

VALS Policy Paper

Addressing Coercive Control Without Criminalisation

Avoiding Blunt Tools that Fail Victim-Survivors





Contents

Introduction	3
The Harms of Coercive Control	3
The Move Towards Criminalisation	4
The Victorian Context	5
VALS' Position	6
Note on Language	7
Key Issues	8
Criminalisation & the Safety of Victim-Survivors	9
Ineffective: Coercive Control Offences Rarely Enable Rapid Intervention	9
Unnecessary: Victoria's Civil Framework Allows Intervention Against Coercive Control	12
Obstacles to Intervention under Civil Law would Pose Equivalent Problems for a Criminal Offence	15
Other Purported Advantages of Introducing a Criminal Offence	17
Symbolic Value & General Deterrence	17
Specific Deterrence	19
Conclusion	22
Unintended Consequences of a New Criminal Offence	23
Reduced Reporting of Domestic Violence	23
Misidentification	24
The Risk of Misidentification	25
Would a Coercive Control Offence Reduce Misidentification?	27
Systems Abuse	28
Consequences of Misidentification	29
Bias and Disproportion Impact of the Implementation of a New Offence	30
Recommendations	33
References	36



Introduction

In the past eighteen months in Australia, coercive control – a particularly damaging form of domestic abuse – has moved from being a subject of interest for domestic violence organisations to an issue of intense public debate. Coercive control is becoming more widely recognised as a grave social problem, and there is a growing focus on the possibility of creating a new criminal offence as the centrepiece of a societal response to this deeply concerning type of abuse.

This policy brief sets out the Victorian Aboriginal Legal Service’s position on the criminalisation of coercive control. It draws on international research and experience, consultation with other organisations working in this space, and our own work with clients. Understanding the impact of any legal change on Aboriginal and Torres Strait Islander people in Victoria is essential before major reform is undertaken.

VALS’ position on coercive control has been informed by a continuing discussion among Aboriginal women who, bringing their expertise as researchers, activists and victim-survivors, have shone a light on the way responses to family violence are failing Aboriginal people. Beyond the specific sources cited throughout this document, we would like to thank the people who have contributed to an insightful and nuanced social media discussion about coercive control and Aboriginal people over the past several years, including Professor Chelsea Watego, Nayuka Gorrie, Dr Amanda Porter, Alison Whittaker, Amy McQuire and many others.

The Harms of Coercive Control

Coercive control has gained currency through academic and clinical work as a key concept for understanding the nature of domestic abuse. It can be understood as:

a form of domestic abuse involving repeated patterns of abusive behaviour – which can include physical, sexual, psychological, emotional or financial abuse – the cumulative effect of which is to rob victim-survivors of their autonomy and independence.¹

Coercive control is an especially grave type of domestic abuse. The all-pervasive nature of systematic controlling behaviour makes it very hard for victim-survivors to recognise what is being done to them, and can undermine their sense of self and ability of a victim-survivor to imagine being in control of their own life. It is this all-encompassing nature which leads to

¹ NSW Government (2020), p2.



coercive and controlling behaviour often being named as the worst element of domestic abuse by survivors.² As well as being deeply harmful in its own right, coercive control is a major predictor of intimate partner homicide – New South Wales’ Domestic Violence Death Review Team found that in 111 out of 112 domestic violence homicides between 2008 and 2016, coercive and controlling behaviour was a major feature of the relationship.³

The Move Towards Criminalisation

It is no surprise that the growing recognition of this form of abuse has led to a trend of legal responses. Coercive control has been increasingly identified in academic work and the practice of domestic violence support services since the mid-2000s. Legislation criminalising coercive control has been introduced in England & Wales and in Scotland, and will soon come into force in Northern Ireland. In Australia, a series of tragic and high-profile domestic homicides – including the murder of Luke Batty by his father in Victoria,⁴ and of Hannah Clarke and her children by her partner in Queensland⁵ – have highlighted the prevalence of coercive and controlling behaviour as a precursor to serious crimes.

As a result, jurisdictions across Australia, particularly in the last eighteen months, have begun to consider the criminalisation of coercive control. In South Australia, a bill to criminalise coercive control has been introduced to parliament in 2018 and 2020.⁶ The New South Wales Government has committed to creating a new criminal offence of coercive control, following the recommendation of a Parliamentary Joint Select Committee.⁷ The Queensland Government created an independent taskforce to consult on new offences in February 2021.⁸ Tasmania criminalised emotional abuse or intimidation and economic abuse, key elements of coercive control, in 2004; the offence has very rarely been used, but has become a subject of renewed discussion around Australia in the past two years.⁹

2 House of Representatives Standing Committee on Social Policy and Legal Affairs (2021), paragraph 4.5.

3 NSW Government (2020), p2.

4 Hayley Gleeson, ABC News (2021).

5 Rachel Riga, ABC News (2021).

6 Premier of South Australia (2020).

7 AAP (2021).

8 Stephanie Zillman, ABC News (2021).

9 Hayley Gleeson, ABC News (2019).



The Victorian Context

There is a need for caution, however, in applying developments from other jurisdictions to Victoria, given their very different contexts. In England and Wales, a coercive control offence was introduced in 2015 as a corrective to an essentially broken family violence legal framework. Responses to domestic abuse had a “focus... on discrete, injurious assaults [which] was too narrow to capture the patterns of coercion and control.”¹⁰ The failure to understand family violence as rooted in patterns of behaviour, not individual incidents, meant that a “large proportion of the male offenders... were ‘repeaters’”, but “criminal sanctions were no more likely after a man’s 50th offense than his first.”¹¹ Though there are still important critiques of whether criminalisation was the right approach, it is clearly the case that coercive control as a concept was entirely absent from the legal framework in England and Wales, and that this absence was causing serious problems.

In New South Wales, the Australian jurisdiction that has taken the most significant steps towards creating a new criminal offence, the state of the family violence system is certainly not as inadequate as that in England and Wales had been. Nonetheless, a victim-survivor of domestic abuse can only benefit from a civil intervention order if they fear a criminal offence.¹² As a result, intervention orders and other civil remedies cannot be used in direct response to coercive control because it does not constitute a standalone criminal offence.

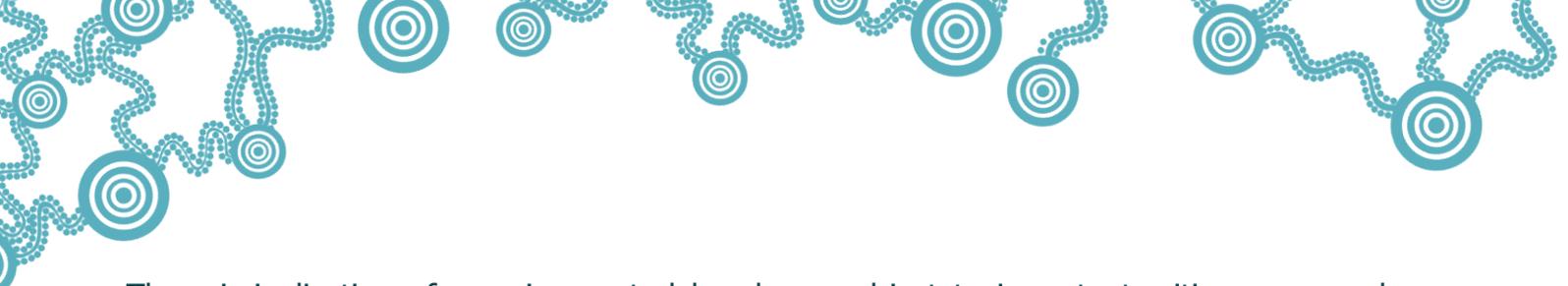
Victoria enters the discussion about coercive control from a very different starting point. *The Family Violence Protection Act 2008* includes coercive and controlling behaviour as part of its definition of family violence, and highlights the importance of patterns of abuse.¹³ Courts can make intervention orders specifically in response to coercive control and include conditions designed to target this behaviour in particular. Beyond the legislative framework, coercive control is a major focus of service providers, practitioners and policymakers working in the area.

10 Stark & Hester (2018).

11 Ibid.

12 *NSW Crimes (Domestic and Personal Violence) Act 2007*, Section 16.

13 *Family Violence Protection Act 2008*, Section 5.



The criminalisation of coercive control has been subject to important critiques everywhere it has been implemented.¹⁴ But the arguments against criminalisation are even stronger in the context of Victoria’s existing legislative, policy and operational framework for responding to family violence. The potential benefits of adding a criminal offence on top of this existing framework are minimal.

VALS’ Position

Our state also has well-documented issues with the way that Aboriginal people are treated by the legal system, both criminal and civil. These problems extend to family violence, with Aboriginal victim-survivors regularly disbelieved or mistreated by police, prosecutors and judges. These harms and their disproportionate impact on Aboriginal people in Victoria need to be carefully considered before new criminal offences are canvassed.

VALS recognises the unique and pervasive harm caused by coercive control, and the need for an improved response to it. We do not, however, support criminalising coercive control as a necessary or appropriate step in Victoria. Like Aboriginal Community Controlled Organisations which have made submissions to reform processes in other states, VALS recognises the particular risks that a criminal offence of coercive control would pose to Aboriginal people.¹⁵ Creating a new criminal offence is unlikely to protect women at risk of violence, particularly Aboriginal and Torres Strait Islander women, and risks becoming a new source of harm to victim-survivors of abuse and to the Aboriginal community in Victoria.

This paper is divided into two parts. The first considers the safety of victim-survivors of family violence. It suggests that new criminal offences would not improve women’s access to immediate protection when they need it, and that there is very limited evidence for a broader, long-term impact on safety. The second part examines the impact of criminalising coercive control on those charged with the new offence. It highlights the substantial risk that victim-survivors, particularly Aboriginal women, will be misidentified as having engaged in domestic abuse, and that a new law would create new tools for abuse to be perpetuated. The paper concludes with VALS’ recommendations – against criminalising coercive control, and in support of alternative approaches to dealing with this serious form of abuse.

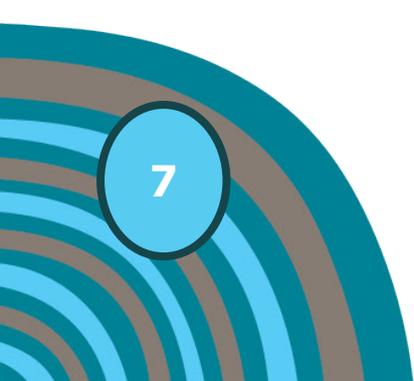
¹⁴ See e.g. Killean (n.d.), Walklate et al. (2017).

¹⁵ Wurringa Baiya Aboriginal Women’s Legal Centre (2021); Aboriginal Legal Service (NSW/ACT) (2001); Aboriginal & Torres Strait Islander Legal Service (Qld) (2021).



Note on Language

This policy paper uses gendered language to refer to victim-survivors of domestic abuse, as VALS recognises that domestic violence is a gendered phenomenon, most frequently and severely suffered by women. We recognise that domestic violence also takes a severe toll on trans and non-binary people, men and women in same-sex relationships, and in some cases is perpetrated by women against men. Aboriginal people of all genders are severely affected by domestic abuse and by the criminal legal system's response to it.





Key Issues

The benefits of a coercive control offence are significantly overstated by its proponents.

- A criminal offence of coercive control would make no difference to the ability of victim-survivors to call police and have someone removed from a dangerous scene
 - Police are very unlikely to be called in relation to coercive control offences
 - Arrest on coercive control charges could not occur immediately, as the charges take thorough investigation to gather sufficient evidence
- The existing civil law framework in Victoria makes police intervention possible where that is the appropriate or necessary response, without a need for new criminal offences
- There are challenges in addressing coercive control using the civil framework, but these challenges would be even more problematic for implementing a criminal offence
 - Detecting coercive control from outside a relationship can be very difficult
 - Police and authorities continue to downplay the importance of coercive control in practice, even with clear legislation and guidelines in place
- The purported symbolic value of a criminal offence, to clearly condemn coercive control, can be delivered by the civil law framework and no evidence otherwise has been presented
- A coercive control criminal offence would not have much deterrent value
 - No solid evidence suggests criminal punishment is an effective deterrent for people who commit acts of family violence
 - A high rate of attrition at every point of the criminal legal process means successful prosecutions would be rare
 - A rarely-successful coercive control offence may send a message that coercive and controlling behaviour is taken less seriously, creating a sense of impunity

A new coercive control offence would have deeply harmful unintended consequences.

- A new offence would expand the ways in which people can become entangled in the criminal legal system, with disproportionate impacts on Aboriginal people in Victoria
- Expanded criminal sanctions may reduce reporting of domestic abuse, especially among Aboriginal people, for those who fear that trying to seek help will mean sending their partner to prison and exposing them to the dangers Aboriginal people face in custody
- Victim-survivors of domestic abuse are frequently misidentified as having committed abuse by police and courts – both unintentionally, and due to deliberate manipulation by the person who has actually offended. A coercive control offence expands opportunities for this to occur.
- A coercive control offence would have significant ambiguity and room for interpretation, likely to lead to disproportionate enforcement against Aboriginal people, due to both individual biases of police officers and the systemic racism of policing in Victoria.





Criminalisation & the Safety of Victim-Survivors

The most important consideration in family violence policy-making and legislative reform is ensuring that people at risk are able to access safety. Coercive control is very frequently a precursor of intimate partner homicide. This fact has been highlighted by advocates of criminalisation to suggest that a new offence could provide a key intervention point to ensure women's safety.

Earlier intervention in situations where coercive control is present and at risk of escalation is vital. VALS emphasises, however, that early intervention *by police* is not the best or only kind of early intervention. Many victim-survivors are unwilling or unable to contact police, and this is particularly true for Aboriginal people, who may be concerned about authorities removing their children or about their own criminal records.¹⁶ Other kinds of intervention which make it easier for victim-survivors to leave environments they recognise as dangerous are far more important.

Moreover, the reality is that, even to the extent that police responses are useful, a new coercive control offence would make very little difference to the ability of victim-survivors to have someone who is committing acts of family violence removed from the scene, or of police to intervene in situations that could escalate to homicide or serious violence.

Ineffective: Coercive Control Offences Rarely Enable Rapid Intervention

Advocates for the criminalisation of coercive control have highlighted powerful testimonies from victim-survivors of coercive control who perceived the extreme danger they were in and recognise the urgency of earlier intervention to protect women in similar situations.

A coercive control offence is unlikely to serve as an effective intervention point. A proper understanding of the dynamics of domestic abuse, and the experience of coercive control offences in other jurisdictions, makes this clear. There a number of reasons why a coercive control offence would not be likely to enable rapid or emergency intervention by police in the way that proponents envisage.

¹⁶Taylor & Putt (2007).



- **Police are unlikely to be called out for coercive control offences**

This kind of intervention, whether by police or any other kind of service provider, requires someone – typically the victim-survivor – to recognise the abuse and call for support. Coercive and controlling behaviour typically escalates over time, from a sometimes innocent starting point. This extended duration, and the fact that coercive control directly attacks a victim-survivor’s autonomy and self-confidence, means that it can be very difficult for victim-survivors to recognise that they are being subjected to domestic abuse. Even where they do recognise the abusive nature of their relationship, it is substantially less likely that a victim-survivor will call the police or other support services in response to a general pattern of behaviour, as opposed to a particular incident.

Evidence from the implementation of the coercive control offence in England and Wales demonstrates this. The large majority of police call-outs which involved coercive control *also* involved an incident-based offence such as a physical assault.¹⁷ This pattern is maintained throughout the legal process. Coercive control was not the principal offence in 47% of prosecutions involving this charge.¹⁸ Where it is the principal offence, other offences are almost always laid alongside it, including assault or battery in 65% of cases.¹⁹ Logs of call-outs also show specifically that the calls were very rarely made with the intention of reporting coercive control; police were much more likely to be called primarily about a particular incident or immediate threat.²⁰ This data clearly shows that few police interventions are enabled *specifically* by the coercive control offence – most would have occurred anyway on the basis of accompanying offences.

- **Arrest for coercive control at first response is not feasible**

When police are on the scene, it is again unlikely that they will arrest someone specifically for coercive control, particularly in the absence of other offences. This is because gathering adequate evidence to substantiate a charge of coercive control is very difficult. In the experience of community sector lawyers, victim-survivors are unlikely to give detailed testimony about their

¹⁷ Barlow et al (2020).

¹⁸ Office for National Statistics (2020), section 7.

¹⁹ Office for National Statistics (2018), section 11. This figure is from 2018, as in more recent years the UK Ministry of Justice has changed its statistical breakdown and the comparable figure is no longer available. Related data points (such as the percentage of coercive control prosecutions in which it is the principal offence) have remained very stable in this time and there is no reason to expect this figure to have changed significantly.

²⁰ Barlow et al (2020).



abuse unless lawyers “carefully and sensitively tease out the details of the violence,” something which can take “more than an initial meeting [even] in a safe, trauma-informed environment”.²¹ Police do not have the specialist training of family lawyers or the ability to promise confidentiality, making it even less likely that they would be able to collect such evidence.

In the experience of VALS’ lawyers and client service officers, eliciting detailed information about domestic abuse of any kind – particularly from Aboriginal people – requires a trusting relationship to be built with the client, sometimes over the course of several months. The total lack of trust in police and other government authorities felt by many Aboriginal people, as a result of ongoing racism and discrimination, makes it very hard to establish this kind of relationship.

Even well-trained police officers are therefore extremely unlikely to elicit statements about coercive control during an emergency call-out. Coercive control often “involves micro-regulation of some of the daily activities already commonly associated with women” and is enforced by “signals and covert messages to exert and maintain control... [which] may be hard to classify as abusive in and of themselves,” particularly to a criminal standard, and certainly not without in-depth investigation.²²

The UK’s prosecution guidelines for coercive control suggest sources of evidence should include diary entries, email and text communication, and testimony from friends and family.²³ This makes it clear that coercive control, even where criminalised, is not an offence for which police can attend a scene, recognise with an adequate level of confidence, and make immediate arrests. While VALS is not of the view that a focus on arrests is a productive response to family violence, the reality is that a coercive control offence would not facilitate immediate arrests; even on the logic of advocates for a new offence, it would not succeed in providing better protection.

The role of a coercive control offence in enabling police intervention in immediately dangerous situations is therefore minimal. **It is very unlikely that a coercive control offence would ever enable police interventions that aren’t possible under current law.**

VALS is particularly concerned that these difficulties are amplified for Aboriginal people. Coercive control is difficult to recognise for all victim-survivors, and in the absence of well-funded, culturally safe community legal education and family violence services, this is especially

21 Elizabeth Evatt CLC (2021), p5

22 Bishop (2016).

23 Bishop (2016).



difficult for Aboriginal women. Aboriginal women are substantially less likely to call police.²⁴ Any interaction with police or the criminal legal system can be a source of fear for Aboriginal people, who may be concerned about how police will treat them because of a criminal record or because of conditions of bail, parole or a community corrections order. Particularly if there is not an immediate physical threat, Aboriginal people are highly unlikely to call police. Any purported advantages flowing from increased police intervention would therefore not extend to Aboriginal women.

Further, when Aboriginal people do engage with police and the legal system on family violence matters, they are frequently subjected to racism. Victim-survivors are often disbelieved by police because they do not fit common stereotypes about how a victim-survivor of family violence would behave.²⁵ They are not likely to be calm when dealing with police, may have used defensive violence themselves, and are more likely to have a criminal record of their own, all factors which make police less likely to believe a victim-survivor's account.²⁶ Being Aboriginal itself can also impact a victim-survivor's credibility according to police, due to stereotypes about dysfunctional relationships or the prevalence of family violence in the Aboriginal community.²⁷ The risks associated with police stereotyping of Aboriginal victim-survivors are discussed further below.

Unnecessary: Victoria's Civil Framework Allows Intervention Against Coercive Control

As well as being ineffective, criminalisation of coercive control is also *unnecessary* to facilitate urgent intervention by police, if in some cases that is the appropriate or necessary response.

The *Family Violence Protection Act* establishes a definition of family violence which includes coercive and controlling behaviour:

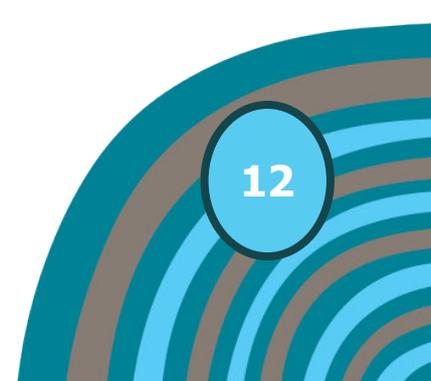
- (1) For the purposes of this Act, family violence is—
 - (a) behaviour by a person towards a family member of that person if that behaviour—
 - (i) is physically or sexually abusive; or
 - (ii) is emotionally or psychologically abusive; or

²⁴ Willis (2011).

²⁵ Monash Gender and Family Violence Prevention Centre (2021).

²⁶ Women's Legal Service Victoria (2020); Reeves (2019).

²⁷ ANROWS (2019).





(iii) is economically abusive; or

(iv) is threatening; or

(v) is coercive; or

(vi) in any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person; or

(b) behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of, behaviour referred to in paragraph (a).²⁸ (*emphasis added*)

It also includes a specific note that “behaviour may constitute family violence even if the behaviour would not constitute a criminal offence.” Police and courts have the power to respond to family violence under this definition, even in the absence of a criminal offence. Police can direct someone who has committed acts of family violence to leave premises and detain them if they refuse to do so.²⁹ Magistrates can make a Family Violence Intervention Order in response to behaviour falling under the definition, which enables a wide range of conditions to be imposed, including prohibiting the subject of the order from coming to the family home, communicating with a victim-survivor, surveilling them or damaging their property.³⁰ Breach of these conditions is a criminal offence.³¹ Applications for a Family Violence Intervention Order (**FVIO**) can be made by police, and in certain circumstances police can also make temporary orders themselves, before a matter can come before a magistrate.³²

The comprehensive nature of this civil law framework is such that it is unclear what urgent interventions would be enabled by the criminalisation of coercive control in Victoria. Victim-survivors can already call police about coercive and controlling conduct, although the evidence from the United Kingdom suggests this is unlikely in the absence of a specific prompting incident. If they do, police have the power to attend and to remove a person from the scene if there is a danger of escalation. Courts and police can prohibit people who have committed acts of family violence from a wide range of conduct – including electronic communication, surveillance and damage to property – which often forms part of coercive control, and if the behaviour continues,

28 *Family Violence Protection Act 2008*, Section 5.

29 *Family Violence Protection Act 2008*, Part 3, Division 1.

30 *Family Violence Protection Act 2008*, Part 4.

31 *Family Violence Protection Act 2008*, Section 123.

32 *Family Violence Protection Act 2008*, Part 3, Division 2



there can be criminal sanctions. In Victoria, it is simply not the case that there is a legislative lacuna preventing intervention against coercive control, or endangering lives as a result.

Clearly these provisions have not eliminated the problem of coercive control in Victoria, and in many cases involving Aboriginal people they are applied in counterproductive ways. The intervention order system, including both FVIOs and Personal Safety Intervention Orders, can itself be used in ways that reflect individual and systemic racism against Aboriginal people. The power of police to issue Family Violence Safety Notices without a magistrate's approval creates particular risks. Interim orders made by magistrates are frequently made on little or no evidence, and without proper consideration of the vulnerabilities of the person affected. Orders can have inappropriate conditions attached – particularly when a victim-survivor is misidentified as an aggressor, as discussed further below – and failure to comply with conditions can draw marginalised people into contact with the criminal legal system.³³ This can have serious consequences for Aboriginal people and contributes to the extraordinary incarceration rate of Aboriginal women in Australia.

The problems with the civil protection framework, however, are certainly not a lack of powers to facilitate intervention by police and the justice system. There is no reason to think that writing coercive control into criminal law would fix the shortcomings of the civil framework.

³³ Douglas (2018).



Obstacles to Intervention under Civil Law would Pose Equivalent Problems for a Criminal Offence

Rather than addressing shortcomings in the civil family violence framework, a new coercive control offence would be plagued by the same issues which currently prevent victim-survivors from accessing protection.

There are a number of barriers to adequate intervention against coercive control, despite the fact that it is present in family violence legislation in Victoria.

- **Victim-survivors may not recognise their situation as abusive**

Someone being subjected to controlling and dominating behaviour in an intimate relationship may find it very difficult to identify their situation as abusive. Coercive control is often built on everyday gender or cultural norms about behaviour in relationships, rather than being entirely alien to them, making it harder to identify. It can also develop out of relationship dynamics which are not initially abusive but become so over time. The difficult exercise of recognising coercive control is particularly acute for victim-survivors because, while they are still in or only recently out of the relationship, the continuing effect of psychological coercion on their perception of themselves and their partner will incline them against recognising the abuse. In these circumstances, many women subjected to coercive control will not recognise its wrongness or abusive character.

A further barrier is that even where victim-survivors themselves do recognise coercive control as abuse, they may not understand that the law also recognises this type of abuse and offers provisions to protect them. This makes it less likely that victim-survivors will call for help, either from police, service providers or family and friends – under either a civil or criminal legal approach to the issue.

- **Detecting coercive control from the outside is very difficult**

It can also be challenging for outside parties to confidently identify coercive control. Victim-survivors may have little or no contact with people trained to recognise abusive behaviour in a relationship. Where they do, the nature of coercive control – constituted by a pattern of subtle behaviours rather than clear ‘red flags’ – makes it very hard to detect in relatively short interactions, such as a court date or a routine appointment with a service provider. The specific tactics of control used vary substantially between relationships, which means there can be no



quick or simple approach to identifying whether coercive control exists.³⁴ This is the case even when a particular incident has alerted police to risk in a relationship, as recognition of possibly coercive behaviour may not provide a sufficient evidence base for taking police action. These challenges for others in identifying when there is coercive control in a relationship constitute another barrier to engaging the legal framework to protect victim-survivors, whether the law in question is civil or criminal.

- **Authorities disregard coercive control, even with legislation in place**

Third, and most concerning, there are consistent reports in Victoria and across jurisdictions of authorities failing to respond to coercive control appropriately because they do not take it seriously as a form of abuse. This continues to occur even where coercive and controlling behaviour is explicitly part of the legal and policy frameworks for responding to family violence. In England and Wales, even after the introduction of the offence of coercive control, researchers found police treating accounts of coercive control as 'weak' relative to physical assaults or dismissing them as 'arguments between partners'.³⁵ In Australia, even when matters reach the courts, magistrates are very inconsistent in their understanding of how patterns of behaviour are more significant parts of domestic abuse than isolated incidents.³⁶ These problems arise because of inadequate training for police and judges on the nature of family violence and coercive control, leading to an emphasis on serious physical violence, and because of biases against victim-survivors who do not conform to stereotypes about typical or 'ideal' victim behaviour.

All three of these issues would be even more serious obstacles to enforcement of a criminal offence than they are to the use of civil intervention orders. A new criminal offence could not constitute any improvement on the existing civil protections and would be plagued by the same difficulties.

These systemic challenges to tackling coercive control also have far more significant impacts on Aboriginal victim-survivors than others. The lack of funding for culturally safe family violence services and community legal education makes it very difficult for Aboriginal people to recognise when they are being subjected to coercive control. And the difficulties caused when victim-survivors struggle to recognise their own situation are more challenging in the case of criminal charges, where proceeding without extensive testimony from the person affected – including under cross-examination – is effectively impossible.

34 Stark (2012).

35 Barlow et al (2020).

36 Reeves (2019).



Similarly, Aboriginal victim-survivors are less likely to be in contact with support services or properly trained police officers who could recognise coercive control from the outside, given the shocking underreporting of family violence among Aboriginal people³⁷ and the community's mistrust of police and child protection. Where they are in contact, a lack of adequate training and persistent biases – about both Aboriginal people and family violence generally – reduce the chance that a pattern of abusive behaviour will be effectively identified.

Finally, it is well documented that police and courts' failure to respond appropriately to family violence is particularly acute for Aboriginal and Torres Strait Islander women, who are subjected to biased views on account of their Aboriginality and because of related factors such as overcriminalisation or substance use problems. Victoria's Royal Commission into Family Violence heard evidence of these failings, including cases where a "police officer said to [a victim-survivor], 'He's just whacked you in the head this time. It's getting better. Last time it was worse'" and adopting an "attitude... that 'every Aboriginal woman is a victim', 'it's normal... deal with it'."³⁸ Though the Royal Commission has prompted efforts at reform, deep problems with police's approach to Aboriginal people in Victoria persist, and these continue to affect the police response to family violence. In this context, the likelihood that a new criminal offence would deliver any protection or benefit to Aboriginal women is extremely low.

Other Purported Advantages of Introducing a Criminal Offence

Criminal sanctions are frequently a counterproductive response to social problems, and a new criminal offence should not be introduced if it would not assist in protecting women in situations of urgent risk. However, several other arguments are also advanced in support of criminalising coercive control, and this section briefly considers them.

Symbolic Value & General Deterrence

Supporters of criminalisation suggest that making something a criminal offence is "our strongest denunciation", critical to "giv[ing] the broader community a language and shared understanding that can lead to long-term changes in attitudes" and "legitimis[ing] victims' perceptions that what they are experiencing is unacceptable."³⁹ If coercive control is criminalised, this sends a

37 Willis (2011).

38 Royal Commission into Family Violence (2016), p40.

39 McGorry & McMahon (2020).



clear message to society, and ultimately to people who commit acts of domestic violence, that such behaviour is wrong and will not be tolerated, either by society in general or by the criminal legal system in particular.

There is no clear evidence that this kind of symbolic value shift leads to reduced rates of domestic abuse, or even that it happens in the wake of law reform. Reporting of domestic abuse in the United Kingdom has been on the increase, but this trend predates the criminalisation of coercive control.⁴⁰ There is no survey evidence on public attitudes or understanding to suggest that knowledge about the nuances of family violence and coercive control has improved. In 2010, the Australian Law Reform Commission and NSW Law Reform Commission found that “there is insufficient evidence to conclude that improvements cannot be realised within existing frameworks, or that an umbrella offence would necessarily achieve the desired outcomes” in terms of changing community or practitioner attitudes to family violence.⁴¹ This evidence gap has not been filled in the years since.

In the absence of specific evidence, there is no reason to think that the symbolic value of legislative condemnation – to the extent this is significant at all – cannot be delivered by the civil legal framework. Coercive control is unambiguously defined as family violence in Victoria. It is not the case, as some proponents of criminalisation suggest, that the civil law implies coercive control is only wrong when an intervention order is in place.⁴² Legally, a victim-survivor of coercive control can call the police, have a person ordered to leave or even detained, and have police apply for an intervention order on her behalf.⁴³ These are all clear demonstrations that the legal system regards coercive and controlling behaviour as unacceptable. If there is doubt in the minds of victim-survivors, people who have committed acts of family violence, or society at large about this, that is because the system *in practice* does not deliver on this in-principle condemnation. Legislative measures which offer symbolic denunciation (while bringing no practical benefits) are not what Victoria’s family violence system lacks.

It *is* vitally important to legitimise victim-survivors’ perceptions of what has happened to them. The criminal law, however, is not the best tool for providing this legitimisation and reassurance. Even when everyone involved has been well trained, pursuing a criminal charge involves being questioned by police who are professionally required to examine your story critically, then cross-examination in an adversarial legal setting, where any reasonable doubt about your evidence

40 Women’s Legal Service Victoria (2020), p9.

41 Australian Law Reform Commission & NSW Law Reform Commission (2010), p588.

42 McGorrey & McMahon (2020).

43 *Family Violence Protection Act 2008*, Part 3, Division 1.



is enough for the person who has offended to be found not guilty.⁴⁴ The courtroom experience may be re-traumatising, inducing flashbacks or panic attacks for victim-survivors.⁴⁵ This is a kind of proceeding which is liable to be undermining and debilitating for victim-survivors, just as often as it is legitimating or empowering.⁴⁶ Properly funding and training community services – which can provide the support victim-survivors need to process and understand what has happened to them in a safe, non-adversarial environment – is a much more important and effective means of legitimating their experiences.

Specific Deterrence

As well as the general deterrence and reshaping of community expectations, proponents of criminalisation suggest that a new offence will deter people who are charged from repeating their conduct. As highlighted in the introduction, the criminalisation of coercive control in England & Wales was partly a response to the fact that people who repeatedly committed acts of domestic violence were no more likely to be punished after fifty offences than one – demonstrating a lack of deterrent value in the legal system’s approach. A coercive control offence is intended to target people who repeatedly offend, and sanction them specifically for the pattern of abuse they perpetrate, deterring them from similar conduct in future.

It should be noted that there is no solid evidence to suggest that criminal punishment is a valuable method of deterrence for people who commit family violence offences.⁴⁷ In the absence of this kind of evidence, even for long-established criminal offences which are far easier to implement and enforce than a coercive control offence would be, there is strong reason to doubt that a new offence would have any significant deterrent value.

There are also more specific reasons to question the potential for a new offence to serve as a deterrent. Evidence from the use of coercive control offences in other jurisdictions does not support the claim that criminalisation would play an effective deterrent role, for several reasons. There is a high rate of attrition at every stage of the path from abuse to conviction – from police call-out, to laying charges, to commencing prosecution, to securing conviction. This greatly reduces the likelihood that committing a coercive control offence will lead to criminal punishment.

44 Women’s Legal Service Victoria (2020).

45 Bishop (2016).

46 Tolmie (2017), p6.

47 Domestic Violence Victoria & Domestic Violence Resource Centre Victoria (2021), p16.



In the first instance, many victim-survivors of coercive control will never call police. This is particularly common for Aboriginal people with little trust in policing or state authorities. Many cases of coercive control will therefore never come before the criminal legal system at all.

When police are called, international evidence suggests that they very rarely record coercive control offences. In England and Wales in the year to March 2020, just under 24,900 coercive control offences were recorded, out of a total of 758,941 domestic violence-related offences.⁴⁸ It is clear that this low number does not reflect a low prevalence of coercive control – there were, for example, 176,837 recorded offences of domestic violence-related stalking and harassment, a typical tactic of coercive control.⁴⁹ Analysis by researchers of a random sample of domestic assault charges found that there was evidence of coercive control in 87% of cases where police *had not* recorded a coercive control offence.⁵⁰ This suggests that coercive control offences are not in practice relied upon in most instances of coercive control, which sharply limits any possible deterrent effect from coercive control offences.

When police do record a coercive control offence, there is then a substantial drop-off in the numbers of people that are formally charged or prosecuted. In England and Wales, police recorded 24,856 coercive control offences in the year to March 2020, but the Crown Prosecution Service commenced only 1,208 prosecutions.⁵¹ This drop-off appears to be becoming *more* acute over time rather than less: from 2018-19 to 2019-20, the number of coercive control offences recorded by police rose by 49% but the number of prosecutions increased by just 3%.⁵² This means a large, and increasing, number of people who come into contact with police in relation to coercive control offences are never charged.

In addition, when coercive control charges are brought, they are overwhelmingly brought alongside other charges – this was the case for 95% of prosecutions in England and Wales 2019.⁵³ There are very few people who face criminal sanction exclusively because of the coercive control offence, reducing any additional deterrent value it might have.

Finally, when coercive control offences are prosecuted, it appears to be very challenging to secure a conviction. In England and Wales in the year to December 2019, only 452 out of 1,112

48 Office for National Statistics (2020).

49 Ibid.

50 Barlow et al (2020).

51 Office for National Statistics (2020).

52 Ibid.

53 Ibid.



coercive control prosecutions ended in conviction, a rate of just 41%.⁵⁴ This compares to an overall conviction rate of 78% for domestic abuse prosecutions, which is itself lower than the conviction rate for most other types of offending.⁵⁵

This attrition at every stage of criminal legal proceedings is not surprising given the evidential challenges associated with coercive control offences. Gathering evidence to substantiate a 'course of conduct' charge, as opposed to corroborating a particular violent incident, is very difficult. It may require in-depth testimony from a still-traumatised victim-survivor. Other sources of evidence are relevant, but because police in England and Wales still frequently focus on gathering evidence of a particular violent incident when called out, they may neglect to collect other evidence, such as diaries or testimony from friends or neighbours, until much later in the process.⁵⁶ As noted above, coercive control often lies on a spectrum with much more common, less serious behaviour like the enforcement of gender roles. It may be difficult to satisfy a jury that the "signals and covert messages to exert and maintain control ... [which] may be hard to classify as abusive in and of themselves" add up to a pattern of abuse.⁵⁷

The evidence from jurisdictions which have introduced coercive control offences clearly shows that they have limited reach. It is very difficult to successfully prosecute under these offences, and it is clearly not the case that they bring a substantial number of people into the net of criminal sanction and effectively deter them from future offending. If anything, the rate of drop-off at every stage – from police callout to commencing prosecution to securing a conviction – is liable to have the opposite effect. Particularly if incident-based offences like assault are easier for police to pursue and more likely to result in conviction, **the existence of a rarely-successful coercive control offence may send a message to people who have committed acts of domestic abuse that coercive and controlling behaviour is taken less seriously, and create a sense of impunity.**

While some of these challenges could theoretically be addressed by improved practice on the part of police and prosecutors, it is an unavoidable fact that proving coercive control charges to a criminal standard will always be very difficult, and it is unlikely that they will ever be used widely enough to have a significant effect in deterring repeat offending, except in particularly egregious and straightforward cases. Resources would be far better used in reinforcing the civil

54 Ibid.

55 Ibid.

56 Barlow et al (2020).

57 Bishop (2016).

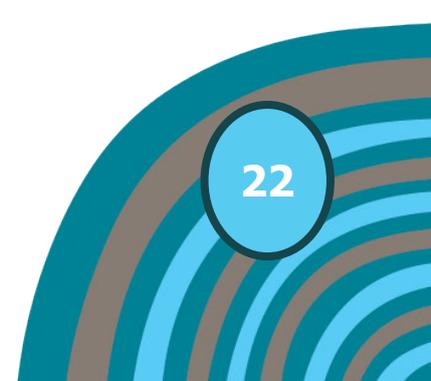


protection framework and associated support services, including behaviour change programs, than on trying to bolster police and prosecutorial capacity in pursuit of a likely minimal deterrent effect.

Conclusion

Coercive control is not always adequately responded to by police, courts, family violence services and others. This is an issue which needs to be addressed through better family violence education and community legal education, including specific culturally safe education for Aboriginal people, as well as improved training for police, judges and those working in the sector. If these types of reforms are introduced, the civil protection framework will provide a sufficient basis for early intervention to protect women affected by coercive control, and a new criminal offence will add no value. If they are not introduced, a new criminal offence would be even more extensively affected by these same challenges. **Criminalising coercive control in Victoria is unlikely to improve the protection of any victim-survivors, and is especially unlikely to help Aboriginal people.**

There is a striking absence of robust evidence that criminalising coercive control will provide any benefit to victim-survivors, and compelling reasons to think that it will not. In light of this, there needs to be particular attention paid to the harms that would be associated with a new criminal offence, which are detailed in the second part of this policy brief.





Unintended Consequences of a New Criminal Offence

The creation of a new coercive control offence would expand the ways in which people can become entangled in the criminal legal system, with disproportionate and troubling impacts on already marginalised Victorians. VALS is concerned about the consequences for the Aboriginal community, which is subject to over-policing and bias in all kinds of criminal proceedings, and particularly for Aboriginal victim-survivors of domestic violence, who face being re-traumatised and further victimised by a new criminal offence. Victoria has a disappointing track record of disregarding expert advice about the potential consequences of changes to criminal law. Changes to bail laws introduced in 2018 were opposed by expert stakeholders, including VALS, on the basis that they would disproportionately affect Aboriginal people. This expertise was disregarded, and the changed bail laws have resulted in Aboriginal women – including victim-survivors of domestic violence – being remanded in custody at alarming rates. Aboriginal people bear the costs of ill-considered law reform, and the criminalisation of coercive control would create further harmful consequences for the Aboriginal community in Victoria.

Reduced Reporting of Domestic Violence

Domestic abuse is already under-reported by Aboriginal victim-survivors to a shocking degree, with some estimates suggesting as much as 90% of violence against Indigenous women goes unreported.⁵⁸ The reasons for this are complex and widely discussed, and include a strong reluctance to involve government authorities which Aboriginal communities do not trust, particularly in relation to child protection.⁵⁹

Any measure which would further undermine the willingness of Aboriginal victim-survivors to engage with the legal system and seek help should, therefore, be approached with extreme caution. There is good reason to anticipate that the criminalisation of coercive control would have such an effect. As Domestic Violence Victoria and the Domestic Violence Resource Centre Victoria have noted, “[r]esearch demonstrates that the introduction of criminal sanctions in response to family violence may lead to victim-survivors being less willing to engage... due to a victim-survivor having had negative experiences with the criminal justice system in the past or not wanting the perpetrator to get a criminal record”.⁶⁰ This concern can be particularly acute

⁵⁸ Willis (2011).

⁵⁹ ANROWS (2020), p70.

⁶⁰ Domestic Violence Victoria & Domestic Violence Resource Centre Victoria (2021), p16.



for Aboriginal people who fear seeing their partner sent to prison, given the ongoing trauma of prisons and deaths in custody for the Aboriginal community.

Victoria's family violence response system has been built around civil intervention orders, partly in recognition of this fact, and of the need to create ways to access legal protection without exposing a partner to criminal sanction or having to engage with an extensive police investigation. There are already enough challenges to making Aboriginal women feel able and willing to report coercive and controlling conduct. A new offence would add to these challenges, by creating a risk of extended engagement with the criminal legal system, likely decrease reporting as a result.

Misidentification

Any proposal to increase the use of criminal charges in the family violence system needs to grapple with the fact that, with alarming frequency, police and courts take action against victim-survivors instead of the people who have committed the abuse.

Misidentification is a very serious problem with multiple causes. Police often believe the account of a person who has committed abuse over that of a victim-survivor, and a focus on isolated incidents can lead to arrests for minor defensive violence while ignoring the real pattern of abuse. Vulnerable victim-survivors with complex mental health needs, outstanding warrants or criminal records are particularly vulnerable to being misidentified as an aggressor.

There has been increasing media reporting on misidentification, especially of extreme cases which highlight how deep-rooted the problem is. Tamica Mullaley was assaulted by her partner in 2013 in Broome; when police were called by a neighbour, they found her outside wrapped in a bedsheet with serious, visible injuries. But Tamica was arrested – for assaulting a police officer, after refusing to give a witness statement while traumatised and in urgent need of medical attention. Her partner, who had committed the abuse, was not taken into custody, and the next day tortured and killed her son.⁶¹

VALS has experience of cases in which Family Violence Intervention Orders have been taken against the wrong party and Aboriginal women have been imprisoned for sending text messages in breach of these orders, when the overall relationship history clearly showed that they were not the aggressor.

⁶¹ Natassia Chrysanthos, Sydney Morning Herald (2019).



When misidentification occurs even in clear-cut cases of extreme physical abuse, there is grave reason for concern about how police would implement a coercive control offence. The complexity of coercive control means there is great potential for police to misinterpret self-defensive actions or coping mechanisms as forms of abuse. Refusing to talk to someone who persistently emotionally degrades you, or verbally abusing someone in reaction to their long-running abuse, could be misidentified by police as tactics of coercive control. Aboriginal women are significantly more likely to be misidentified, and increasing the risk of misidentification in general will inevitably have disproportionate impacts on Aboriginal victim-survivors.

The Risk of Misidentification

Research has identified a consistent set of risk factors which raise the likelihood of misidentification. Broadly, they relate to whether police perceive a victim-survivor as fitting the stereotype of an 'ideal victim' – with the effect that already marginalised women are much more likely to be subjected to misidentification.

The **willingness of a victim-survivor to talk with police** is one major factor. Police often interpret reluctance to talk as evidence that a victim-survivor is hiding something, or as meaning that they have no choice but to accept the account of the person who has committed the abuse.⁶² This is sometimes the case even when police have simply failed to interview the victim-survivor at all – because of the need for an interpreter, or because they have fled the scene out of fear – or failed to interview them separately from the person who has abused them.⁶³ Anything except full cooperation with police, even when there are clear reasons why a victim-survivor may have left the scene, is sometimes treated as a sign of guilt, leading to misidentification.

Relatedly, **victim-survivors' emotional state** plays a major role in police judgement of their credibility. General duty police officers often regard someone 'carrying on' in their presence as more likely to be an aggressor, and the calmer person more likely to be the victim; domestic violence specialists recognise that the opposite is true.⁶⁴

Mental health and addiction issues similarly play into misidentification. These kinds of complex needs make it harder for victim-survivors to be able – or sometimes willing – to present their account to police clearly.⁶⁵ Police can also have biases due to approaching people with mental health challenges as a 'problem' in other policing contexts, making them less likely

62 ANROWS (2019).

63 Women's Legal Service Victoria (2018a).

64 ANROWS (2019).

65 Reeves (2019).



to view them as a victim-survivor in a domestic abuse situation.

Criminal history is also a major factor. Whereas establishing the history *of the relationship* is an essential step to avoiding misidentification, police instead focus on the history of the individuals. Outstanding warrants and criminal records make police much less inclined to think of someone as a victim; this is particularly true when the person who has committed domestic abuse has a 'clean' record, which biases police away from perceiving them as an abuser.

These factors are borne out in data on misidentification, analysed by the Women's Legal Service Victoria. In a survey of family violence intervention order files, it was found that:⁶⁶

- 40% of women misidentified as having committed domestic abuse had a psychological illness, around twice the general population rate
- 40% were at risk of homelessness, some 8000 times more than the rate in the overall population
- 59% had been victim-survivors of family violence by the other person in the past, and 50% had been subjected to abuse by the other party on the same day as the incident that led to misidentification

Misidentification of Aboriginal people

These risk factors all make Aboriginal women much more liable to be misidentified as aggressors by the police. Aboriginal women are less likely to want to cooperate with police and are disproportionately affected by mental health issues and previous contact with the criminal legal system. As Australia's National Research Organisation for Women's Safety found:

Aboriginal and Torres Strait Islander women very often do not fit the ideal victim stereotype. They are more likely than other women to use weapons and to be uncooperative when police intervene (Blagg, 2008; Cunneen, 2009; Nancarrow, 2010, 2016, 2019). They are also more likely to have a fraught relationship with police, due to the neo-colonial context in which violence and policing of violence plays out.⁶⁷

As well as experiencing these general risk factors at a higher rate, Aboriginal women are also more likely to be misidentified simply because they are Aboriginal, as a result of racism and bias among police and service providers. Police stereotypes about Aboriginal people, and the prevalence of family violence in their relationships, lead to a bias towards thinking an Aboriginal

⁶⁶ Women's Legal Service Victoria (2018b).

⁶⁷ ANROWS (2019).



person has been violent. This raises the risk of misidentification, particularly for Aboriginal people in a relationship with a non-Aboriginal person. The examples highlighted above – of police telling Aboriginal women that it was ‘normal’ they were being abused – demonstrate the failure to take Aboriginal women seriously as victim-survivors, which increases the chance they will be treated as not credible and misidentified as having committed abuse.

There are particular risks when Aboriginal people are in domestic relationships with non-Aboriginal people, where racist stereotyping makes police immediately more inclined to regard the Aboriginal person as the aggressor. Family violence in these circumstances often involves, and is magnified by, racism, and misidentification can replicate that discrimination and be especially traumatising.

There are opportunities for misidentification to be corrected later in a legal process. Evidence from Victoria and Queensland, however, suggests that this does not happen as often as it should because prosecutors and courts often defer to the judgement of police officers who were on the scene.⁶⁸ Even where misidentification is corrected, the harms in the interim – including the trauma and risk for Aboriginal people of being held in police custody and prison, loss of access to family violence services and housing, and potential intervention of child protection – are very serious.

Would a Coercive Control Offence Reduce Misidentification?

The most important underlying driver of misidentification is a mode of thinking in which police focus on individual incidents rather than the wider context of a relationship and patterns of abuse over time. Some advocates for criminalisation of coercive control have suggested that this new offence, by focusing attention on patterns of conduct, would help to reduce misidentification.⁶⁹

It is not, however, realistic to expect a new criminal offence would address a deeply rooted failing in police’s understanding of domestic abuse. This is particularly clear because the nature of family violence as centred on patterns of abuse and control over time is *already* codified in Victoria. It is legislated in the preamble to the *Family Violence Protection Act* and its definition of family violence. It is thoroughly explained in the Victoria Police Code of Practice for the Investigation of Family Violence, which emphasises that family violence includes “not only physical assaults but an array of power and control tactics used along a continuum with one another, direct or indirect threats, sexual assault, emotional and psychological torment, economic control”, and instructs police to consider “[p]atterns of coercion, intimidation and/or violence”

68 ANROWS (2019); Reeves (2019).

69 See e.g. Women’s Safety NSW (2021).



when identifying the primary aggressor.⁷⁰ Approaching domestic abuse through an incident-based lens, nonetheless, remains common, and misidentification is frequently the result.

Family violence law in Victoria has already made the conceptual shift to understanding the importance of patterns of abuse and controlling behaviours, not just individual incidents. At the level of policy and among specialists, this framework has also reached Victoria Police. Efforts at improving training for police, prosecutors and judges have been made. To date, this has not led to a correct understanding of family violence becoming embedded in the practice of police or courts. There is no evidence for the claim that criminalising coercive control would change this fact, and no good reason to expect it would.

Systems Abuse

A particularly harmful effect of misidentification is that it can enable 'systems abuse' of victim-survivors. Systems abuse occurs when someone committing domestic abuse uses government systems and social services to extend and enforce their control over someone.⁷¹ For example, a partner could take advantage of family court proceedings, bail conditions or conditions attached to receiving social welfare, and use these to threaten and coerce a victim-survivor.

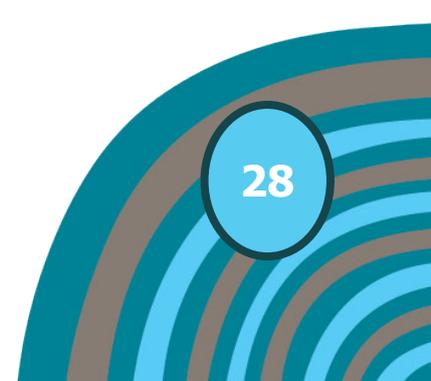
The prevalence of misidentification makes a particularly harmful type of systems abuse possible. Police and courts' willingness to respond to individual incidents as if they were isolated means that people who have committed acts of domestic violence can seek intervention orders or criminal charges against victim-survivors, and use the associated legal restrictions to threaten and control them. Systems abuse can be especially effective when there are already biases against the victim-survivor (such as those noted above), and when they have limited trust in or knowledge of the legal system – both of which make Aboriginal people more vulnerable to this kind of abuse.⁷² This type of abuse may be deliberately initiated through false claims from the person who has committed abuse, or they may take advantage of police misidentification for a new kind of control they had not previously attempted.

A coercive control offence would open a new avenue for this kind of systems abuse. As noted above, the type of evidence police would require to lay charges is likely to be detailed and complex, and therefore difficult for a traumatised victim-survivor to provide in a first interaction. This is particularly the case for Aboriginal victim-survivors who are more likely to be hostile to police presence in their home. By contrast, people who have committed acts of domestic abuse

⁷⁰ Victoria Police (2019). See e.g. p11, p15, p23.

⁷¹ Reeves (2019).

⁷² ANROWS (2019).





are frequently the calmer person at a scene when police are called, which enables them to present as the victim, even when the other party had made the call to police.⁷³ With a coercive control offence on the books, a calmer person will often have a greater ability to describe a coherent sequence of events and present them as a pattern of emotional abuse.

These risks are heightened when an Aboriginal person is facing abuse from a non-Aboriginal partner. The danger of misidentification is already extremely high in these relationships, because police stereotyping means the non-Aboriginal partner is likely to be judged as more credible. People who have committed acts of domestic abuse can deliberately exploit this dynamic. VALS has heard from clients whose abusive non-Aboriginal partners told them not to call police because they would not be believed, or even threatened to call police and falsely allege abuse. This is a form of systems abuse which exploits and reinforces systemic racism, and is especially damaging to Aboriginal victim-survivors.

It would likely be more difficult for a false accusation about a pattern of coercion, rather than about a single incident, to be sustained through a full legal process⁷⁴ – but this kind of systems abuse has hugely harmful consequences for victim-survivors even if it is subsequently corrected, as noted above.

Consequences of Misidentification

Criminalisation of victim-survivors replicates the trauma and abuse they have already suffered. If held in police custody or imprisoned, of course, the risks for Aboriginal people are well known, and the denial of autonomy and violence of incarceration mirror the dynamics of coercive control in personal relationships.⁷⁵

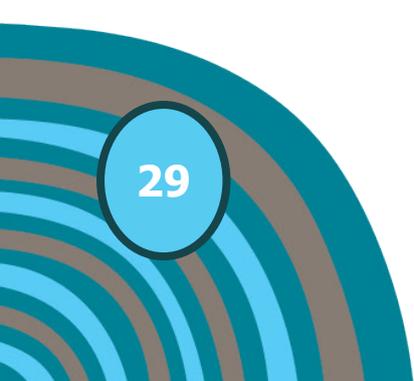
Being misidentified and subject to legal proceedings as a result leads to serious harms for victim-survivors. Identification as someone who has committed family violence is often a bar to accessing domestic violence support services, including emergency housing.⁷⁶ More broadly, it can make it difficult for a victim-survivor to find employment or access other kinds of government support. A heightened risk of homelessness and isolation from other supports can perversely increase a victim-survivor's dependence on the person who has abused them. Exclusion from domestic violence services also means that victim-survivors cannot benefit from being screened and having the danger they are in assessed, leaving them alone to confront the risk of further

73 Women's Safety NSW (2021), p92.

74 Neilson (2004) [as cited in ANROWS (2019)].

75 Sisters Inside & Institute for Collaborative Race Research (2021).

76 Women's Legal Service Victoria (2018a); ANROWS (2019).





violence.⁷⁷

Intervention from child protection services or the Family Court is also a major risk, and serious concern for Aboriginal people. Victim-survivors can have existing custody arrangements affected if they are identified as having committed acts of family violence, including having children removed from their care. Where a parent does not have primary custody, other effects of misidentification – such as temporary homelessness – can effectively force them out of contact for a time, causing harm to the welfare of both parent and children. These consequences compound and continue historic government and police practices which have broken up Aboriginal families for centuries, and further undermine any faith in the justice system or government services to help Aboriginal communities.

Bias and Disproportion Impact of the Implementation of a New Offence

While the protection of victim-survivors is and should be paramount in family violence law, it is also important to consider the effects of creating a new offence on those who will be charged and prosecuted for it.

VALS runs a sizeable criminal practice, and it is clear from our experience that police and prosecutors in Victoria operate in a way which serves to exacerbate the marginalisation faced by Aboriginal people. Aboriginal people are vastly overrepresented in every part of the criminal legal system, most troublingly in their disproportionate incarceration. This has wide-ranging consequences for the Aboriginal community, ranging from the simple fact that it keeps Aboriginal people marginalised from secure housing and employment, to the devastating continuing toll of Black deaths in custody. The legal system's treatment of Aboriginal people is severe and disproportionate.

It is highly likely that a criminal offence of coercive control would be used disproportionately against Aboriginal people. In part, this is simply because Aboriginal people are overpoliced and so are overrepresented in statistics for most criminal offences. In part, it is because of the high risk of misidentification, discussed above.

However, there is also a specific risk with the implementation of an offence based on a complex and variable pattern of facts. Coercive control frequently draws on existing social norms, including gendered or cultural expectations about behaviour in a relationship, to provide the

⁷⁷ ANROWS (2019).



base on which a coercive pattern starts. Tactics used to enforce control over and coerce a partner vary, influenced by the unique history of each relationship. Some aspects of a coercive and controlling dynamic – such as the setting of rules or expectations about how someone dresses or talks; or a ‘hot and cold’ relationship that shifts between periods of anger and affection – are not necessarily easy to distinguish from features of an ordinary, or a difficult but non-abusive, relationship.

This creates challenges for prosecution, as discussed above, but it also opens substantial space for bias to affect the implementation of a coercive control offence. Police need to make decisions about whether to try and pursue a criminal charge early in the process, before a fuller investigation of complex evidence can be launched. Given the ambiguity and scope for difference in interpretation of potentially coercive behaviour, there can be no fully objective way for police to make those decisions. Instead, assessment of very preliminary evidence will be informed by officers’ snap judgement about whether someone is ‘the type’ – that is, whether they conform to biased stereotypes of how a typical ‘perpetrator’ or victim should look and behave.

Inevitably this will lead to a disproportionate impact on Aboriginal people. Stereotypes incline police officers to view Aboriginal men as likely to commit acts of domestic violence. Aboriginal people are also more likely to have previous police encounters, a criminal history or outstanding warrants on their record, all of which can reinforce police prejudgement about whether someone is ‘the abusive type’. Cultural awareness training for police cannot address clear racism in police responses across all kinds of matters, and the problem remains very acute for family violence issues. An improvement in the quality of cultural awareness and anti-racism training, designed and delivered in partnership with Aboriginal Community Controlled Organisations, is essential.

The likely result is that Aboriginal people will be investigated for coercive control offences more often than non-Aboriginal people in similar circumstances. Consequently, they will be more affected by the loss of access to housing, employment and services which can follow criminalisation, particularly for family violence offences. They will also be subjected more frequently to intervention by child protection services as a result of police charges and prosecutions. Though some of those investigated will ultimately be found guilty of coercive and controlling behaviour, it is still a grave concern if investigations and prosecutions of Aboriginal people are carried out in a biased manner and at a disproportionate rate – which is inevitable given the ambiguity and scope for judgement and bias introduced by a coercive control offence.



The consequences of being arrested, held in police custody and imprisoned are very serious, both for individual Aboriginal people and for the community as a whole. A coercive control offence would not address the problems of overincarceration and racism.

These are already problems which impact every aspect of the criminal legal system. This does not mean the consequences of a new offence should not be given proper consideration, on the basis that disproportionate impact of the criminal legal system on Aboriginal people needs to be addressed more broadly.

On the contrary, it means that any proposed expansion of the criminal law should be carefully assessed for its impact on Aboriginal people and the likelihood that it will be used disproportionately. In this case, there is every reason to expect that a coercive control offence would be a site of particularly acute racism and would lead to overrepresentation of Aboriginal people.



Recommendations

Coercive control is a complex and pernicious form of abuse, which the family violence sector in Victoria has already identified and has been working to address for many years.

VALS is not a specialist family violence organisation. We do not claim to have all the answers about how service providers, communities, police and courts should cooperate to address coercive control. We are, however, an organisation with significant expertise in criminal, family and child protection law, how Aboriginal people interact with these systems, and how they are applied to them. It is that expertise which makes us confident that coercive control should not be addressed through criminalisation.

Recommendation 1. The Victorian Government must not criminalise coercive control.

The civil legal framework provided by the *Family Violence Protection Act 2008* is an appropriate way to recognise and respond to coercive control in law. Its shortcomings should be addressed; a new criminal offence would not fix them and would be even more affected by the same implementation challenges.

Recommendation 2. The Government should expand the availability of support services, including housing, to make it easier for victim-survivors to safely leave a dangerous situation. Ensure support services are culturally safe for Aboriginal people.

The ability to leave a relationship, if they choose, is far more important to ensuring the safety of victim-survivors than giving them the option to pursue criminal charges. Refuges and emergency housing services in particular, along with other specialist domestic violence services, face greater demand than they can meet, reducing the options for victim-survivors trying to leave a dangerous situation. This is particularly an issue for Aboriginal women, who are disproportionately affected by both domestic violence and homelessness. Services need to be available and, crucially, culturally safe, to create accessible pathways out of harmful relationships.



Recommendation 3. The Government should fund culturally appropriate community legal education to expand knowledge about coercive control and the options available for people experiencing it. Community legal education should also be funded to support and inform people who have committed family violence offences, including by providing community legal education in prisons.

As highlighted in this paper, it is often difficult for victim-survivors to recognise coercive control as abuse or to be aware that there are legal avenues for responding to it. This challenge is more acute for Aboriginal people, who are often not reached by generalist legal and family violence education. Funding needs to expand both specialist community-run and generalist community legal education to address this barrier to victim-survivors accessing support.

Recommendation 4. Improve training for police, service providers and courts to ensure that a proper understanding of coercive control and of domestic violence becomes fully and consistently embedded in practice. In consultation with Aboriginal Community Controlled Organisations and other relevant stakeholders, design and develop cultural awareness and anti-racism training to ensure that domestic abuse is responded to in a culturally appropriate manner.

In Victoria, guidance and codes of practice incorporate an understanding of coercive control and of the fact that domestic abuse should not be approached as a series of isolated incidents. This understanding, however, is only very inconsistently reflected in the practice of police, in particular, but also of courts.

Improving police responses to domestic violence will also require broader changes to the way police operate. VALS advocates consistently for the development of a strategy to tackle systemic racism in Victoria Police, which is too often ignored or denied.⁷⁸ Police conduct would also be improved by the introduction of a more robust police oversight system, including a fully independent process for complaints against police and stronger monitoring mechanisms. VALS will be releasing a policy paper on the police oversight system in February 2022.

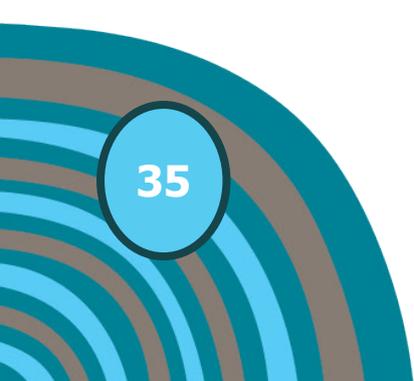
78 VALS (2021), pp99-104.



Recommendation 5. The Government should fund place-based legal and other support services, including VALS' Place-Based Delivery Model, to properly support victim-survivors outside metro Melbourne.

Victim-survivors are often in danger when they seek support, or may face pressure from their partner, family or community not to report family violence, or to drop issues they have raised. This can be a particular problem for Aboriginal people, given the shocking rates of underreporting of family violence against Aboriginal women. This makes it vital that services are easily accessible to reduce barriers for people who already face great challenges in seeking and getting help. VALS' Place-Based Delivery Model would make legal support available in regional hub offices and vastly improve the accessibility of services to those outside metro Melbourne. This is especially important for the Aboriginal community, given that around half the Aboriginal population in Victoria resides outside Melbourne.

Proper consultation with Aboriginal Community Controlled organisations, and a proper understanding of domestic violence and how it is policed, should guide any changes in Victoria's response to coercive control. Domestic violence is an issue of significant complexity, and it needs to be addressed with care, nuance, and attention to the needs of victim-survivors. Criminalising coercive control would not benefit victim-survivors and would inflict new harms on Aboriginal people in Victoria.





References

- AAP (2021), 'NSW pledges to criminalise coercive control and change existing abuse laws'. Available at <https://www.theguardian.com/society/2021/dec/18/nsw-pledges-to-criminalise-coercive-control-and-change-existing-abuse-laws>.
- Aboriginal Legal Service (NSW/ACT) (2021), *Submission to the Joint Select Committee Inquiry into Coercive Control in Domestic Relationships*. Available at <https://www.parliament.nsw.gov.au/ladocs/submissions/70723/Submission%20148.pdf>.
- Aboriginal & Torres Strait Islander Legal Service (Qld) (2021), *Submission to the Women's Safety and Justice Taskforce – Discussion Paper 1: Options for Legislating Against Coercive Control and the Creation of a Standalone Domestic Violence Offence*. Available at https://www.womenstaskforce.qld.gov.au/_data/assets/pdf_file/0006/691242/wjst-submission-aboriginal-and-torres-strait-islander-legal-service.pdf.
- ANROWS [Australia's National Research Organisation for Women's Safety] (2019), *Accurately identifying the "person most in need of protection" in domestic and family violence law*.
- ANROWS (2020), *Improving family violence legal and support services for Aboriginal and Torres Strait Islander women*.
- Australian Law Reform Commission & NSW Law Reform Commission (2010), *Family Violence – A National Legal Response*.
- Barlow, Charlotte, Johnson, Kelly, Walklate, Sandra & Humphreys, Les (2020), 'Putting Coercive Control into Practice: Problems and Possibilities', *British Journal of Criminology*.
- Bishop, Charlotte (2016), 'Why it's so hard to prosecute cases of coercive or controlling behaviour', *The Conversation*. Available at <https://theconversation.com/why-its-so-hard-to-prosecute-cases-of-coercive-or-controlling-behaviour-66108>.
- Domestic Violence Victoria & Domestic Violence Resource Centre Victoria (2021), *Responding to Coercive Control in Victoria – Broadening the conversation beyond criminalisation*.
- Douglas, Heather (2018), 'The Domestic Violence Protection Order System as Entry to the Criminal Justice System for Aboriginal and Torres Strait Islander People', *International Journal for Crime, Justice and Social Democracy* 7(3).
- Elizabeth Evatt CLC (2021), *Submission to the NSW Government's Joint Select Committee on Coercive Control*.



Hayley Gleeson, ABC News (2019), 'Coercive control: The 'worst part' of domestic abuse is not a crime in Australia. But should it be?'. Available at <https://www.abc.net.au/news/2019-11-19/coercive-control-domestic-abuse-australia-criminalise/11703442>.

Hayley Gleeson, ABC News (2021), 'Rosie Batty joins family violence experts' calls to prioritise preventing coercive control'. Available at <https://www.abc.net.au/news/2021-09-17/rosie-batty-family-violence-victoria-coercive-control-prevention/100467392>.

House of Representatives Standing Committee on Social Policy and Legal Affairs (2021), *Report of the inquiry into family, domestic and sexual violence*. Available at https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/Familyviolence/Report/.

Jamie McKinnell, ABC News (2021), 'Coercive control should be criminalised in NSW, parliamentary committee finds'. Available at <https://www.abc.net.au/news/2021-06-30/committee-finds-coercive-control-should-be-criminalised/100255580>.

Killean, Rachel (n.d.), 'A Leap Forward'? Critiquing the Criminalization of Domestic Abuse in Northern Ireland'.

McGorrery, Paul & McMahon, Marilyn (2020), 'Coercive control is a key part of domestic violence. So why isn't it a crime across Australia?', *The Conversation*. Available at <https://theconversation.com/coercive-control-is-a-key-part-of-domestic-violence-so-why-isnt-it-a-crime-across-australia-132444>.

Monash Gender and Family Violence Prevention Centre (2021), *Coercive Control Reform: Submission to the Joint Select Committee on Coercive Control*. Available at <https://www.parliament.nsw.gov.au/ladocs/submissions/70584/Submission%20-%20119.pdf>.

Natassia Chrysanthos, Sydney Morning Herald (2019), 'I haven't been right since': Mother of murdered baby makes discrimination complaint'. Available at <https://www.smh.com.au/national/i-haven-t-been-right-since-mother-of-murdered-baby-makes-discrimination-complaint-20190403-p51ah4.html>.

Neilson, Linda (2004), 'Assessing mutual partner-abuse claims in child custody and access cases', *Family Court Review* 42(3), pp411-438.

NSW Government (2020), *Coercive control: Discussion paper*.

Office for National Statistics (2018), *Domestic abuse in England and Wales: year ending March 2018*. Available at <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/>



[bulletins/domesticabuseinenglandandwales/yearendingmarch2018](#).

Office for National Statistics (2020), *Domestic abuse and the criminal justice system, England and Wales: November 2020*. Available at <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/domesticabuseandthecriminaljusticesystemenglandandwales/november2020>.

Premier of South Australia (2020), 'Media release: Liberal women consider coercive control crackdown'. Available at <https://www.premier.sa.gov.au/news/media-releases/news/liberal-women-consider-coercive-control-crackdown>.

Rachel Riga, ABC News (2021), 'Hannah Clarke's parents push for coercive control to be made a crime one year on from horrific murders'. Available at <https://www.abc.net.au/news/2021-02-14/qld-hannah-clarke-domestic-violence-murder-anniversary-brisbane/13137484>.

Reeves, Ellen (2019), 'Family violence, protection orders and systems abuse: views of legal practitioners', *Current Issues in Criminal Justice*.

Royal Commission into Family Violence (2016), *Volume V: Report and recommendations*.

Sisters Inside & Institute for Collaborative Race Research (2021), '*In no uncertain terms*' the violence of criminalising coercive control. Available at <https://www.sistersinside.com.au/in-no-uncertain-terms-the-violence-of-criminalising-coercive-control-joint-statement-sisters-inside-institute-for-collaborative-race-research/>.

Stark, Evan & Hester, Marianne (2019), 'Coercive Control: Update and Review', *Violence Against Women* 25(1), pp81-104.

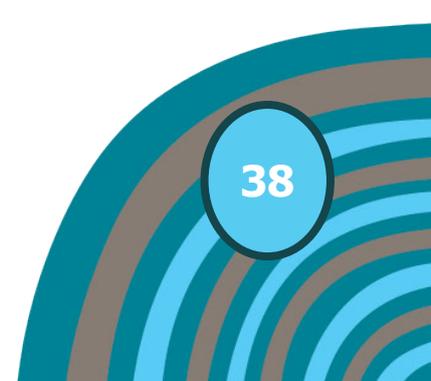
Stark, Evan (2012), 'Looking Beyond Domestic Violence: Policing Coercive Control', *Journal of Police Crisis Negotiations* 12(2), pp199-217.

Stephanie Zillman, ABC News (2021), 'Queensland sets up taskforce to investigate coercive control laws one year after Hannah Clarke's murder'. Available at <https://www.abc.net.au/news/2021-02-17/hannah-clarke-domestic-violence-laws-coercive-control-taskforce/13162226>.

Taylor, Natalie & Putt, Judy (2007), 'Adult sexual violence in Indigenous and culturally and linguistically diverse communities in Australia', *Trends & issues in crime and criminal justice*.

Tolmie, Julia (2017), 'Coercive control: To criminalize or not to criminalize', *Criminology & Criminal Justice*.

VALS (2021), *Building Back Better: COVID-19 Recovery Plan*. Available at <https://www.vals>.





[org.au/wp-content/uploads/2021/02/Building-Back-Better-Victorian-Aboriginal-Legal-Service-COVID-19-Recovery-Plan-February-2021-FOR-DISTRIBUTION.pdf](https://www.org.au/wp-content/uploads/2021/02/Building-Back-Better-Victorian-Aboriginal-Legal-Service-COVID-19-Recovery-Plan-February-2021-FOR-DISTRIBUTION.pdf).

Victoria Police (2019), *Code of Practice for the Investigation of Family Violence* [interim].

Walklate, Sandra, Fitz-Gibbon, Kate & McCulloch, Jude (2018), 'Is more law the answer? Seeking justice for victims of intimate partner violence through the reform of legal categories', *Criminology & Criminal Justice* 18(1), pp115-131.

Willis, Matthew (2011), 'Non-disclosure of violence in Australian Indigenous communities', *Trends & issues in crime and criminal justice*.

Wirringa Baiya Aboriginal Women's Legal Centre (2021), *Submission to the Joint Select Committee Inquiry into Coercive Control in Domestic Relationships*. Available at <https://www.parliament.nsw.gov.au/ladocs/submissions/70669/Submission%20-%20142.pdf>.

Women's Legal Service Victoria (2018a), "*Officer she's psychotic and I need protection*": *Police misidentification of the 'primary aggressor' in family violence incidents in Victoria*.

Women's Legal Service Victoria (2018b), *Snapshot of Police Family Violence Intervention Order applications, January-May 2018*.

Women's Legal Service Victoria (2020), *Policy Brief: Justice system response to coercive control*.

Women's Safety NSW (2021), *Submission to the NSW Joint Select Committee on Coercive Control in Domestic Relationships*.



Acknowledgement of Traditional Owners

The Victorian Aboriginal Legal Services acknowledges all of the traditional owners in Australia and pay our respects to their Elders, past and present. Sovereignty was never ceded. Always was, always will be, Aboriginal land.

Thank you

VALS would like to thank all those who contributed to the knowledge and analysis presented in this policy paper. In particular, Ellen Reeves of the Monash Gender and Family Violence Prevention Centre; Debbie Kilroy OAM and her colleagues at Sisters Inside; all the Aboriginal people and victim-survivors whose social media discussions have helped raise the profile of this issue and its importance to Aboriginal communities; and our own legal and community justice staff, whose experience and expertise have been invaluable.

Artwork

The artwork used in this document was originally designed by Gary Saunders for the Victorian Aboriginal Legal Service.

Contact

Andreea Lachsz at alachsz@vals.org.au.