

## BRIEFING NOTE 9

### Coercive Control Legislation

This Briefing Note contains key points, key terms, background information and examples of practical application as well as links to further information and local contacts. It does not contain legal advice and should be used as a starting point for further research rather than an authoritative source. Feedback on its contents is welcome.

#### Key Points

- The term ‘coercive control’ has emerged in recent discourse around family and domestic violence, and generally refers to non-physical forms of relationship violence and harm, such as intimidation, isolation and control of intimate partners.
- Last February, the murder of Hannah Clarke and her three children by Rowan Baxter revealed a pattern of coercive control. On 19 February 2020, Baxter set fire to a car with Clarke and their children inside, he then stabbed himself to death with the knife he used to threaten bystanders from helping Clarke. Clarke’s death has raised significant public attention to the harmful impacts of coercive control on domestic and family relationships.
- Overseas, coercive control offences have developed across different jurisdictions. For example, coercive control offences have been introduced in England, Wales, Ireland and Scotland.
- In South Australia, the Criminal Law Consolidation (Domestic Abuse) Amendment Bill was introduced in February 2020 by John Darley MLC (Advance SA) as a private members Bill. The Bill aims to address an aspect of domestic and family violence by criminalising coercive and controlling behaviour as a discrete offence.
- Legislation designed to criminalise coercive control engages internationally protected rights such as the right to a fair trial, right to family life, rights of the child and the right to privacy and reputation. It also offers potential benefits in enhancing the recognition of coercive control and a few potential risks and limits.
- This Briefing Note contains a discussion of overseas legislation and the considerations for the proposed Criminal Law Consolidation (Domestic Abuse) Amendment Bill.

#### Definition of Coercive Control Offence

##### Coercive Control

- Renowned sociologist Professor Evan Stark published *Coercive Control* (2009), originating coercive control theory as non-violent aspects such as intimidation, isolation and control of intimate partners.
- Stark’s work described the critical importance of coercive control, stating that offenders typically use isolation, cyber-stalking, sexual coercion, financial and emotional abuse as well as micromanagement as a method of intimidation.
- Stark stated that the violence used in coercive control resembles the violence used in capture crimes as it is designed to punish, hurt, or control a victim.
- Coercive control can also be used to prevent escape and exposure through means that effectively controls the victim’s confinement by extending surveillance and behavioural regulation to all settings where they initially felt freedom.

- In their article, *Coercive control in intimate partner violence*, Hamberger, Larsen and Lehrner (2017) identified 22 different measures of defining coercive control. Their published work discussed three features of coercive control; intentionality of the abuser, the victim's negative perception of the controlling behaviour, and the ability of an abuser to obtain control by deploying a credible threat.

## Coercive Control in other Jurisdictions

The criminalising of coercive control offences are relatively recent developments across legislation in other jurisdictions.

### England and Wales

In England and Wales, an offence criminalising 'controlling or coercive behaviour' in an intimate or family relationship was introduced in December 2015 - *Serious Crime Act 2015 (UK), s76*. This offence is committed when a person repeatedly or continuously engages in controlling or coercive behaviour towards another person, and the behaviour has a 'serious effect' on the victim.

The offence requires the proof of actual harm or impact on the victim; however, it does not require an intention to coerce or control. Another required circumstance is that the offender must have or ought to have known that the behaviour would have a serious effect on the victim.

The England and Wales offence applies to relationships beyond intimate partner relationships. The offence expands to when the offender and victim are 'personally connected'. This term is described to include people currently or formerly in an intimate partner relationship or living together as members of the same family.

### Ireland

Ireland criminalised 'coercive and controlling behaviour' under *section 39 of the Domestic Violence Act 2018*. Similar to England and Wales, the offence criminalises behaviour that a person knowingly and persistently engages in that is controlling or coercive. This offence is committed when the behaviour has a 'serious effect' on the victim, and it would be considered by a reasonable person to have a serious effect on a person in the victim's circumstances.

In Ireland, the offence requires proof of actual harm to the victim. It also requires the application of an objective 'reasonable person' test to that harm.

Unlike England and Wales, the offence is restricted to individuals who are in an intimate partner relationship.

### Scotland

In Scotland, the *Domestic Abuse Act 2018* provides coercive and controlling behaviour as an offence of domestic abuse. It criminalises behaviour which is abusive and that a reasonable person would consider the behaviour to likely cause the victim to suffer harm. The offender must also intend to cause or be reckless towards causing, the victim to suffer the harm. The legislation describes abusive behaviour to include 'violent, threatening or intimidating' conduct with examples of such effects as isolation, control or micromanagement and restriction of victim's freedom.

The offence criminalises conduct expressly limited to abuse of a current or former partner. The restricted approach is consistent with existing definitions of 'domestic violence' in Scotland.

The offence requires the application of an objective 'reasonable person' standard in assessing the effects of the offender's behaviour on the victim. Unlike England and Wales, the offence requires the specific intention of the offender to be proven.

### **Other Australian Jurisdictions**

In 2020, the NSW Labor opposition has proposed a bill to criminalise coercive control, with a ten year maximum penalty. Similar legislation is currently being considered in Queensland.

The current law in Tasmania criminalises a range of conduct falling within the category of ‘coercive control’. In particular, sections 8 and 9 of the *Family Violence Act 2004* (SA) provide:

#### **8. Economic abuse**

*A person must not, with intent to unreasonably control or intimidate his or her spouse or partner or cause his or her spouse or partner mental harm, apprehension or fear, pursue a course of conduct made up of one or more of the following actions:*

*(a) coercing his or her spouse or partner to relinquish control over assets or income;*

*(b) disposing of property owned –*

*(i) jointly by the person and his or her spouse or partner; or*

*(ii) by his or her spouse or partner; or*

*(iii) by an affected child –*

*without the consent of the spouse or partner or affected child;*

*(c) preventing his or her spouse or partner from participating in decisions over household expenditure or the disposition of joint property;*

*(d) preventing his or her spouse or partner from accessing joint financial assets for the purposes of meeting normal household expenses;*

*(e) withholding, or threatening to withhold, the financial support reasonably necessary for the maintenance of his or her spouse or partner or an affected child.*

*Penalty: Fine not exceeding 40 penalty units or imprisonment for a term not exceeding 2 years.*

#### **9. Emotional abuse or intimidation**

*(1) A person must not pursue a course of conduct that he or she knows, or ought to know, is likely to have the effect of unreasonably controlling or intimidating, or causing mental harm, apprehension or fear in, his or her spouse or partner.*

*Penalty: Fine not exceeding 40 penalty units or imprisonment for a term not exceeding 2 years.*

*(2) In this section –*

*a course of conduct includes limiting the freedom of movement of a person's spouse or partner by means of threats or intimidation.*

<b>Interpreting Current Legislation</b>
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The current South Australian legislation adopts a definition of domestic and family violence (DFV) that recognises behaviour that is not just physically abusive but also emotionally or psychologically abusive, economically abusive, or coercive or controlling behaviour towards the victim. For example:

### **Intervention Orders (Prevention of Abuse) Act 2009**

In South Australia, the *Intervention Order Act 2009* provides legislation preventing domestic and non-domestic abuse. Although an interpretation of the legislation provides a definition of DFV that expands

and covers coercive and controlling behaviour, there is no distinct offence in South Australian jurisdiction.

Under this act, the definition of domestic and non-domestic abuse includes conduct that can be interpreted as coercive and controlling behaviour. The Act defines abuse's meaning to take 'physical, sexual, emotional, psychological or economic' forms of abuse. Subsections also provide examples of the meaning of abuse with recognised coercive behaviour such as isolation, intimidation, cyber-stalking, sexual coercion, financial and emotional abuse.

### **Criminal Law Consolidation Act 1935 (SA)**

The *Criminal Law Consolidation Act 1935* refers to domestic relationships subject to aggravated offences. The Act recognises an aggravated offence is committed when the offender committed the offence knowingly on a victim that was a person with whom the offender is currently or formerly in a relationship or on a child residing with or under the custody of the offender, a current or former spouse or partner of the offender.

<b>Considerations</b>
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### **Criminal Law Consolidation (Domestic Abuse) Amendment Bill 2020**

The Criminal Law Consolidation (Domestic Abuse) Amendment Bill proposes the insertion of Part 3 Division 7AB, section 20B criminalising 'controlling or coercive behaviour in a relationship'. The offence criminalises controlling or coercive behaviour a person repeatedly or continuously engages in towards the victim. The offence requires the behaviour to have a serious effect on the victim, and the offender to know or ought to know that the behaviour will have a serious effect on the victim.

In defining 'serious effect', the offence provides that an offender's behaviour has a serious effect on a victim if it causes them to fear violence on at least two occasions or causes 'serious alarm or distress on the victim's usual day-to-day activities.

The proposed offence applies to relationships beyond intimate partner relationships. The offence expands to when the offender and victim are 'in a relationship'. This term is described to include people in an intimate partner relationship or other forms of intimate personal relationships such as holding custody and guardianship over a child, related to each other by blood, marriage, adoption, or related according to Aboriginal or Torres Strait Islander kinship rules. The term also includes carers within the meaning of the Carers Recognition Act 2005. The Act expands the offence to include different forms of interrelated relationships; however, does not cover those who were not in a relationship at the time of the conduct, therefore, excluding former partners.

The proposed offence dictates that in proceedings of the offence if a defendant is charged, it unnecessary to prove that each act constituting controlling or coercive behaviour had a serious effect on the victim. It would not be necessary that the defendant knew, or ought to have known, that each act subject to the offence, would have a serious effect on the victim.

### **Potential Benefits:**

- Criminalising coercive and controlling behaviour addresses an aspect of DFV outside the scope of current criminal law. The use of a discrete offence would perform an educative function enhancing recognition of coercive and controlling behaviour. It will also improve a victim's ability to identify their experiences.
- The Australian Bureau of Statistics released statistics on recorded crimes during 2019. The report revealed that almost a third (30%) of all homicide and sexual assault (33%) offences were domestic and family violence-related crimes. It also recorded that in 2019, almost two-thirds (64%) of

domestic and family violence related homicide victims were female. The use of a coercive control offence may potentially prevent intimate partner homicides through earlier intervention.

- The proposed offence provides its own measure of penalties, allowing offenders to be punished according to their behaviour and conduct. The proposed maximum penalty may facilitate offenders to be held accountable for the full extent of their behaviour rather than subject to single incidents.

### **Potential Limits and Risks:**

- Sometimes, relationships involving coercive or controlling behaviour are misunderstood to be based on choice. The criminal justice system must understand that the offender's behaviour can isolate, control and limit the resources and choices that a victim has to address the violence that they experience. As a result of this, a victim's ability and willingness to report abuse is restricted. As criminal proceedings may rely on the victim's willingness, it can place them in a dangerous and compromised position.
- In England and Wales, the offence has been enacted with needed measures such as further training of police. In situations where offenders may seek to justify their abuse or assert that they were the primary victim or a victim's resistance to abuse is possibly perceived as abuse, the law enforcement may fail to take the right actions. There is a need for the proposed offence to be complemented by extensive training of police to effectively identify coercive and controlling behaviour and avoid mistakenly identifying the victim as the primary aggressor,
- While most criminal offences address singular instances of conduct, coercive control requires a focus on a pattern of abusive behaviour. As a course of conduct offence, coercive control would ordinarily be protracted behaviour that becomes harmful when considered whole rather than incident-based.
- A key issue with criminalising coercive control is proving the offending conduct. An offence of coercive control involves a majority of acts that occur behind closed doors. The offence can happen without any independent witnesses who can support their occurrence. As the offence addresses a behaviour pattern, when viewed in singular incidents, they may not be considered harmful or criminal and rarely leave physical evidence.
- The introduction of an offence also requires a cautious approach towards the apparent challenges involved in investigating, prosecuting and proving coercive control. As mentioned above, in Scotland, the coercive control offence does not require evidence of harm to the victim but instead proof that the conduct is likely to have a relevant effect. This is assessed using an objective standard of reasonableness.
- The application of preconceived notions or stereotypes can affect the victim's enjoyment of equality before the law and to a fair trial.
- Another issue with the reasonable person test is where there is no requirement for actual harm to be proved. It becomes possible that investigation and prosecution may occur where there is no harm that meets the threshold of criminal conduct. In some circumstances, there may be a misunderstanding in the dynamics of a certain relationship, the cultural practices and interpersonal relationships; therefore, what may amount to abusive conduct in one relationship may be harmless in another.
- In England, Wales and Ireland, the coercive control offence requires a subjective test requiring evidence that the victim suffered a significant impact from the coercive conduct. The test is to assess whether or not the victim experienced fear as a result of the conduct or suffered any distress affecting their day-to-day activities. In comparison to Scotland and Tasmania, this approach limits the risk of incorrect prosecution. However, the evidentiary burden may prove a challenge for victims of coercive control and possibly rely on domestic and family violence indicators rather than addressing forms of coercive control.

### Human Rights Issues:

The proposal of a coercive control offence engages numerous human rights under international instruments. The International Covenant on Civil and Political Rights (ICCPR) is one of the most significant conventions ratified by the Australian Government in 1980. With the proposed coercive control offence, there are tensions in how the relevant articles of the ICCPR might operate.

- The investigation and prosecution of coercive control produce evident tension between the rights of the victim who seeks to rely on the proposed law and the rights of the person accused to be presumed innocent and have a fair trial. The person accused of committing the criminal conduct is entitled to a fair trial and the presumption of innocence. The family as a fundamental unit of society is entitled to protection from arbitrary and unlawful interference and the right to privacy and reputation.
- Firstly, the proposed offence engages the requirement of the accused receiving a fair trial. Under article 14 of the International Covenant on Civil and Political Rights, the right to a fair trial includes the recognition of the interests of all parties and an independent and impartial court. Other guarantees of a fair trial include the presumption of innocence and the minimum guarantees in criminal proceedings.
- The presumption of innocence imposes on the prosecution the burden of proving the charge and also guarantees the presumption of innocence till proved guilty beyond a reasonable doubt.
- In order to ensure fair practice, the circumstances of coercive control require the strict application of all criminal law provisions punishing the offence, ensuring all legal procedures in cases involving such allegations are impartial and fair, and unaffected by gender or cultural stereotypes or discriminatory interpretation of the proposed legal provisions.
- As a party to the ICCPR, the equal protection of women and men's human rights without discrimination and equality before the law must be guaranteed through a fair trial and the presumption of innocence.
- Furthermore, article 17 of the ICCPR covers the right to respect for the family and the right to protect one's privacy and reputation. The article provides freedom from arbitrary or unlawful interference with a family.
- Under article 16 of the Convention on the Rights of the Child, the rights of the child are protected in that no child shall be subjected to arbitrary or unlawful interference.
- In the context of the right to family life, article 23 of the ICCPR provides that as the natural and fundamental group unit of society, families are entitled to protection by society and the State. Additionally, the article ensures the equality of spouses' rights and responsibilities as to marriage, during marriage, and at its dissolution.
- Stark discussed the structure of coercive control predicated on the devalued status of women. However, coercive control is not always a gender-based violence against women; there is a percentage of male victims. The Convention on the Elimination of Discrimination Against Women (CEDAW) was ratified by the Australian government in 1983 and specifically recognises and protects women's rights.
- Alongside forms of sexual, emotional and psychological abuse, coercive control can cause political and economic harm. This concept of non-violent harm is used in the deprivation of the victim's rights and resources.
- Under articles 1-3, CEDAW guarantees the equal exercise or enjoyment by women of human rights and fundamental freedoms 'in the political, economic, social, cultural, civil or any other field'. The rights protected under CEDAW provide for the common forms of political and economic abuse and harm of coercive control against women.

#### Further Information

- In memory of Clarke and her children, Clarke's family established the [Small Steps 4 Hannah](#) foundation to 'put a halt to the incidences and severity of domestic and family violence in Australia'
- [Criminal Law Consolidation \(Domestic Abuse\) Amendment Bill 2020](#) was introduced by MLC John Darley in February 2020.
- New South Wales Department of Communities and Justice released a [Coercive control discussion paper](#)
- New South Wales Parliament provided key sources on [Criminalising coercive control in the context of domestic and family violence](#) in October 2020.
- Australian Bureau of Statistics released [Recorded Crime - Victims, Australia](#) for the reference period 2019.
- Australian Law Reform Commission launched the [Family Violence - A National Legal Response](#) report in 2010.
- Kate Fitz-Gibbon, Sandra Walklate and Silke Meyer 'Australia is not ready to criminalise coercive control – here's why' *The Conversation* 1 October 2020 <https://theconversation.com/australia-is-not-ready-to-criminalise-coercive-control-heres-why-146929>
- Douglas, Heaher --- "Do we need an offence of coercive control?" [2018] PrecedentAULA 6; (2018) 144 Precedent 18

#### Local Contacts

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