Options for legislating against coercive control and the creation of a standalone domestic violence offence

Submission to Queensland Women's Safety and Justice Taskforce

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

The ALA National Criminal Law Special Interest Group is one of the ALA's national policy interest groups and is responsible for developing, promoting and responding to criminal law policy issues.

The ALA office is located on the land of the Gadigal of the Eora Nation.

[1] www.lawyersalliance.com.au.

Response to discussion paper

1. The ALA Criminal Law Special Interest Group ('ALA Criminal Law SIG') welcomes the opportunity to provide this submission to Queensland's Women's Safety and Justice Taskforce in response to the discussion paper *Options for legislating against coercive control and the creation of a standalone domestic violence offence*.

2. The ALA Criminal Law SIG is opposed to the option of legislation to criminalise coercive control.

3. In this submission the ALA Criminal Law SIG endorses the joint statement from the organisation Sisters Inside and the Institute for Collaborative Race Research, *'In no uncertain terms' – the violence of criminalising coercive control*, dated 17 May 2021. The statement is reproduced at Appendix 1 of this submission and is also available online.[2]

4. The ALA Criminal Law SIG acknowledges the seriousness of coercive control and supports all Aboriginal and Torres Strait Islander women who experience and speak up against it. However, it shares the concerns of Sisters Inside and the Institute for Collaborative Race Research that the Taskforce appears to be predisposed to a carceral solution as the most appropriate option to deal with coercive control.

5. The ALA Criminal Law SIG notes reported figures from 2017 that of the 27 women murdered by an intimate partner in Queensland, 12 had been previously identified by police as the perpetrator in a domestic dispute and issued with a restraining order or formal charge.[3] This prompted research by Australia's National Research Organisation for Women's Safety (ANROWS), which found that identifying the person most in need of protection is a significant existing problem for law enforcement and legal systems in Queensland, and that there were far-reaching effects when women – especially First Nations women – were

[2] The statement is available online 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>.

[3] Ben Smee, 'Queensland police misidentified women murdered by husbands as perpetrators of domestic violence', *The Guardian* (online, 3 May 2021) https://www.theguardian.com/australia-news/2021/may/03/women-murdered-by-husbands-labelled-perpetrators-of-domestic-violence-by-queensland-police>.

misidentified as offenders.[4] The Taskforce's discussion paper notes that the introduction of any new legislation to criminalise coercive control may further exacerbate this issue.[5]

6. For these reasons, the ALA Criminal Law SIG is opposed to the option of legislation to criminalise coercive control.

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[4] Australia's National Research Organisation for Women's Safety, *Defining and responding to coercive control* (Policy Brief, January 2021) 4–7 <https://www.anrows.org.au/publication/defining-and-responding-to-coercive-control>.

[5] Women's Safety and Justice Taskforce, *Options for legislating against coercive control and the creation of a standalone domestic violence offence* (Discussion Paper 1, 27 May 2021) 44–45 <https://www.womenstaskforce.qld.gov.au/publications>.

Appendix 1

'In no uncertain terms' the violence of criminalising coercive control. Joint statement: Sisters Inside &Institute for Collaborative Race Research

May 17, 2021

Background

In March 2021, the Queensland Government announced the establishment of the Women's Safety and Justice Taskforce. They claimed it would be tasked with conducting ***"a wide-ranging review into the experience of women across the criminal justice system"***.[i] The Terms of Reference (ToR) of the Taskforce have been made publicly available and outline the timeframe, scope, guiding principles and considerations, and consultation framework for this proposed inquiry.[ii]

From the ToR, it is clear that this taskforce is not in fact conducting such a wide-ranging review. It has a very specific focus, which is to examine "***coercive control and review the need for a specific offence of domestic violence".*** While the second stated aim in the terms of reference is the broader examination of ***"the experience of women across the criminal justice system"***, the remainder of the ToR document make clear that this is not central to the taskforce and not possible within the scope of the terms of reference. This joint statement provides a critical appraisal of the taskforce's terms of reference, revealing the brutality of its agenda.

Summary of critique

1. The Taskforce ToR are severely restrictive. They presuppose a carceral solution as the only and best response to coercive control.
2. The Taskforce ToR ignore the existing evidence base (statistical, theoretical and testimonial) relating to the violent relationship Indigenous women have with the criminal legal system.
3. The Taskforce ToR are explicitly discriminatory. They name Aboriginal and Torres Strait Islander women as the only racialized category of women considered "both victims and offenders".
4. In their scope, the Taskforce ToR fail to adhere to their own guiding principles. Most notably they fail to protect and "***promote human rights"***, or to employ a ***"trauma informed"*** and ***"evidence-based approach"***.

5. The Taskforce ToR fail to provide a definition of **"coercive control**", or any conceptual clarity in relation to this contested term.
6. For all these reasons, the Taskforce ToR are an enabler to the state's exercising of coercive control over Aboriginal and Torres Strait Islander women.

We argue that the Taskforce focus on coercive control, and the restricted range of criminological responses offered, ignore the experiences of Aboriginal and Torres Strait Islander women who are already over-represented across the criminal legal system. It is via the Taskforce ToR and the terminology deployed within it that we demonstrate how the Queensland Government's agenda is at odds with its apparent commitment to the principles of ***"women's safety and justice"***. In fact, rather than seeking to protect them from harm, the relationship that the state establishes over Aboriginal and Torres Strait Islander women is one of coercive control. This taskforce operates as an apparatus for intensifying this control, further trapping Aboriginal and Torres Strait Islander women within criminal legal systems which have long been a key site of colonial and racial violence.

This entrapment occurs through the erasure of power. Coercive control is a form of domination which can only take place in asymmetrical conditions of power, and these are structural as well as personal. By stripping coercive control of its gendered dimension, the ToR hide the fact that it is a practice of control exercised in conditions of patriarchal power. By failing to name the most powerful form of domination in the criminal legal space – the hyper incarceration of Aboriginal women – the ToR position these women as potential perpetrators and propose new legal instruments that can and will be used to further criminalise them. Coercive control legislation thus becomes a mechanism to further structurally disempower Indigenous women, making them more rather than less vulnerable to subtler forms of control.

We acknowledge the seriousness of coercive control and support all Aboriginal and Torres Strait Islander women who experience and speak up against it. Here, we focus on the need to extend our understanding of coercive control so that we can see its operation in the actions of the state itself. Indigenous women and survivors of DSV have solutions to coercive control beyond the criminal justice system. One of the missed opportunities of these ToR is that they do not make space for these voices, experiences and knowledges.

The problem with a carceral solution

The ToR move straight from a general injunction to examine coercive control to the assumption that the criminalisation of this category of control will be the outcome of the inquiry. The terms of reference thus pre-empt the deliberations, rendering voiceless those who oppose criminalisation

even if they are invited to participate in the process. The timeframe section tells us that the taskforce will need to inform the Attorney General ***"how best to legislate against coercive control as a form of domestic violence"*** by October this year – it does not ask the taskforce to decide *if* such legislation is necessary. It also tells us that, in making recommendations, the Taskforce may consider ***"how best design, implement and successfully operationalise legislation to deal with coercive controlling behaviour in a domestic and family violence context"***. The Taskforce is also directed to consider how to improve rates of reporting and lower attrition – so how to expand the reach of existing and new criminal offences. This does not consider the fact that Aboriginal and Torres Strait Islander women may avoid interaction with the criminal legal system because of the high likelihood that this will lead to trauma and criminalisation.

The only specific areas for consideration mentioned are policing, investigative approaches, collection of evidence, first responders and so on – the state is the assumed agent of redress and protection for women. In the case of colonial Australia, we know this to be untrue. From the earliest times Native police, mission controls, child removal systems, incarceration in dormitories, police harassment, deaths in custody and hyper incarceration in the prison system have been a central mechanism of Indigenous dispossession and colonial control. This traumatic and politicised relationship with the criminal legal system continues today. These ToR erase the brutal impacts of the carceral system upon those women who are most likely to be affected by the proposed changes and create a path dependency leading to the expansion of this violent system.

In fact, the assumption that the expansion of carceral control benefits and protects Aboriginal and Torres Strait Islander women is also a common feature of colonialism. Systems of intense, violent micromanagement have long been justified as protecting these women from predation and from the violence of their own culture (as in the language of the 1897 'Protection' legislation). The ToR might aim to ***"improve the criminal justice system",*** but there is real danger in giving more power to a system that has evolved to brutalise Aboriginal women.

The objectives listed by these ToR appear incompatible. How can the Taskforce both criminalise coercive control, and truly consider ***"any other policy, legislative or cultural reform relevant to the experience of girls and women as they engage with the criminal justice system?"*** The vagueness of the proposed methodology, and the ordering of priorities (focusing on expanding offences first, and considering contextual factors last) is highly concerning. In such a limited and vague framework, those invited to participate will determine the extent to which the racist context of the legal system is considered.

The criminalisation of coercive control can be deployed by both state and individual perpetrators to control women rather than protect them. This is of particular concern in Queensland, where incarceration rates for women have increased 72% in the last ten years.[iii] But this control does not happen in the same way to all women. By erasing gender, the ToR make space for race. The imagined victim and beneficiary of media discussions of coercive control is a white straight middle-class suburban woman. It is for this woman's protection that the state has initiated the current process. The ToR implies that in protecting this middle-class white woman all women will be afforded the same protection. This is not the case; the vulnerability of white women has long been a justification for the extension and policing of racial hierarchies.

Racial violence and the state

We know that the Queensland criminal legal system is profoundly racist in its interaction with women: nearly 40% of current female prisoners are Indigenous, despite forming only 4.6% of the Queensland population. This race based hyper-incarceration has also intensified in the past decade, up from 32% of the female prison population in 2010. Unlike white women, Aboriginal and Torres Strait Islander women are seen as already culpable; domestic violence interactions with police already regularly lead to criminalisation and incarceration for Indigenous women. In this context, the vagueness of the nature of coercive control, and the difficulty demonstrating it and documenting it, makes coercive control legislation an incredibly powerful weapon in the criminalisation of Indigenous women.

Race is not mentioned in the ToR as a power structure, or a factor which profoundly shapes Indigenous women's experience of the criminal justice system as violent and coercive. Race is not mentioned to name racism. Instead, it is mentioned only *racialize* Aboriginal and Torres Strait Islander women. The ToR make this crystal clear when they claim to take into consideration:

> ***the unique barriers faced by girls, Aboriginal and Torres Strait Islander women, culturally and linguistically diverse women, incarcerated women, elderly women, women in rural, remote and regional areas and LGBTIQA+ women, when accessing justice as both victims and offenders;***

It is alarming that the only time Aboriginal and Torres Strait Islander women are mentioned in the ToR, they are named as "**offenders".** The ToR separate out Aboriginal and Torres Strait Islander women from the normative 'white woman' specifically criminalising them in the framing of proposed coercive control investigation. Indigenousness is the only racialised category to be explicitly named as both victim and offender, and we also note that Indigenous women occupy the other 'offending'

categories listed (culturally diverse, incarcerated, LGTIQA+, rural and remote, etc). In this long list of 'diversity', difference is framed as individual and lifestyle based, rather than as structural and

related to long standing systems of power. This makes it much easier to cast these individuals as responsible for their own difficulties and experiences. Indigenous women are mentioned as one of many categories of diversity, when all involved know that they are by far the most important category of women affected, many hundreds of times more likely to be imprisoned than other women.

The ToR in not naming white, middle-class, middle-aged, suburban, straight women as "both victims and offenders" make explicit how the state assures their innocence via a discourse of protection, and in doing so, guarantees their position as both victim and beneficiaries of state control. By both erasing and then reinscribing gendered and racialized systems of power, these terms of reference make their intent and eventual effect all too clear. In no uncertain terms, this taskforce aims to extend the legal jurisdiction and practical reach of criminal legal institutions which remain a key agent of violence and colonisation for Aboriginal and Torres Strait Islander women. These ToR foreclose possibilities other than intensifying harm via the extension of the state's coercive control.

Returning to coercive control

The concept of coercive control emerged out of debates over 'the disputed nature, extent and distribution of domestic violence: whether domestic violence is primarily rooted in men's control of women.'[iv] The term, as first defined by Stark describes a form of domestic violence that is considered more serious in that it is 'gender asymmetrical', that is, it is focused on control over women by men, and is said to be distinguishable from fights or arguments between men and women.[v] We would highlight that, in the same way that gender asymmetries enable the subtle mechanisms of coercive control, so too do other structured forms of power including race, class and heteronormativity. Stark defines coercion as "the use of force or threats to compel or dispel a particular response" (p. 228), while control refers to "structural forms of deprivation, exploitation, and command that compel obedience indirectly" (p. 229). When coercion and control occur together, he argues, the result is a "condition of unfreedom" (p. 205) that is experienced as *entrapment.*[vi] Coercive control often includes subtle psychological techniques such as gaslighting, surveillance, isolation, restricting freedom and controlling women through threats to their children. It may or may not include physical and/or sexual assault, and can continue well after physical violence has ended.

There is an emergent literature examining the creation of coercive control as a new criminal offence, primarily from the United Kingdom.[vii] One of the major criticisms of the legislative response to coercive control has been the removal of gender asymmetry as a defining characteristic. This allows vulnerable and disempowered women to be misidentified as perpetrators, especially given the necessarily imprecise and hidden nature of coercive control practices. It will be up to the police to determine the truth of coercive practices, and, as in the ToR, it appears that legislation offers little

precision about the meaning and application of the term. This is a major expansion of police discretion. The threat of such a vague offence will further deter at risk women from engaging with police in domestic violence situations and will subject them to the very forms of subtle control that this legislation ostensibly seeks to avoid. Aboriginal and Torres Strait Islander women are routinely misidentified as 'offenders' rather than 'victims'. Not only will Aboriginal and Torres Strait Islander women and girls not be afforded protection by this legislation, they will be squarely targeted.

Women's Taskforce ToR as a form of coercive control

The very elements of coercive control – gaslighting, manipulation via family relationships, isolation and surveillance – already characterise much of Aboriginal and Torres Strait Islander women's interaction with the criminal legal system. When the ToR refer to these women as **"engaging"** with, **"interacting"** with or **"accessing"** the criminal justice system, it is a form of gaslighting. Such experiences are not neutral but routinely violent, criminalising and traumatic. The carceral system is a key "condition of unfreedom" for Aboriginal and Torres Strait Islander women both inside and outside formal prisons.

A critical limitation of these ToR is the fact that they centre the voices of legal and state agencies, further foreclosing non-carceral responses. Seven out of the eleven stakeholder groups specified in the ToR are such agencies – police, DPP, statutory authorities, legal practitioners and government departments. The highly politicised Queensland Police Union, which has a history of conflict with Indigenous communities, is mentioned by name as an example of an 'advocacy group'. It is clear the Queensland Police Service are seen as key stakeholders and decision makers.

While the ToR indicate that DFSV survivors will be consulted, they do not specify consultation with Aboriginal and Torres Strait Islander representative or advocacy groups. This is a clear omission, given all are aware of the extreme levels of Indigenous incarceration in the state. Therefore, it seems that the women with lived experience will again be those white middle class women who are framed as most-deserving of state protection. Even non-racialised survivors of domestic violence and of the criminal legal system are aware of the limitations of carceral responses, yet the ToR structures out such voices by predetermining the recommendations of this taskforce. The idea that the criminal legal system itself might be deeply flawed, and a site that intensifies rather than redresses domestic violence for marginalised women, is not within the scope of these terms. There is a large body of research and evidence showing precisely this, but the framing of this Taskforce can only extend the reach of this system and see it as in need of expansion and 'reform'.

There too is a deep contradiction with the ToR's apparent recognition of "***the need for attitudinal and cultural change across Government, as well as at a community, institution and professional level,***

including media reporting of DFSV". If there is a need for attitudinal and cultural change across government, how can this same government direct discussion of these issues by establishing such a limited and path dependent ToR? The ToR appears to share the same attitudes of those they seek to correct; there is no scope within these terms for fundamental value change.

The following examples highlight the contradictions between the scope and guiding principles built into these Terms of Reference:

- The Taskforce via its ToR claim to be ***"trauma informed",*** but the primary trauma of Indigenous women in this context is their experience with the legal system. A carceral solution, such as that already predetermined by this process, is therefore not trauma informed. Once again, we must ask whose trauma is recognised and used to inform change; Indigenous women are forced to carry the seeds of their own culpability in the current carceral system, and their trauma is therefore tainted and silenced.
- The ToR refer to the need for an ***"evidence-based approach"*** which presumes a reasoned neutrality or impartiality. Yet the ToR, which presuppose the value of criminalising coercive control, as well as the list of stakeholders to be consulted, tell us what evidence will be valued and heard. The evidence which points towards truly transformative change such as community justice processes and abolition and defunding of carceral systems is likely to be excluded.
- The ToR refer to ***"just outcomes"*** only in the context of balancing the needs of ***"victims and accused persons"***, as if this were a simple calculus, and the state the arbiter rather than a party to violence and injustice. Are just outcomes possible given the way that structural factors mitigate against even-handedness and lead to profoundly unjust distributions of harm?
- There is an apparent concern for "***cost-effectiveness'*** yet the massive expansion of the prison system and policing is clearly not considered. This is one of the major areas of increased government spending over the past two decades and is highly profitable to many private and quasi-government organisations. Abolitionist research highlights the economic forces driving the expansion of carceral systems and leads us to question the independence of a Taskforce which is deeply enmeshed in the sprawling and expanding prison industry.

Conclusion

We do not raise these concerns in relation to the ToR to call for greater inclusion of Aboriginal and Torres Strait Islander women in the Taskforce. Rather we seek to explicitly name a process that is itself violent, in its stated aims of ***"women's safety"***. By interrogating the ToR, and terminology, we show

that this Taskforce's outcomes reflect the same kind of abuse that it is charged with remedying. This is not a matter of Indigenous women being silenced and 'left out' of a process of protection; in fact they will be made hyper visible and directly targeted. Aboriginal women are already rendered as marginalised, underserving victims and "***perpetrators, offenders and accused persons"***. They are not seen as worthy of inclusion in consultation and stakeholder discussions, only of inclusion as potential perpetrators of the new crime of coercive control. Instead of seeking this inclusion, we question the very terms of this Taskforce and its agenda.

The concept of coercive control itself tells us that those who are victimised typically cannot seek justice. They do not have power, are structurally silenced and are not believed – this disempowerment is reflected in the Taskforce ToR. The state casts Indigenous women as perpetrators of coercive control when it is the state itself who exercise this control and occupies the role of perpetrator. Which kind of women can avail themselves of this law to their benefit? Only a very few, and it is for them these laws are being made, and for the colonial political order that has long justified itself as protecting white female virtue and disciplining Aboriginal criminality.

References:

[i] Queensland Government (2021) Women's Safety and Justice Taskforce, Department of Justice and Attorney General, accessed May 2021 https://www.justice.qld.gov.au/initiatives/womens-safety and-justice-taskforce

[ii] Queensland Government (2021) Terms of Reference: Taskforce on Coercive Control and Women's Experience in the Criminal Justice System, Department of Justice and Attorney General, accessed May 2021 https://www.justice.qld.gov.au/ data/assets/pdf file/0010/672706/womens-safety justice-taskforce-tor.pdf

[iii] Australian Bureau of Statistics, Prisoner numbers and prisoner rates by Indigenous Status and sex, States and territories, 2006-2020 (Tables 40 to 42).

[iv] Walby, S & Towers, J (2018) Untangling the concept of coercive control: Theorizing domestic violence crime, Criminology & Criminal Justice, 18(1): 8. https://doi.org/10.1177%2F1748895817743541; see also Barlow, C, Johnson, K, Walklate, S and Humphreys L. (2020). Putting Coercive Control into Practice: Problems and Possibilities, The British Journal of Criminology, 60(1): 160–179, https://doi.org/10.1093/bjc/azz041

[v] Walby, S & Towers, J (2018) Untangling the concept of coercive control: Theorizing domestic violence crime, Criminology & Criminal Justice, https://doi.org/10.1177%2F1748895817743541

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[vii] Tolmie, J (2017). Coercive Control: To Criminalise or not to Criminalise? Criminology and Criminal Justice. 18(1): 50-66. https://doi.org/10.1177/1748895817746712