**COMMENTARY AND RESPONSE TO THE REMARKS OF**

**THE HON MARGARET MCMURDO AC:**

**THE CRIMINALISATION OF COERCIVE CONTROL**

*Current Legal Issues Seminar*

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Before I share my comments, I too acknowledge the Aboriginal and Torres Strait Islander people on whose unceded lands we gather, the Turrbal and Jagera people. I also acknowledge their elders past and present. Such acknowledgement is particularly significant in a discussion about the introduction of new criminal laws given we know that there is almost always a disproportionate impact on Aboriginal and Torres Strait Islander people when more criminal law is introduced.

Her Honour's remarks provide a clear overview of the recent Taskforce enquiries with one of the key recommendations being the criminalisation of coercive control in Queensland, a recommendation that now has commitment from the Queensland government. While I plan to focus my comments on that issue, I had a couple of preliminary remarks to make regarding other aspects of Her Honour's presentation.

First, I was pleased to see that, in Her Honour's view, 'neither a baby lawyer nor a curmudgeonly dinosaur lawyer would say in or out of court – 'it was just a domestic'. I hope that is generally true. However, it is still not uncommon to hear comments like 'technical breach' or 'trivial breach' made when discussing a contravention of a protection order involving, for example, obsessive text messages. Emphatic announcements by lawyers that 'there was no physical abuse', assuming therefore that the abuse was necessarily less harmful are also still made.

Comments like these underscore the continuing lack of understanding about the effects, and dangers, of coercive control, and the reality that non-physical abuse can be extremely harmful.

In NSW, the Domestic Violence Death Review Team[1] noted, that in 111 of the 112 intimate partner homicides that occurred in NSW between 2008 and 2016, (that's 99% of cases) the relationship was characterised by the abuser's use of coercive and controlling behaviours toward the victim.

Still, I recognise the enthusiasm with which the Queensland Law Society has approached the Taskforce recommendations and also that, many years ago, they were the first Australian law society to provide written guidance to lawyers dealing with family violence in their practice.

The second matter was that I certainly agree with Her Honour's remarks that better training of law students about family violence is important. Unfortunately, every subject in the law curriculum offers

[1] NSW Domestic Violence Death Review Team, *Report 2017-2019*, 2020, NSW Government.

opportunities to address domestic and family violence – from criminal law, to trusts, to tax. So, there is ample scope for discussions of this issue to be part of the law school curriculum, and it should be. It is good to hear also that specialist training programs are being developed in Queensland.

Turning then to the criminalisation of coercive control.

The broader community appears, in general, to support criminalisation. The many submissions to the taskforce highlight this clearly.

A survey conducted by Monash University and led by Kate Fitz-Gibbon,[2] last year, sought responses from victim-survivors of domestic and family violence, and attracted over 1,200 responses. Over 80% of the respondents were women and many were from Queensland. Respondents were asked whether they thought coercive control should be a criminal offence.

91% said they thought it should be. In answering the question about what effect a criminal offence of coercive control would have, over 70% of respondents agreed that:

- it would improve community awareness,
- it would improve awareness of the non-physical aspects of family violence,
- it would send a clear message to the community that it was not acceptable
- It would allow police to respond to it, and
- It would make sure it was taken seriously.

However, in answering the survey, participants were much less likely to identify the delivery of improved safety outcomes and greater justice for victim-survivors as likely effects of the introduction of an offence of coercive control.

These responses highlight a particular role for criminal law – as *primarily* a tool to denounce behaviour and educate the public about it. This has interesting implications for how we develop the offence, and the sentencing response associated with it, which need deep consideration.

Despite my increasing concerns about the punitive effects generally associated with criminalisation on marginalised communities, I do accept that criminalisation is the pathway Queensland is on, so my comments are made in that context.

The introduction of a coercive control offence is no longer revolutionary.

As the Taskforce observed, offences of coercive control focused on emotional and financial abuse have been in place for some time in Tasmania,[3] although they are rarely prosecuted.

More recently, NSW has introduced a new Bill[4] on coercive control that is likely to be passed soon. There has been considerable discussion about the pros and cons of the NSW response.

On one side, there are concerns that the NSW offence is too limited (it applies *only* to current and former intimate partner relationships). It will also be hard to prove. It requires the prosecution prove *a*

[2] Kate Fitz-Gibbon, Sandra Walklate, Silke Meyer and Ellen Reeves, *The criminalisation of coercive control: the benefits and risks of criminalisation from the vantage of victim-survivors* in Heather Douglas, Kate Fitz-Gibbon, Leigh Goodmark and Sandra Walklate (eds), *The Criminalization of Violence Against Women* (forthcoming, OUP).
[3] *Family Violence Act 2004* Tas, ss 8,9.
[4] *Crimes Legislation Amendment (Coercive Control) Bill 2022* NSW.

*course of conduct* of abusive behaviour, and that the accused intended that the behaviour coerced or controlled the other person. There is also an objective assessment that must be satisfied, that the conduct would cause fear of violence, or serious adverse impact, on the person's capacity to carry out daily activities. And finally, there is a defence:- that the behaviour was reasonable.

However, perhaps - if the role of criminalisation in the context of coercive control is denunciation and education - a form of the offence that is difficult to prove is an appropriate approach. It denounces and educates, yet also diminishes the negative impacts on marginalized groups.

I also note the overarching concern about the NSW approach: that it is too rushed – an issue Queensland is trying to deal with through its staged, 4-year approach, as was recommended by the Taskforce.

Other Australian states are also moving forward on the criminalisation of coercive control. South Australia has a Bill[5] and is currently discussing it along with implementation concerns. And Western Australia is also exploring the issue.

As many of you are aware, offences of coercive control have been introduced in the United Kingdom in recent times: in England and Wales in 2015,[6] in Ireland and Scotland in 2018,[7] and in Northern Ireland in 2021.[8]

Research about the England and Wales offence is beginning to show how the offence is playing out in the overall landscape of criminal law responses to domestic and family violence.

A 2021 Home Office report[9] on the coercive control offence in England and Wales highlighted that up to 700,000 people experience coercive control annually, but only around 24,000 offences were recorded in 2020. Around 50% of those matters initially charged proceed.

Why don't they proceed? In about one-third of the cases, victims wanted to proceed but the prosecution found there was insufficient evidence, and in the remaining cases it was because victims chose to withdraw.

Once matters proceed, about 50% result in a conviction and of those who were convicted, most (70%) were immediately imprisoned with an average sentence of 13mths (the maximum sentence is 5years on indictment; and 6mth if heard summarily). (These statistics are similar to the non-fatal strangulation offence in Queensland, which I will return to).

The Home Office report found that police and prosecution had a good understanding of coercive control, but said the offence was more difficult and time-consuming to prosecute than those offences involving physical violence. In particular, there were challenges with proving the behaviour had the required 'serious effect', collecting evidence, and coercive control was often charged alongside physically violent offences, such as assault.

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[5] *Criminal Law Consolidation (Abusive Behaviour) Amendment Bill 2021* SA.
[6] *Serious Crime Act 2015* (England and Wales) s76.
[7] *Domestic Abuse (Scotland) Act* 2018.
[8] *Domestic Abuse and Civil Proceedings Act 2021* (Northern Ireland), s1.
[9] Home Office, *Review of the Controlling or Coercive Behaviour Offence*, UK Government, 2021 Accessed: https://www.gov.uk/government/publications/review-of-the-controlling-or-coercive-behaviour-offence

The Scottish offence was introduced in 2018 and there is less information about how that offence is tracking. The Scottish offence refers to 'behaviour which is abusive of a partner or ex-partner'. It extends to intimate partners living together, or separated, and references the offender's 'reasonable' understanding that his behaviour will frighten, or otherwise harm, the targeted partner rather than proof of those effects by the victim. However, Scottish law requires two different, and independent, sources of evidence to prove a crime, so the victim's testimony will be insufficient on its own. Researchers have speculated this may be an issue.[10]

The experience of the implementation of the non-fatal strangulation offence in Queensland is relevant in at least three ways for considering how to proceed with the coercive control offence in Queensland. I have been exploring strangulation with my colleague Robin Fitzgerald.[11]

First: the non-fatal strangulation offence has a seven-year maximum jail penalty, and it can only be dealt with in the higher courts, where cases typically take much longer to be finalised. This results in considerable time - on average nine months- between a person being charged with non-fatal strangulation, and finalisation of the case.

The implications of this extended timeframe include prolonged engagement with the legal system, later closure for offenders and complainants alike, as well as heightened system costs and greater risk of victim-survivors withdrawing from the prosecution.

Second: Less that 50 percent of those who are charged with non-fatal strangulation receive bail and, given the likelihood that those convicted will be sentenced to terms of imprisonment, many defendants do not seek bail. The result is that more than half of all accused people spend an average of nine months as an unsentenced prisoner on remand waiting for their matter to be finalized - and the cost of remand is even higher than prison.

Remandees are rarely provided with access to rehabilitative programs, such as men's behaviour change programs, literacy, employment, mental health or drug and alcohol programs.

A good proportion of strangulation offenders are sentenced and released based on time served on remand, meaning that following release they are unlikely to have accessed any rehabilitative or educational intervention.

Even if those convicted do receive a prison sentence post-remand, the period they spend in prison (usually less than 10 months) is usually insufficient time to gain access to prison-based rehabilitative programs.

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[10] Michele Burman and Oona Brooks Hay, 'Aligning policy and law? The creation of a domestic abuse offence incorporating coercive control', (2018) 18 (1) *Criminology and Criminal Justice,* 67, at 75.

[11] For information about this project see: The non-fatal strangulation offence as a response to domestic and family violence. Available at: https://law.unimelb.edu.au/research-programs/non-fatal-strangulation-offence. The following comments are based on our research see: Robin Fitzgerald, Heather Douglas, Eden Pearce and Mady Lloyd, *The Prosecution of Non-fatal Strangulation Cases:An Examination of Finalised Prosecution Cases in Queensland, 2017 – 2020*, The University of Melbourne and The University of Queensland (2022) available at: https://law.unimelb.edu.au/__data/assets/pdf_file/0005/4096535/Fitzgerald-et-al-ODPP-report.pdf; Leah Sharman, Robin Fitzgerald and Heather Douglas, *Non-Fatal Strangulation offence convictions and outcomes: Insights from Queensland Wide Inter-linked Courts data, 2016/2017-2019/2020* , The University of Melbourne and The University of Queensland (2022).

Thus, most people convicted of strangulation have no access to programs. Mental health and drug misuse issues are typically exacerbated on remand. Obviously, there is also loss of employment. Social exclusion is intensified, and the offender may leave detention feeling like he has nothing more to lose – women are not safe.

The inevitable prison sentence also causes many women to withdraw from prosecution – their reasons include fear of course but also, stigma of prison, loss of their children's father's support – both material and emotional - and other reasons.

Regarding coercive control, careful consideration must be given as to which court can hear it, in what context, and necessarily the kinds of penalties that should be associated with it. It should also be able to be dealt with quickly.

Third: consistent with most other offences, although less than 5% of people in Queensland are First Nations people, 21% of those charged with strangulation are First Nations people. Robin and I found similar numbers in the criminalisation of protection order contravention charges – with Aboriginal women's imprisonment rising fastest in this context. This issue is on the Taskforce and Queensland Government radar, but it is not really clear how these effects will be avoided regarding coercive control offences.

How, and whether, to use criminal law to address violence against women is at the centre of ongoing discussion. Lately the debate has been pitched in an adversarial style with one side, 'anti-carceral' positioned against the other side, 'carceral' – the latter used broadly to critique arguments in favour of criminalisation.

However, the most concerning aspect of the criminalisation of coercive control is arguably not the denunciative and educative aspects of introducing appropriate crimes, but rather how we respond to the people who commit them.

We have to do more to decouple criminalisation from incarceration and take rehabilitation, reintegration and community safety seriously.[12]

For those few who are found too dangerous to release immediately, earlier and better interventions are required. This might encompass different approaches to employment, education and training support, treatment, recognition of disability, and other forms of re-integration support.

What the taskforce, and the government's, response clearly recognizes, is that real investment in a range of interventions is needed. These include housing and social assistance for both perpetrators and victim-survivors, more perpetrator programs, and other creative responses.

Recognising the deep harms of coercive control is crucial but we need to keep remembering that criminal law interventions, at least as they are currently operating, in general don't improve the longer-term safety of women and children.

[12] We make this argument in the following: Heather Douglas and Robin Fitzgerald, 'The consequences of criminalising domestic violence: A case study of the non-fatal strangulation offence in Queensland, Australia' in Heather Douglas, Kate Fitz-Gibbon, Leigh Goodmark and Sandra Walklate (eds), *The Criminalization of Violence Against Women* (forthcoming, OUP).