

**Abstract**

Nothing is straightforward when it comes to the gathering and analysis of criminological evidence for policymaking. This is particularly so with the question of whether coercive control should be criminalised.

**Caution required before creating a new crime of coercive control**

Coercive control (CC) is an area of domestic and family violence (DFV) characterized by threats, insults, demands and other behaviour designed to make a family member fearful or exercise control over his/her mind, body, will, emotions, finances, belongings, contacts, family, animals, movements, technology, and even thoughts/beliefs. The first challenge to criminalising CC is that, unlike physical DFV, CC leaves no visible injury. Police, prosecutors and judiciary need to establish things like the accused's knowledge/intent. Any crime created would need mechanisms for achieving the rule of law (for generality, publicity, certainty, consistency, equality and human rights protection, including the alleged offender's rights).

Another challenge is that, whilst physical DFV is typically a brief incident, CC can be conducted over months/years. Although CC can be inhuman, it can also involve seemingly innocuous actions like phone calls that, multiplied over time, become like 'dripping machine' torture (Cassidy 2018:120-21; Barlow et al. 2019:160-79). This relentless CC may

not involve physical harm, but (a) it is crippling in terms of lost confidence, privacy, freedom, peace and dignity (Stark 2007: 4; Morales-Brown 2020); and (b) research shows CC is a strong indicator of present and future sexual assault and severe or fatal physical violence (Sheley 2020:10; Stark 2007:4, 2012:5; DVDRT 2019:69). 57% of Australian women and 24% of men experiencing emotional abuse were also assaulted or threatened with assault (AIHW 2019:8,14). Emotional abuse is the most common form of abuse preceding DFV homicide (80%). Physical abuse is second (76%) and controlling behaviour third (61%) (AIHW 2019:54), so the present focus on physical assaults fails to stem the array of tactics used to dominate, isolate, frighten, degrade and exploit victims (Stark 2007:3).

In Australia, 23% of women and 16% of men have experienced emotional abuse by a current/previous partner since age 15 (ABS 2017, cited in AIHW:4). Through advocacy, there is now great awareness of the serious harm done by CC, and strong support for criminalising it (McGorrery and McMahon 2020; Gleeson 2019; Are Media 2020; White Ribbon Australia 2020). There remain, however, many challenges and dangers. One danger in targeting CC to avoid physical assault/homicide is the problem in the film, *Minority Report*, where 'PreCrime' police rush in and arrest future criminals. Any new CC crime must have safeguards, such as definitions of CC that are not so broad that they fill jails with the merely selfish, persuasive or romantic/lovestruck. Conversely, the provisions cannot be constructed so narrowly (for example, with high standards of proof for intent to control or cause fear, or for the victim's felt fear) that they fail to convict for CC. Policymakers must spend adequate time to get provisions right to sanction the guilty; avoid penalising the innocent; and protect the victim from even greater danger.

Only Tasmania has made some CC behaviours a crime (*Family Violence Act 2004*) - economic abuse (s8) and emotional abuse or intimidation (s9). The wording of section 9 is broader than its heading: ‘... 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’ (s9(1)). A ‘course of conduct’ is also defined to include restricting the partner’s movements through threats or intimidation (s9(2)). Other States and Territories have legislated regarding at least some aspects of CC, but without criminalisation. Only a family violence order (FVO) can be made (a civil matter, unless the FVO is breached). In ACT, for example, ‘family violence’ is defined in the *Family Violence Act 2008* (ACT) s8 as including emotional, psychological or economic abuse; threatening behaviour; coercion that controls or dominates the family member and causes fear for the safety of the family member or another; sexual coercion; property damage; animal harm; stalking; and deprivation of liberty. Crimes within the *Crimes Act 1900* may be penalised with sanctions other than FVOs, for example, stalking (s35); torture (s36) or non-consensual distribution of intimate images (s72). Other jurisdictions have similar legislation (Douglas 2018; McGorry and McMahon 2017). The definitions and approaches vary. As seen above, ACT has a long prescriptive list of behaviours, whereas Tasmania is more descriptive with regard to ‘course of conduct;’ ‘knows, or ought to know;’ ‘likely to have the effect;’ and ‘unreasonably controlling or intimidating, or causing mental harm, apprehension or fear in.’ Even choosing between these two approaches is complex and time-consuming. One problem with the ACT approach is that as society and technology change, policymakers need to add CC instances, for example, cyberbullying, cyberstalking, stalking by proxy, high-tech stalking and the dark web (Cassidy 2018:19-20; 123-24; Ormsby 2018:98). A problem with Tasmania’s approach is the perception it does not mention all

aspects of CC. These are just two approaches, but Hamberger et al. (cited in Walklate and Fitz-Gibbon 2019:95) identify 22 ways of defining and operationalising CC.

The greatest challenge is ensuring the CC policy and laws are evidence-based, effective and worthwhile without further endangering victims. This typically requires time to progress through the policy cycle stages: Issue identification > Policy Analysis > Policy Instrument > Consultation > Co-ordination > Decision > Implementation > Evaluation (Althaus et al. 2018:48-53); and to satisfy the evaluation hierarchy (like medical triage, given numerous crime issues and limited resources). Worthy policy is: (1) targeted toward pressing social problems/needs; (2) grounded in credible logic, theory and research; (3) well-implemented; (4) effective (positive, not negative, outcomes); and (5) cost-efficient (benefits outweigh costs) (Blomberg et al. 2016:32-34).

It is easy to join the growing chorus of people demanding a new crime due to the terrible effects of CC - and be honoured as a progressive leading the way - but publicizing CC's destructivity is not good policymaking. Most people are against CC, but some are working hard to analyse evidence and compare all promising solutions, even while being accused of 'turning a blind eye' or 'dragging their feet.' Many claim the success of UK's 2015 CC offence demonstrates that criminalisation is possible in Australia. However, Sheley urges caution for America because the UK laws may be unconstitutional if transferred (n.d.:5,6), and the same may be the case here. Even if successful in the UK, it will not necessarily be so in Australia. It is also unclear whether the UK law has been a success, at least initially. Reviews two years later showed the police were finding charges 'challenging to prove,' and 75% of English police forces interviewed had less than two charges per 100,000 population over those two years. The Inspectorate admitted some trained officers did not understand CC dynamics and

how manipulative offenders can be. The College of Policing admitted their current methods of risk assessment (ticking boxes for a recent situation) did not work with CC. They needed to spend more time asking questions (McClenaghan and Boutaud 2017; Barlow et al. 2019:160-79).

Many criminologists and sociologists, as well as several Commissions, have held back on recommending the creation of a new offence (Fitz-Gibbon et al. 2020; ALRC and NSWLRC 2010; Queensland Special Taskforce 2015; RCFV 2016). There are multiple complex issues to consider and if we make token changes, they will be ineffective and possibly dangerous for victims. The Victorian Government is not currently planning a new criminal offence, but leading the way in responsible, effective measures. The Government has within 5 years implemented 167 of the Victorian Royal Commission's 227 recommendations (Dept of Premier and Cabinet 2020b; Royal Commission into Family Violence (Vic) 2016). They have a 10-year rolling action plan backed by a massive budget and will implement all recommendations (Dept of Premier and Cabinet 2020a).

Policymakers must be allowed time to complete the policy cycle/s to develop the best possible policy with limited available resources and opportunities. Any new law must be accompanied by a holistic raft of support measures, including proper training of, and cooperation between, all stakeholders who will provide counsel, support, investigation, protection, review and reform (Barlow et al. 2019:160-79).

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