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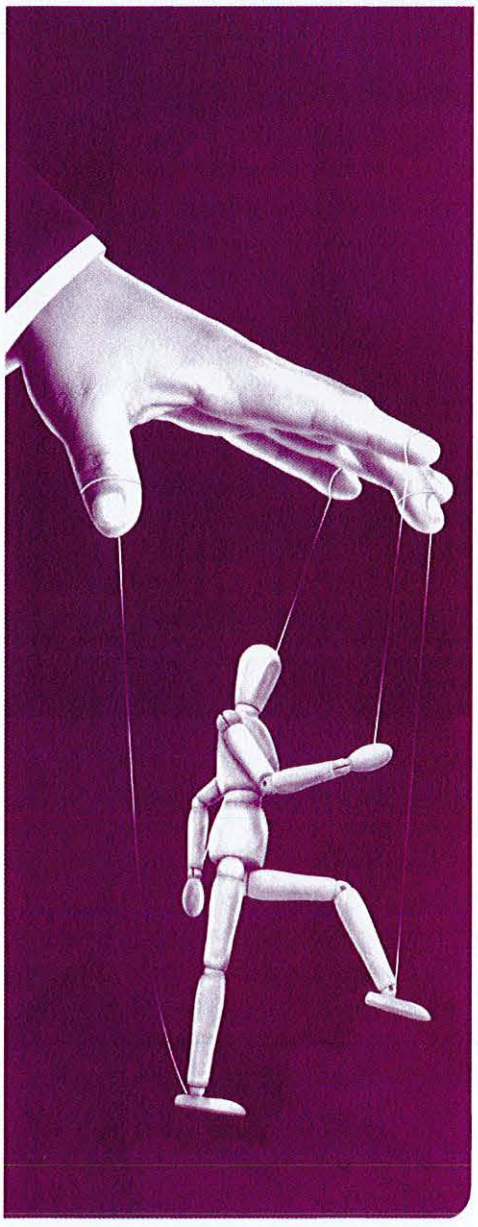
Criminalisation of coercive control



The debate over the criminalisation of coercive control has gained significant momentum in the past few months.

The murders of Hannah Clarke and her children in 2020, and of Preethi Reddy in 2019, have been central to the emergence of recent calls for action.[1] The call for criminalisation is usually supported by the view that it will allow for intervention in the absence of physical violence. This means it may capture instances where the act of homicide would otherwise be the first act of physical violence. In other words, as suggested by the Guardian's recent headline, 'Coercive control laws could have saved Hannah and her three children'.[2]

In the Northern Territory (NT), our clients experience high levels of coercive control but we also have the highest victimisation rates for domestic and family violence offences.[3] There are instances in which coercive control is present without physical violence, however the majority of our family violence clients also experience physical violence. This has led some to query the utility of criminalising coercive control. *What difference could it make when perpetrators are already committing serious criminal offences?*

We suggest that it has the potential to make a significant difference in reshaping how our institutions identify and respond to family violence. In moving away from an incident-based system towards one which views family violence as a pattern of abuse, we see the potential to facilitate earlier intervention and to better understand retaliatory or resisting violence. We acknowledge that this is a complex and challenging policy question which elicits strong and sometimes divergent views. Overall, we support the call for carefully designed research and consultation to

ensure there is an evidence-based foundation for the path forward.

This article provides a brief overview of the coercive control debate in Australia and offers a preliminary NT perspective drawing attention to the fact that law reform will need to respond to local complexities. Significant amongst these complexities are:

- the intersection with mandatory sentencing reform;
- the over-incarceration of Aboriginal people;
- a high level of physical violence; and
- a high rate of misidentification of women as perpetrators.

It will also be necessary to consider what adjustments, if any, might be needed to take into account the effect of extended family relationships prevalent in many cultural and linguistically diverse (CALD) and Aboriginal communities.[4]

What is coercive control?

Coercive control is a debilitating and dangerous form of violence present in almost all cases of intimate partner homicide.[5] While there is no single definition of coercive control, a common defining feature is a pattern of behaviour or course of conduct designed to gain and maintain power and control.[6] Coercive control is comprised of different forms of abuse, some of which are considered criminal, such as physical and sexual assault. However, not all forms of coercive control fall within our current criminal framework, especially when instances of abuse are viewed in isolation.[7] These include financial abuse, technological abuse, social and emotional abuse and psychological abuse.[8] Victims often experience humiliation, intimidation, surveillance, gaslighting and isolation designed to strip them of autonomy.[9]

When each incident of coercion or control is examined on its own, it is unlikely to reveal the true level and impact of the violence taking place.[10] Yet the evidence is clear, the cumulative effect is debilitating.[11] Coercive control is also recognised as a significant risk factor preceding intimate partner homicide.[12] Attempts by the victim to leave a coercive partner are particularly dangerous and heighten the risk of lethality.[13] As noted above, coercive control was identifiable in the cases of Hannah Clarke and Preethi Reddy. Similarly, a history of non-physical coercive control has been identified in cases of intimate partner homicides in the NT. For example, in 2012, Kirsty Ashley was murdered after having filed for a protection order in response to over 300 calls and texts from her ex-partner in the previous 19 days.[14] Unfortunately, there was no coronial inquest into Kirsty Ashley's death which may have provided the opportunity to examine the impact of coercive control. Inquests into the deaths of Hannah Clarke and her children will be held in early 2021.[15]

How do we currently respond to family violence and coercive control?

Each state and territory has a civil regime to facilitate the making of protection orders referred to in the NT as Domestic Violence Orders (DVOs).[16] These orders seek to protect the victim of domestic violence by prohibiting the respondent from specified behaviour. A breach of an order constitutes a criminal offence. In the NT, an issuing authority may make a DVO if satisfied there are reasonable grounds to fear the commission of domestic violence.[17] Domestic violence is defined to include conduct causing harm,[18] damaging property, intimidation, stalking and economic abuse.[19] Intimidation includes harassment or conduct that causes a reasonable apprehension of violence or damage to property.[20] Harassment includes regular and unwanted contact by mail, phone or through the internet. The legislation also allows consideration to be given to a pattern of conduct.[21]

The NT definition of domestic violence is arguably wide enough to encompass coercive control yet clients still face barriers in both identifying and convincing others that the control they experience is a form of domestic violence. Our clients also report the need to manage the impact of reporting which has resulted in further victimisation at the hands of extended family. In addition, when our clients do report breaches of DVOs, a failure to view the offending within the prism of an ongoing pattern of abuse can expose them to ongoing and often escalating risk of violence. Illustrating the

commonality of this experience, almost a quarter of the males who killed their current or former female partners in Australia in a four-year period were named as respondents in DVO's 'protecting' the female homicide victim at the time of her death.[22] A small subset of intimate partner homicides during that period were committed by females against their current or former male partner.[23] The majority of those women were found to be the primary victims of family violence perpetrated by the homicide victim. A quarter were also 'protected' under a DVO.[24] Almost half identified as Aboriginal.[25]

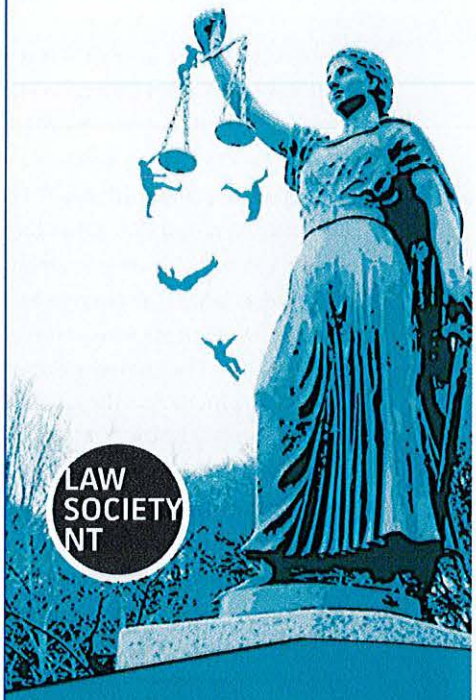
Currently no Australian state or territory has a specific criminal offence of family violence, however some behaviours which are used to commit family violence are criminalised, including assault, stalking and sharing of intimate images.[26] In Tasmania, there are specific offences relating to economic abuse, emotional abuse and intimidation.[27] The live question is whether criminalising coercive control will drive down family violence assault and intimate partner homicide.

The trend towards criminalisation of coercive control

Over the past decade, overseas jurisdictions have moved towards criminalising coercive control. In 2015, England and Wales introduced an offence of controlling or coercive behaviour, followed offences in both Scotland and Ireland in 2019.[28] The current debate revolves around whether Australia should introduce a similar offence. Divergent views have emerged with some calling for caution and others advocating strongly for criminalisation.

In October 2020, an influential group supported by Are Media launched the Criminalise Coercive Control Campaign calling on state and territory governments to move towards criminalisation by July 2021.[29] Broadly, the arguments is that a new offence is needed to accurately reflect our understanding of family violence as a pattern of abuse. It is expected to contribute to a greater understanding of the nature and dynamics of family violence. A more sophisticated understanding will drive changes in the attitudes and beliefs which currently contribute to a failure to respond to coercive control and to the increasing criminalisation of women, particularly Aboriginal women. It will also allow police to prosecute cases which do not fit within the current criminal law framework, but which expose victims to a continued risk of homicide.

On the other hand, there are a range of concerns that have been put forward by respected practitioners, advocates and academics.[30] The concerns have been summarised by those advocating for criminalisation as an expression of nihilism 'about the ability of the justice



Call for volunteers Pro Bono Clearing House (PBCH)

The aim of the Society's PBCH is to connect members of the public needing pro bono assistance with NT legal practitioners able to provide that assistance.

Whether you're a new lawyer wanting practical skills to build your career or a senior lawyer looking to re-energise yourself in an area of law that's important to you—volunteering your time to provide assistance to those that are disadvantaged and cannot afford legal support is a fulfilling, valuable experience.

To find out more about the PBCH and how you can help make a difference, please contact the Law Society NT:

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system to protect women.'[31] It is acknowledged that neither the 2015 Victorian Royal Commission into Family Violence nor the 2015 Queensland Special Taskforce recommended the introduction of a coercive control offence.[32] The Victorian Commission noted that often the introduction of new offences has only a symbolic effect and stated that whatever laws we have will only be as effective as those who enforce, prosecute and apply them.[33] The Commission emphasised that improving practices—through education, training and embedding best practice and family violence expertise in the courts—is likely to be more effective than simply creating new offences.[34] From our perspective, this is not an argument against new offences nor a clear recommendation against them. Rather it is a strong statement about the fundamental importance of education and training, with which we agree. To be clear, no advocate for criminalisation is advocating for 'simply creating new offences'. In addition to legislation, advocates are campaigning for consultation with frontline workers and survivors to shape the new law and a sufficiently funded education framework to ensure effective enforcement, whilst prioritising the safety and wellbeing of victim-survivors.[35]

Important considerations for the NT

The criminalisation of coercive control stands to have a significant impact in the NT. However, we will need to consider coercive control in relation to the high level of physical family violence, the over-incarceration of the Aboriginal population, the intersection with mandatory sentencing reform and the increasing misidentification of primary perpetrators.

We may also need to consider what adjustments, if any, need to be made to ensure the safety of women and children whose extended families may play a role in perpetuating or amplifying coercive control. For example, a 2016 coronial heard evidence that many women get the blame from family and the Aboriginal community for what happens to their partners, particularly if the men are sentenced to a prison term. Further, there is pressure from the family to withdraw complaints and if the victim fails to do so, 'the paternal mother-in-law, who possesses considerable power, may well take the victim's children', the victim will be monitored by family who will update the perpetrator on her actions and the perpetrator may seek retribution upon release.[36]

High rates of victimisation

As noted above, the NT does experience cases of coercive control with no evidence of physical violence. In these cases, the arguments in favour of criminalising coercive control might be applicable. However, the NT also experiences the highest rates of domestic violence related assaults.[37] The victimisation rate is three times higher than in any other jurisdiction and 18 times higher for Aboriginal people.[38] Further, Aboriginal women are 31 times more likely to be hospitalised due to domestic violence related assaults compared to non-Aboriginal women.[39] And the rates of domestic violence assault are increasing. In the last year, Alice Springs experienced an increase of 25%, with 989 domestic violence related assaults.[40] It is important to bear in mind that every assault is a potential homicide.[41] Intimate partner homicide has also been higher in the NT than other jurisdictions over several years in the past decade.[42] It valid to ask what difference we might expect a new offence to make in this context.

We suggest that criminalising coercive control may in some instances facilitate intervention before the use of physical violence, driving down serious assaults. To achieve this, the introduction would need to be supported by evidence-based sentencing options, embedded with sophisticated risk assessment and management and supported by a sustained education campaign. It is a significant task that requires strategic and evidence-based development, consultation and the involvement of victim-survivors.

Over-incarceration

There may also be concern that the introduction of a new offence will lead to more charges, more arrests and higher levels of imprisonment. The NT has been recently described as having the highest imprisonment rate 'on the planet' at 913 per 100,000 people.[43] Eighty-six percent of the NT prison population are Aboriginal, a significantly disproportionate number given the Aboriginal population comprises only 30% of the total NT

population.[44] The prevalence of family violence in Aboriginal communities has been recognised as a key driver for the incarceration of both men and women.[45]

We acknowledge that some of our clients report feeling safer when their abusive partner is serving a prison sentence but that many continue to fear violence as a result of being blamed by family.[46] Consequently, we emphasise that at these early stages, criminalising coercive control should not automatically be equated with increasing imprisonment rates. This is particularly so in the context of the pending review of the mandatory sentencing regime. There is potential for community-based therapeutic sentencing options in appropriate cases, if the regime is informed by risk assessment and management principles which prioritise the welfare and safety of victims. We can already see therapeutic approaches being developed and trialed through the Specialist Family Violence Court.

A coercive control lens to correct misidentification of primary perpetrators

We suggest the criminalisation of coercive control could play a more direct role in addressing over-incarceration of women. Aboriginal women represent the fastest growing prison population in the NT and across Australia.[47] They are 19 times more likely than non-Aboriginal women to be imprisoned.[48] There is concern that criminalising coercive control will increase the number of women being identified as perpetrators and sentenced for offences.[49] McMahon and McGorrery have responded noting there is no evidence this happens in any overseas jurisdiction.[50] From our perspective, there will always be a risk of systems abuse and misidentification, in any population, however if criminalisation is supported by a fully funded education and training program it has the potential to reduce misidentification rather than exacerbate it.

By way of background, misunderstanding of coercive control plays a significant role in the criminalisation of women who physically resist or retaliate. We are increasingly seeing the DVO regime being weaponised against our clients by abusive partners. We also see increasing numbers of police DVOs against women, including instances of reciprocal DVOs, which reflect a misunderstanding of the nature of the violence police are responding to. When confronted with defensive use of violence, police may issue a DVO against both parties on the basis that it's difficult to identify the primary perpetrator or that the incident appears to be one of mutual violence. Women's Safety NSW argue that the introduction of a coercive control offence will 'allow retaliatory or resisting behavior to be understood in the context of a wider pattern of abuse'.[51]

The Australian Death Review Network data suggests that Aboriginal women are more likely to be involved in the deaths of their partner or former partner while at the same time being the primary victim of ongoing abuse.[52] Amongst the growing prison population of Aboriginal women in the NT, we see women serving sentences for manslaughter after enduring years of horrific abuse, the majority of which was mandatorily reported to police well before the homicide occurred.[53] The criminalisation of coercive control could allow earlier protective intervention and, at the very least, ensure that retaliatory or resisting violence is viewed through the lens of a pattern of abuse.

The potential adverse impact of a higher standard of proof

There is a legitimate concern that our clients will be unable to meet the higher standard of criminal proof for coercive control offences and that they may be re-traumatised through the criminal process. The prosecution of coercive control will rely on collaboration between victim-survivors and the police and there are many reasons women will not come forward including fear for their ongoing safety, mistrust of the justice system and the risk of not being believed or even being criminalised for their response as well as family retribution. These barriers already exist in relation to domestic violence related offences and they are particularly pronounced for our Aboriginal and CALD clients.

However, past failures to engage and support victims of crime is not a sound rationale for failing to criminalise dangerous and destructive behaviour. Rather, efforts should be directed towards improving processes through education and awareness and the adoption of trauma-informed practice. We need to hear from victims about how they can best tell their story in the justice setting—relating to all matters, not just coercive control. The introduction of new processes as part of Specialist Family Violence Courts in Victoria, Queensland and now in Alice Springs, demonstrates that adjustments can be made to make our system more accessible and safer for victims and vulnerable witnesses in general. There is a need for further improvement and we need to continue to monitor outcomes and listen to the voices of victim-survivors.

There are many other concerns about criminalisation of coercive control which are explored in the media, discussion papers and academic literature. Some of these include a lack of evidence of outcomes for victims,[54] the potential for new offences with lesser penalties to be charged in place of assault,[55] and the assertion that coercive control is already covered by existing civil laws. In response, advocates have argued that it cannot be proven that an offence actually deters coercive control in the same way that it cannot be proven that the offence of rape prevents its occurrence.[56] Further, there is no suggestion that coercive control should be used in place of existing offences and the full extent of coercive control is only covered in some of the civil law regimes. And finally, that the civil regime fails to protect women on too many occasions. These are all worth further exploration in the context of the NT.

What is the current state of play?

There has been significant media coverage of the campaign to criminalise coercive control in NSW. Women's Safety NSW's position paper was followed by the introduction of a private members Bill proposing an offence of coercive control with a maximum penalty of five years imprisonment.[57] The Bill is awaiting its second reading debate. The Attorney-General has announced a Parliamentary Joint Select Committee inquiry to examine coercive control supported by the recent release of a government discussion paper.

There has also been significant discussion in Queensland. The Palaszczuk Government issued an election promise to tackle coercive control.[58] The LNP opposition also committed to implementing new coercive control laws.[59] In South Australia, Advance's John Darley has reintroduced his Criminal Law Consolidation (Domestic Abuse) Amendment Bill 2020, first introduced in 2018, with the Liberal Government also announcing a Parliamentary Joint Selected Committee.[60]

The Victorian Law Reform Commission has stated that it considers the most appropriate way to

address the exclusion of non-criminal forms of violence, including behaviour that is threatening, coercive or domininating, is to criminalise such conduct.[61] However, Women's Legal Service Victoria oppose criminalisation due to concerns that it may be detrimental to safety and accountability outcomes, with the view that the existing legislative environment strikes the right balance.[62] It is important to note that family violence is defined in Victoria to include behaviour that is 'coercive' or 'in any other way controls or dominates the family member and causes that family member to feel fear for the safety of that family member or another person'.[63] The Victorian Act also explicitly recognises that 'family violence may involve overt or subtle exploitation of power imbalances and may consist of isolated incidents or patterns of abuse over a period of time'.[64] This definition more directly responds to our understandings of coercive control than the NT definition explored above.

Victoria has also had the benefit of a Royal Commission as well as sustained government commitment to the establishment of Specialist Family Violence Courts and to funding ongoing training of cross-professional multidisciplinary teams which support the work of specialist courts. The context is quite different to that of the NT where despite significantly higher levels of physical violence we have had no Royal Commission, no dedicated domestic violence death review mechanism and few coronial inquests exploring the systemic causes of family violence homicides.

As noted above, Tasmania is the only Australian jurisdiction to have criminalised elements of coercive control (economic and emotional abuse or intimidation).[65] The Women's Legal Service of Tasmania explain that despite being in force since 2004, the provisions are underused. There are a range of factors which have been identified as contributing to slow uptake and low prosecution rates including the lack of community awareness and some antipathy from key members of the legal profession.[66] The Tasmanian experience has been contrasted to the Scottish experience of implementation which was underpinned by extensive consultation, stakeholder engagement and community education and awareness program.

Conclusion

There is no doubt that the capacity of the NT justice system to identify and respond to coercive control must be improved. Whether or not this requires criminalisation is unclear however the potential should be fully explored. In doing so, the NT will have to grapple with the additional challenges of significantly higher rates of physical violence, over-incarceration of Aboriginal people, mandatory sentencing and misidentification of primary perpetrators. In grappling with these complexities, it is important not to forget there are women who are at risk of homicide but have not experienced physical violence. In the absence of criminalisation, there are still changes to be made to reflect the realities of coercive control. We need to support the workers in our justice system with ongoing training to ensure red flags are identified, information and risk assessment is informed by an understanding of coercive control and that police and decision-makers are able to identify retaliatory or resisting violence in the context of ongoing abuse and victimisation. We are all working towards the same aim—the safety and wellbeing of all members of our community.

This is a complicated, multi-faceted and at times vexing policy question. If you are interested in exploring the complexities around the justice system response to coercive control, be sure to check out CAWLS podcast series launching in March 2021.

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Endnotes: Pages 77-78