. By not making coercion and control a context for DFV, this Victorian Act paves the way for the misidentification of the person most in need of the future protection of the law, which the Women’s Legal Service Victoria (WLS Vic; 2018) reports is occurring. The tendency of police to consider whoever calls them first as the victim can be weaponised by DFV perpetrators as a form of systems abuse. This makes women who use violence in response to patterns of coercive and controlling behaviours vulnerable to being misidentified as the perpetrator and pulled into the criminal justice system via perpetrators calling the police (WLS Vic, 2018). This sits in contradiction to the stated purpose of the Act.

In Queensland, the preamble of the *Domestic and Family Violence Protection Act 2012* (Qld) states that domestic violence “usually involves an ongoing pattern of abuse over a period of time”, while s 8 states:

Domestic violence is behaviour perpetrated by one person against another, where two people are in a relevant relationship, which is: physically or sexually abusive; emotionally or psychologically abusive; economically abusive; threatening; coercive, or in any other way controls or dominates the victim and causes the victim to fear for their own, or someone else’s, safety and wellbeing.

In this construction, controlling and coercive behaviours are part of a list of tactics rather than the overarching context required to consider these behaviours as DFV. This allows physically abusive behaviours—like violence during family fights—occurring outside of an overarching strategy of control and coercion to be legitimately called DFV in legislation intended to address coercive controlling DFV (Nancarrow, 2019).

In New South Wales, DFV is covered by the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) that is another hybrid criminal and civil law response, setting out both offences and protection orders relating to people in intimate relationships. While there is no specific

mention of, or offence relating to coercive control, s 9(3)(d) of the Act states that DFV “extends beyond physical violence and may involve the exploitation of power imbalances and patterns of abuse over many years”. This Act criminalises stalking and intimidation with courts to pay regard to patterns of behaviour, so it is arguable that in this state, some (but not all) aspects of coercive control are already criminalised. This was also the view of the ALRC and NSWLRC. Their final report also questioned whether an offence of economic abuse was necessary given the scope of existing laws prohibiting fraud, causing financial disadvantage and undue influence (ALRC & NSWLRC, 2010). The Commissions instead recommended that economic abuse “be expressly recognised in the definitions of family violence in the family violence legislation of each state and territory”, necessitating amendments to family violence legislation in New South Wales, Queensland and Western Australia (ALRC & NSWLRC, 2010, p. 238).

#### KEY CONSIDERATION 2:

### **Build the evidence base on the effectiveness of criminalisation and other responses to coercive control**

There is limited evidence on the success of criminal justice approaches to tackling coercive control, both in Australia and internationally. While coercive control has been identified as underpinning DFV for a considerable length of time (see for example Dobash & Dobash, 1979; Herman, 1992; Jones, 1994; Pence & Paymar, 1993), it is only in recent years that a number of international jurisdictions have begun criminalising it (Douglas, 2018; McMahon & McGorriery, 2020). Coercive and controlling behaviour that deprives the victim/survivor of her liberty and autonomy is addressed in legislation in England and Wales and, more recently, in the Republic of Ireland and Scotland. Some international jurisdictions, including the United States, have considered criminalisation but have not taken it up. All international legislation draws upon Stark’s (2007) model of coercive control as a liberty crime, and aims to move from incident-based conceptualisations of IPV toward criminalising a course of conduct that denies victims/survivors their autonomy and liberty (Nancarrow, in press).

Most Australian jurisdictions do not directly make DFV an offence; rather, they employ existing criminal offences—assault, indecent assault, rape, sexual assault, attempted murder, stalking, intent to do grievous bodily harm—to deal with incidents of DFV behaviour as they occur. Sometimes the context of DFV is considered to aggravate such offences. For example, when assault is committed against a family member in South Australia, s 5AA of the *Criminal Law Consolidation Act 1935* (SA) dictates that it is an aggravated offence that attracts a more severe penalty. Preceding the more recent wave of international jurisdictions criminalising coercive control, in 2004 Tasmania criminalised emotional abuse/intimidation and economic abuse, which represented a shift away from only criminalising physical behaviours that can be employed in DFV.

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(Nancarrow, in press)

Multiple Australian jurisdictions have conducted reviews considering the utility of a specific DFV or coercive control offence and have recommended against implementation, opting instead to make improvements to the existing system. In Queensland, the *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* report found that difficulties in prosecuting DFV offences using existing *Criminal Code Act 1899* (Qld) provisions would not be solved by the creation of an additional offence, because the issues related more to problems with evidence gathering, witness cooperation, police practice and court processes (State of Queensland, 2015). It was the view of the Victorian Royal Commission into Family Violence that a new offence of coercive control would only have “a symbolic effect”, as laws are only as “effective as those who enforce, prosecute and apply them”; instead it recommended practice improvements to the existing legislative system “through education, training and embedding best practice and family violence expertise in the courts” (State of Victoria, 2016, p. 27).

Stark (2020) explains that while the creation of a specific offence might be included as part of improving our response to DFV, success relies upon the adoption of a comprehensive coercive control framework, where the legislation is implemented in a way consistent with the meaning of the concept. Stark (2020, p. 35) also cautions against the wholesale adoption of even a well-crafted offence from another international jurisdiction, as it risks

prematurely fixing a statutory gaze on a crime about which relatively little is known and where the government has little direct experience in ways that foreclose the institutional learning that is essential.

This does not prevent or negate the need to gather a global evidence base on the progress and implementation of coercive control and domestic abuse offences in other jurisdictions. This task was recommended by the NSW DVDRT in its 2017–19 report, and accepted in July 2020 by the NSW Attorney-General and Minister for the Prevention of Domestic Violence, Mark Speakman (Speakman, 2020).<sup>1</sup> Monitoring should include quantitative measures of successful prosecutions under the offence, as well as examination of qualitative improvements in attitudes to violence against women, such as those measured by NCAS.

The sections below outline the evidence from four jurisdictions that have implemented offences designed to criminalise domestic abuse or coercive control, or criminalise non-physical tactics of DFV.

## TASMANIA

In 2004, the Tasmanian Government passed the *Family Violence Act 2004* (Tas) and introduced two new criminal offences—economic abuse (s 8) and emotional abuse (s 9)—which are not criminalised in other Australian jurisdictions. These new offences were part of a broader

overhaul of legislative and systemic change in Tasmania designed to respond to critique about the way the criminal justice system responded to DFV (Barwick, McGorrery, & McMahon, 2020; Wilcox, 2007). The Act broadened the definition of family violence to include assault, sexual assault, threats, coercion, intimidation or verbal abuse, abduction, stalking and bullying, economic abuse, emotional abuse, contravening a family violence order (FVO) and damage to property by a spouse or partner. It was implemented alongside the Safe at Home policy, a whole-of-government approach that sought to integrate criminal justice responses to family violence (Department of Justice, Government of Tasmania, 2003). Safe at Home is a pro-arrest and pro-prosecution policy with victim safety as the overarching goal. The Department of Justice is the lead agency and police intervention is the entry point for victims and families to receive a coordinated response.

For economic abuse, the *Family Violence Act 2004* (Tas) states a person must not intentionally and unreasonably control or intimidate their partner or cause their partner mental harm, apprehension or fear by pursuing a course of conduct through a number of actions related to economic abuse (s 8). These include coercing a partner to relinquish control of assets or income, preventing their equal participation in decisions over household expenses or disposal of shared property, denying them access to joint funds to pay household expenses, and withholding reasonable financial support necessary to maintain themselves or a child. There are various challenges in prosecuting economic abuse, such as proving intent to cause harm (Wilcox, 2007). Economic abuse may be perpetrated in different ways—for example, it can occur sporadically or over a cycle longer than a year (the initial statutory period of the offence was six months, amended to 12 months in 2015)—and proving a “course of conduct” may be difficult (Barwick et al., 2020). Between 2004 and 2017, five cases of economic abuse had been prosecuted, and in all of these cases the offender was also charged with emotional abuse (Barwick et al., 2020).

For emotional abuse, s 9 of the *Family Violence Act 2004* (Tas) states a person must not pursue a course of conduct that he or she knows, or ought to know, is likely to have the effect of unreasonably controlling or intimidating, or causing mental harm, apprehension or fear in, his or her partner. The Act specifies that course of conduct covers restricting freedom of movement by threats or intimidation. The scope of the offence is broad, because it includes behaviour which the perpetrator knew or “ought to have known” would cause harm. The offence does not require the prosecution to prove actual harm caused, rather the likelihood of causing harm (McMahon & McGorrery, 2016). The limitations to the structure of the offence include the word “unreasonably” which, as with the economic abuse offence, implies the possibility that some behaviour that is controlling or intimidating in relationships is “reasonable”. The offence also requires multiple incidents of emotional abuse to meet the course of conduct occurring within a 12-month statute of limitations (which again was initially six months, extended to 12 months in 2015; McMahon & McGorrery, 2016). In comparison to the economic abuse offence, the emotional abuse

<sup>1</sup> Since that time, the NSW Parliament has established a Joint Select Committee to inquire into coercive control in the context of domestic relationships, which is due to report by 30 June 2021.

offence has been used more often, with 68 prosecutions between 2004 and 2017 (Barwick et al., 2020). To date all prosecutions of economic and emotional abuse in Tasmania have involved male offenders (Barwick et al., 2020).

While the economic abuse and emotional abuse offences have seen an increase in use, with a total of 198 charges to the end of 2019 (State Prosecution Services as cited in Women’s Legal Service Tasmania, 2020), usage of these offences continues to be minimal in comparison to the number of family violence incidents recorded by police. For example, in 2015–16, there were 3,174 family violence incidents where charges were laid by Tasmania Police, but only a total of eight prosecutions for these offences (Department of Justice as cited in Barwick et al., 2020). Barwick et al. (2020) attributed these low numbers to limitations in police training and investigative practices, a lack of community awareness about forms of non-physical DFV, and the initial six-month statutory time limit on pressing charges. Drawing upon more recent research conducted by police prosecutor Kerryne Barwick, which indicates there are now more than 40 successful convictions, McMahon, McGorriery, and Burton (2019) argue that the change in the limitation period is showing promising improvement to the usage of these offences.

As to the notion that legislative change creates social change, NCAS data relating to the Understanding Violence Against Women Scale (UVAWS), which measures knowledge about (or awareness of) non-physical forms of violence, confirm that while Tasmanian UVAWS scores have improved over the last three waves of the survey (2009–2017), all states and territories have also seen an improvement over this time period (Webster et al., 2017). There was no statistically significant difference between Tasmania’s scores relating to understanding non-physical aspects of violence and those of other states in 2017 (Webster et al., 2017).

## ENGLAND AND WALES

In 2015, the *Serious Crimes Act 2015* was implemented in England and Wales. This legislation introduced a new offence, in s 76, of “controlling or coercive behaviour in an intimate or family relationship”. Prior to this, England and Wales had implemented civil laws and various reforms in regard to DFV. The legislative change came about after policy advocacy, influenced by Stark’s work, led to a broad consultation process in 2014 (Weiner, 2020).

The Act states:

- A person (A) commits an offence if —
- (a) A repeatedly or continuously engages in behaviour towards another person (B) that is controlling or coercive,
  - (b) at the time of the behaviour, A and B are personally connected,
  - (c) the behaviour has a serious effect on B, and
  - (d) A knows or ought to know that the behaviour will have a serious effect on B. (*Serious Crimes Act 2015* [England/Wales], s 76)

The offence applies to people in intimate personal relationships, or those living together as members of the same family, or those who

have previously been in an intimate personal relationship, excluding parent–child relationships where the child is under 16. “Serious effect” means that the offender causes the victim to fear, on at least two occasions, that violence will be used against them, or that the offender’s behaviours cause the victim serious alarm or distress, which has a substantial impact on the victim’s day-to-day activities (*Serious Crimes Act 2015* [England/Wales], s 76). It is important to note this legislation, relevant only to England and Wales, is intended to work alongside other laws that criminalise other forms of DFV.

With the offence only referring to non-physical coercive behaviour such as psychological or emotional abuse, there are limits to its application (Home Office, Government of the United Kingdom, 2015). Wiener (2020), for example, suggests the legislation uses too narrow an understanding of coercive control, and does not consider how different forms of abuse, including physical violence, can be used by perpetrators as a strategy for gaining and maintaining coercive control. “The end of the relationship” is also a legal boundary within this legislation, meaning the offence does not apply to couples who were previously in a relationship but no longer live together (*Serious Crimes Act 2015* [England/Wales], s 76). Weiner (2020, p. 170) argues that using separation “to determine whether the victim is experiencing ‘harassment’ under the *Protection from Harassment Act 1997* (UK) or ‘controlling and coercive behaviour’ contrary to section 76 makes little sense”.

The strengths of the legislation include the way it refers to coercive and controlling behaviour that is repeated or continuous, which moves away from incident-focused behaviour to a “course of conduct” which requires proof of two or more specific incidents (Wiener, 2020). The legislation also enables courts to consider the power imbalance in relationships where coercive control is perpetrated (Wiener, 2020). There has been no formal evaluation of the impact of s 76 of the *Serious Crimes Act 2015* (England/Wales), however there is some evidence on how the legislation is being used. Barlow, Johnson, and Walklate (2018) analysed police responses to domestic violence cases in one police area from 2016–17. They found police used the offence at a low rate, and did not recognise coercive control as occurring in DFV cases that involved more traditionally recognised offences, such as those involving physical violence. Moreover, in police investigations of coercive control, the research showed police officers found it challenging to gather evidence of sustained coercive and controlling behaviours in victims/survivors’ statements and focused instead on isolated incidents, such as a physical assault. As a result there was a lower arrest and charge rate when compared to other domestic violence offences (Barlow et al., 2018).

## REPUBLIC OF IRELAND

In 2018, the Republic of Ireland introduced an offence to respond to coercive control. The Irish definition of coercive control closely resembles the English and Welsh legislation described above (Bettinson, 2020). The offence is housed in s 39 of the *Domestic Violence Act 2018* (Ireland), which commenced in January 2019. This Act was a significant piece of legislative reform for both civil and criminal matters related to

domestic violence. It brought together existing provisions on domestic violence under one piece of legislation in order to make it easier to use, and introduced a number of reforms, new offences and processes. These changes included safety orders being available to persons who are in intimate relationships but do not live together; criminalising forced marriage; providing the option for victims to give evidence in court via video link; and eight-day emergency barring orders to exclude a perpetrator of domestic violence from a home shared with the victim when there is an immediate risk of harm (Department of Justice, Government of Ireland, 2018).

Similar to the offence in England and Wales, the coercive control offence in Ireland refers to knowingly and persistently engaging in behaviour that is controlling or coercive and which a reasonable person would be likely to consider to have a serious effect on a relevant person. The Act applies to intimate relationships only (marriages, civil partners or partners who are not living together). This legislation requires the prosecution to prove that the defendant used coercive or controlling behaviour (Bettinson, 2020) but does not expand on the meaning of coercive or controlling behaviour. Accompanying government documents state the offence was intended to criminalise non-violent control (Dáil Éireann, 2018 as cited in Bettinson, 2020). Providing a more detailed or clearer definition within the legislation could strengthen understanding of how to apply the law. Moreover, as with the offence in England and Wales, this Irish offence does not cater for the way physical abuse can be used as a strategy to achieve and maintain coercive control.

Since the offence of coercive control in Ireland is relatively new, it is difficult to assess its impact. The first conviction occurred in February 2020, more than a year after the Act's commencement (Ireland's National Police and Security Service, 2020) and amid calls by police for more training on identifying and responding to coercive control under the new legislation (Lally, 2019).

## SCOTLAND

Scotland also introduced legislation to address coercive control in 2018. While it does not directly mention the words "coercive control", the *Domestic Abuse Act 2018* (Scotland) differs from the English and Welsh legislation by recognising the gendered pattern of abuse, making it more faithful to its foundations in Stark (2007; Walklate & Fitz-Gibbon, 2019). This Act also includes ex-partners in its remit, recognising the way that abuse can continue after separation and can take time to recognise, recover from and report. Stark has publicly referred to the Scottish Act as "a new gold standard" (Brooks, 2018; Stark, 2020). Scottish law is underpinned by "the '4Ps' approach to combatting domestic abuse: *protection* (legal remedies); *provision* (effective service delivery); *prevention* (stopping domestic abuse and reducing reoffending); and *participation* (by people who have experienced domestic abuse)" (Scottish Government and Convention of Scottish Local Authorities, 2009 as cited in Scott, 2020, p. 181, emphases added). The Act also recognises that children witnessing DFV levelled against one of their parents are co-victims experiencing DFV in their own right.

One of the key features of the Scottish legislation is that it was co-designed with victims/survivors, including a coalition of children's charities and women's charities (Scott, 2020). This coalition was able to lobby for changes that helped to bridge the gap between criminal and civil (family law) proceedings, where sheriffs make contact decisions with little to no information about the behaviour of the offending parent. As Scott (2020, p. 188) explains:

Creating a status for children as co-victim with the non-offending parent offered the opportunity to ensure that abusive behaviours discussed in criminal cases where children were victims would have to be raised in linked civil cases where child contact discussions were being made.

The level of consultation—described as "an unprecedented amount of engagement with stakeholders"—has resulted in an Act that attempts to minimise adverse impacts to victims/survivors (Scott, 2020, p. 190). For example, by moving the focus of the prosecution from proving harm was suffered by the victim/survivor to proving that the behaviour was likely to cause either physical or psychological harm to the particular victim/survivor, the Act attempts to shift the focus from the victim/survivor to the perpetrator's behaviour (Scott, 2020). As laws are interpreted by courts and legal actors, whether this intended pivot to the perpetrator translates into court experience having less of a re-traumatising effect on victims/survivors remains to be proven.

With the Scottish Act only coming into force in April 2019, and Scottish Parliament committing to report on progress three years after implementation, it is hard to measure success at this time (Scott, 2020). Anecdotally, the BBC reports that in the first three months of the legislation, 400 crimes were recorded by Police Scotland, who began training 18,500 officers and staff online, and 7,500 in person, in December 2018—before the law came into force—to achieve this outcome. Of those 400 crimes, the BBC reports that 190 cases were referred to the Crown Office and Procurator Fiscal Service (less than 50%), with just 13 successful convictions ("New domestic abuse laws: More than 400 crimes recorded", 2019).

### KEY CONSIDERATION 3:

## Reform the culture of response to domestic and family violence in and around the legal system

Reforming the culture of response to DFV in and around the legal system is essential to improving our response to coercive control. Walklate, Fitz-Gibbon, and McCulloch (2018), who disagree that "more laws" are the answer, believe it will take significant reform of the legal system before a coercive control offence could be meaningfully applied, and instead suggest it might be helpful for experts to explain the concept of coercive control in trials. The necessity of transforming legal understandings of coercive control is further evidenced in research by Tarrant, Tolmie, and Giudice (2019, p. 19), which highlights court (mis)conceptions that contextualise IPV as a "bad relationship with

incidents of violence". This evidence suggests that a way of rendering visible patterns of harmful behaviour is through the use of a social entrapment framework (Tarrant et al., 2019). A social entrapment analysis of IPV involves scrutiny at three levels:

1. documenting the full suite of coercive and controlling behaviours
2. examining the responses of family, community and agencies
3. examining structural inequities.

A social entrapment framework can help to integrate different kinds of evidence of disadvantage and barriers to help-seeking to better understand the actions of a person experiencing coercive control (Tarrant et al., 2019). This is critically important for women who fight back and aren't "typical" or "ideal" victims—a group disproportionately made up of Aboriginal and Torres Strait Islander women (Douglas & Fitzgerald, 2018; Nancarrow, 2019). The ANROWS evidence produced by Tarrant et al. (2019) has informed new provisions (ss 37–39) in the Western Australian *Evidence Act 1906* via the *Family Violence Legislation Reform Act 2020* (WA) that gained assent on 9 July 2020. Legislating a social entrapment framework, and training all actors in and around the legal system in DFV and coercive control, would aid recognition of non-physical forms of violence as part of a strategic course of conduct to remove the woman's autonomy.

For other experts, like Goodmark (2018), the criminal law system has failed to sufficiently deter intimate partner violence. Goodmark purports that the harms of criminalisation are so significant they "justify abandoning the use of the criminal legal system in cases of intimate partner violence" (2018, p. 12). Goodmark proposes a balanced approach that would, in general, see funds shifted away from courts, police and prosecutors and redirected into programmatic controls in communities and NGOs, under the consultation and guidance of victims/survivors (Goodmark, 2018). Nancarrow (2019) also makes a case for evidence-based justice reinvestment initiatives, with a focus on the particular case of Indigenous women. There is no doubt that, as coercive control is entrenched in gendered and sexual inequality, responding to it will require broad changes across a wide range of social, cultural and legal norms (Buzawa et al., 2017; Walklate et al., 2018).

Addressing coercive control will require effective cross-sector collaboration between a wide range of sectors and actors, including service providers, governments, and justice and health systems (Elliott, 2017). The need for a whole-of-system response to DFV is consistently repeated across the body of ANROWS research, with recommendations outlined in more detail in *Working across sectors to meet the needs of clients experiencing domestic and family violence* (ANROWS, 2020). Specific areas that the evidence identifies as requiring improvements to culture and collaboration in and around the legal system are outlined below.

## REDUCE OPPORTUNITY FOR SYSTEMS ABUSE

That some offenders use the court and other processes to inflict more harm on victims—termed "systems abuse"—is well established in the

literature, with concern expressed by both victims/survivors (Kaspiew et al., 2017) and the service providers working with them (Cortis & Bullen, 2016). The requirement that a specific offence of coercive control be proved to a criminal standard by referring to the psychological dimensions of the abusive relationship inside our adversarial legal system may expand opportunities for systems abuse by the perpetrator (Walklate et al., 2018). With coercive control involving uniquely tailored tactics that are developed over time by trial and error by the aggressor (Tarrant et al., 2019), it is likely that perpetrators will be able to wield them undetected in legal settings. Some of these behaviours can be subtle, and can appear non-violent to an observer: "It reached the point where it was enough for him to give her a 'look' and she became extremely scared and would do as he wanted (Tr, p. 1096)" (Tarrant et al., 2019). When perpetrators are enabled to commit systems abuse unchecked, the legal system is "operating, in effect, as a secondary abuser" (Douglas, 2018, p. 94).

Reducing opportunity for systems abuse would include, for example, legal actors recognising that making legal applications is not itself a neutral behaviour, and factoring this understanding into decisions relating to adjournment applications, cross-applications for protection orders, rejecting subpoenas and allowing matters to proceed (Douglas, 2018). The impact of failing to address existing, and future, opportunities for systems abuse while creating new offences means a wider cohort of victims/survivors will be re-traumatised by their interactions with the legal system. Existing evidence already expounds that women are frequently not believed or supported when reporting abuse by an ex-partner and are often worse off financially and psychologically for their contact with the legal process (Salter et al., 2020). Feeling disempowered by the justice system can be a substantial barrier to future help-seeking, and sits at odds with trauma-informed responses that seek to reaffirm women's agency and autonomy after IPV (Salter et al., 2020).

## RESPOND TO DIVERSITY BETTER

While gender inequality is a primary driver of patriarchal coercive control of women, other forms of structural inequality and transphobia can also be used to perpetrate violence against women. When these forms of systemic social, political and economic discrimination and disadvantage influence and intersect with gender inequality, they can, in some cases, increase the frequency, severity and prevalence of violence against women (Elliott, 2017). When designing systemic change to address coercive control, it is important to think about the ways that these changes will impact women who experience multiple, intersecting forms of structural disadvantage. Nancarrow (2019), who agrees that achieving gender equality is significant in reducing coercive control, points out that achieving gender equality in the absence of racial equality is unlikely to have a significant impact on rates of violence against Aboriginal and Torres Strait Islander women, for example.

Having a singular focus on a criminal justice approach to addressing coercive control may exclude groups of women who already face barriers to accessing justice when compared with other women. These barriers sit in addition to the difficulties women already face when

When designing systemic change to address coercive control, it is important to think about the ways that these changes will impact women who experience multiple, intersecting forms of structural disadvantage.

reporting IPV, even for acts (usually physical) that meet the criteria for existing offences—women are still often met with failures by police and prosecution to enforce the law, and face difficulties relating to meeting the burden of proof (Tolmie, 2018). As Walklate and Fitz-Gibbon (2019, p. 102) point out, “the creation of a new offence does not deal with any of the well-documented concerns women have for not engaging with the criminal justice process”. These issues point to the need for extensive cross-sector consultation with diverse groups of women and the service providers they engage with to precede any systemic change to addressing coercive control, as well as particular consideration of approaches that are not centred solely on criminal justice.

## RESOURCE AND SUPPORT PATTERN-BASED POLICING

Responding to coercive control will require police, who act as gatekeepers to the justice system (Salter et al., 2020), to move from incident-based policing to investigative policing that carefully considers patterns of behaviour. Some experts question the extent to which frontline general duties police officers can, or should be expected to be able to, understand the complexities of coercive control (Walklate et al., 2018). Implementing legislative change in this area would essentially rely upon the

police officer’s ability to identify the potential presence of coercive and controlling behaviour, elicit information on a series of abusive events from the victim and correctly assess that behaviour, in terms of laying charges. (Walklate et al., 2018, p. 121)

Multiplied across the number of domestic violence incidents police record—in New South Wales alone, this was 31,692 between July 2019 and June 2020 (NSW Bureau of Crime Statistics and Research, 2020)—it is questionable whether police are resourced and skilled, with sufficient time and expertise, to make this labour-intensive approach viable.

Recently published research, *Accurately Identifying the “Person Most in Need of Protection” in Domestic and Family Violence Law* (Nancarrow et al., 2020), sheds more light on systems abuse and coercive control by looking at the misidentification of the aggrieved and respondent in cases of DFV. This research highlights that policing tends to be incident-based and retrospective, rather than pattern-based and future-focused (Nancarrow et al., 2020). This means that police often make fast assessments on who is the primary aggressor in a single incident, rather than considering the pattern of behaviour carefully and protecting the person most at risk of future harm (Nancarrow et al., 2020). From a policy standpoint, while all Australian jurisdictions have tools to assess risk, no jurisdiction currently has tools to help police assess patterns of coercive control that would detect which party is the perpetrator, and which party is using violent resistance to ongoing abuse (Nancarrow et al., 2020). This research also supports policing and investigation models that include specialist DFV units and co-responder models where specialists with expertise in coercive

control accompany police at investigations, or otherwise support police assessments (Nancarrow et al., 2020). Reforming the way police respond to DFV has utility whether or not we adopt additional criminal offences.

Reforming the way police respond to DFV has utility whether or not we adopt additional criminal offences.

## Summary

The debate in Australia around coercive control is primarily focused on criminalisation, however criminalisation alone cannot provide the nuanced response needed to address the complexities and specifics of coercive control. Definitional consistency of DFV across policy and legislation, in all Australian jurisdictions, is fundamental to setting the context for understanding coercive control and efforts to prevent and respond to it.

Legislation designed to address coercive control must have an explicit and nationally consistent definition distinguishing it from physical and non-physical aggression that does not seek to deny personhood. A failure to distinguish coercive control from non-coercive control in legislative definitions of domestic and family violence will increase the risk of unintended consequences for victims of coercive control.

Further, legislative change cannot on its own transform the culture of response to DFV within and around the legal system. Effective training, models of co-response and justice reinvestment are all potential avenues that would support effective responses to coercive control. In light of these three key considerations, ANROWS makes the following recommendations.



# Recommendations

## **KEY CONSIDERATION 1:**

### **Harmonise definitions of domestic and family violence and its relationship to coercive control**

#### **RECOMMENDATION 1:**

Responding to coercive control more effectively requires a consistent definition of coercive control and of domestic and family violence across legislative and policy settings, Australia-wide. This definition needs to position coercive control as an overarching strategy designed to remove personhood using a range of physical and non-physical behaviours.

#### **RECOMMENDATION 2:**

Fund the National Community Attitudes towards Violence against Women Survey, implemented by ANROWS, beyond 2022 to monitor progress and enable continued improvement in policy and programs aiming to reduce and prevent violence against women and their children.

## **KEY CONSIDERATION 2:**

### **Build the evidence base on the effectiveness of criminalisation and other responses to coercive control**

#### **RECOMMENDATION 3:**

Fund research to monitor the progress and implementation of coercive control and domestic abuse offences in other jurisdictions, including unintended consequences. This should include quantitative measures of successful prosecutions under the offences, as well as examination of qualitative improvements in attitudes to violence against women, such as those measured by the National Community Attitudes towards Violence against Women Survey.

## **KEY CONSIDERATION 3:**

### **Reform the culture of response to domestic and family violence in and around the legal system**

#### **RECOMMENDATION 4:**

Improve police and all legal actors' understanding of domestic and family violence as involving patterns of behaviour that occur within the strategic context of coercive control, that is, tactics of physical and/or non-physical abuse that seek to deny personhood and the right to think and act independently of the perpetrator.

#### **RECOMMENDATION 5:**

Legislate a social entrapment framework, and train all actors in and around the legal system in domestic and family violence and coercive control, to aid recognition of non-physical forms of violence as part of a strategic course of conduct to deny autonomy/personhood.

#### **RECOMMENDATION 6:**

Strengthen systemic change to better address coercive control with extensive cross-sector consultation with diverse groups of women and the service providers they engage with, carefully considering alternatives to criminal justice approaches.

#### **RECOMMENDATION 7:**

Create a tool to help police assess patterns of coercive control that would detect which party is the perpetrator, and which party is using violent resistance to ongoing abuse.

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ANROWS acknowledges the Traditional Owners of the land across Australia on which we work and live. We pay our respects to Aboriginal and Torres Strait Islander Elders past, present and future, and we value Aboriginal and Torres Strait Islander histories, cultures and knowledge.

We are committed to standing and working with Aboriginal and Torres Strait Islander peoples, honouring the truths set out in the [Warawarngu Guma Statement](#).

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