Submission No 21

COERCIVE CONTROL IN DOMESTIC RELATIONSHIPS

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Date Received: 26 January 2021

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26 January 2021

Dear Ms. Ward,

Thanks for your invitation to make a submission to the *Inquiry into Coercive Control in Domestic Relationships.*

I have addressed the questions raised by the NSW Discussion Paper on Coercive Control (2020) in turn below.

1. **What would be an appropriate definition of coercive control? &**
2. **How should it distinguish between behaviours that may be present in ordinary relationships with those that taken together form a pattern of abuse?**

The language of coercive control is complex. Essentially it is a pattern of behaviours used to enforce domination and limit freedom. The behaviours include, potentially, both physical and non-physical behaviours.[1] One of the difficulties is that coercive control is necessarily inherently vague precisely because of its deeply contextually and culturally prescribed and individualized nature. Underlining its complexity, Stark and Hester comment that 'the mistaken association of coercive control with "psychological abuse" … risks leaving "real" partner violence outside the [coercive control] crime's spectrum, not merely isolated assaults.'[2]

Several researchers have argued that coercive control is a concept that was developed in a clinical context and may be difficult to clearly translate into criminal law.[3] For example, Walklate and colleagues point out three inter-connected problems with criminalizing the coercive control:

> … what is meant by coercion in the context of the offence of coercive control, what implications such understandings have for notions of choice or voluntariness and finally the capacity of the dichotomous thinking of legal proceedings, to incorporate and respond to the *processes* inherent in the emotional relationships captured by coercive control.[4]

[1] Evan Stark, *Coercive control: How men entrap women in personal life*. OUP 2007; Paul McGorrery and Marilyn McMahon, Criminalising the 'Worst' Part: Operationalising the Offence of Coercive Control in England and Wales' [2019] 11 *Criminal Law Review* 957 - 965, 963

[2] Evan Stark and Marianne Hester, 'Coercive control: Update and Review' (2019) 25 (1) *Violence Against Women* 81-104, 86.

[3] Sandra Walklate et al, 'Is more law the answer? Seeking justice for victims of intimate partner violence through the reform of legal categories' (2018) 18 (1) *Criminology & Criminal Justice* 115-131, 117.

[4] Sandra Walklate et al, 'Is more law the answer? Seeking justice for victims of intimate partner violence through the reform of legal categories' (2018) 18 (1) *Criminology & Criminal Justice* 115-131, 118.

Logically, the range of people who may experience coercive control may extend beyond family relationships to any relationship where the person exerting coercive control has inside information about the victim, including potentially care and work relationships. For example, recently Stark and Hester suggested, after reviewing the literature, that coercive control should be reconceptualized as a strategy for establishing dominance across a spectrum of relationships that includes children.[5] There is, therefore, a real question of whether any proposed offence should be introduced to simply respond to domestic relationships when many others may be suffering in a similar way.

Notably, despite the language of coercive control being included in several Australian statutes, the concepts are not clearly defined in those statutes or through subsequent case-law. Generally, statutes produce a list of behaviours that may be present in coercive and controlling relationships.[6] Courts have rarely ventured to describe domestic and family violence in terms of coercive control. For example the *Domestic and Family Violence Protection Act* Qld, section 8 provides a list of behaviours that constitute domestic violence and includes behaviour that is 'coercive' or 'in any way controls or dominates' the other person and 'causes that other person to fear for their safety or well-being'. Other behaviours in the definition include emotionally, psychologically or economically abusive behaviours and threatening behaviour. Emotional or psychological abuse is defined in s11 as behaviour by a person towards another person that torments, intimidates, harasses or is offensive to the other person. Examples include following a person, remaining outside their home or place of work, repeatedly contacting them, repeated derogatory taunts, threatening to disclose a person's sexual orientation without their consent. There have been no pronouncements made specifically about coercive control in published cases although several cases have considered the section 8 definition and gone some way towards recognizing the patterns and individualised forms of domestic violence. For example, in *CPS v CNJ*[7] the judge found that 'continuous contact and comments', verbal and by text made to the victim were capable of constituting domestic violence. Some of the cases point to the subjective nature of the abuse and the need for the court to consider the context and impact on the specific individual.[8]

It its definition of 'family violence' the *Family law Act* identifies family violence is 'violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the *family member*), or causes the family member to be fearful'.[9] Coercive control is not specifically defined in the legislation. Instead a list of examples is provided that includes a number of non-physical forms of behavior including 'sexually abusive behavior', 'repeated derogatory taunts' and 'preventing the family member from making or keeping connections with his or her family or friends or culture'. Some family law matters have recogised incidents of coercive control as family violence. For example in *Sahrawi & Hadrami*[10] the court found that behaving in a 'psychologically coercive manner to secure sex… is conduct that tends towards the vitiation of consent and... trespasses upon an intimate aspect of a person life' and because of the coercive and controlling nature of the conduct, it constitutes family violence [at 82]. However coercive control has not been defined in any reported cases.

[5]Evan Stark and Marianne Hester, 'Coercive control: Update and Review' (2019) 25 (1) *Violence Against Women* 81-104, 98

[6] See also UK Women's Aid who similarly reproduce a list of behaviours: https://www.womensaid.org.uk/information-support/what-is-domestic-abuse/coercive-control/

[7] [2014] QDC 047

[8] Magistrates Court of Queensland Bench Book, Domestic and Family Violence Protection Act 2012https://www.courts.qld.gov.au/__data/assets/pdf_file/0020/435026/dv-bench-book.pdf at 15.

[9] Section 4AB Family Law Act 1975 Cth

[10] [2018] FamCAFC 170

The lack of engagement with the concept in the case-law, despite its presence in legislation, points to its complexity.

While in some relationships certain behaviours will not be experienced or intended to be experienced as coercive and controlling, in other relationships those very same behaviours will be intended as, and experienced as, coercive and controlling. For example, in many 'ordinary' relationships one partner may manage the finances, or the couple's social life. Couples may have tracking devices placed on each other's phones, so they know how far away they are for making dinner or for safety reasons. Partners may stop taking contraception so they become pregnant without telling their partner or secretly get a vasectomy, so they do not have a child. A partner may threaten to separate unless the other partner agrees to have a baby, because they want to make sure they don't run out of time to have children. Partners may tell their intimates they are under or overweight because they are worried about their health or say they prefer their partner looks better in certain clothes. These patterns and behaviours may have developed/ take place after discussion, out of real care or out of habit but may be neither intended nor experienced as coercively controlling in the relationship.

The reality is that it may not be clear in some cases whether a group of behaviours is coercively and controlling or designed to make the home run efficiently, ensure there are sufficient funds to pay utilities by the end of the month, aimed at encouraging the good health of their partner etc. Behaviours may be a symptom of a dysfunctional relationship, or lack of communication without being criminal. Relationships are complex and the lines between autonomy and intimacy are not always clear making it difficult to know when behaviours become coercive and controlling.[11]
Because the discrete behaviours that underpin coercive control are often legal if examined on a one-off or individual basis, most jurisdictions that have introduced an offence of coercive control have included ordinary person tests.[12] Such tests are extremely vague.

One of the risks of such tests is that they rely on an understanding of ordinariness that may not be shared throughout the community and can be enforced in ways that discriminate against minority groups.[13]

Australian legislation encapsulating coercive control has explicitly named behaviours that may be coercive and controlling (eg in *Family Law Act*). This approach has limitations as it might limit the kinds of behaviours that underpin the offending behavior and is not necessarily helpful in distinguishing between legal and non-legal patterns. Other legislation has focused on the effects of the behaviors including isolation and subordination (Scottish offence), this may be preferable although this approach would also require an assessment of the effects, either from an ordinary person perspective (which could be interpreted in a culturally specific way) or evidence from the victim (which could be (re)traumatising) or associated experts (which would be expensive and time consuming).

[11] Sandra Walklate and Kate Fitz-Gibbon, 'The criminalisation of coercive control: The power of law?' (2019) 8 (4) *International Journal of Crime Justice and Social Democracy* 94, 95, referencing Claier Renzetti, *Violent Betrayal: Partner Abuse in Lesbian Relationships*. (1992, Newbury Park, California: Sage).
[12] See s39(1)(c) *Domestic Violence Act 2018* (Ireland); s76(1)(d) *Serious Crimes Act 2015* (England and Wales); s1 (2)(a) *Domestic Abuse (Scotland) Act 2018*.
[13] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law*. ThomsonReuters, 2017, 59.

3. Does existing criminal and civil law provide the police and courts with sufficient powers to address domestic violence, including non-physical and physical forms of abuse?

The NSW regime is quite complex, however as noted in the Discussion Paper there are numerous offences that may capture domestic violence. Traditional offences including assaults, sexual assaults and rape, and more recently developed offences such non-fatal strangulation may be relevant in capturing single incidents of domestic violence. The Discussion Paper includes a list of personal violence offences considered domestic violence on p45. There are also some offences under federal criminal law that may be applicable (eg s474.17 Crimes Act *Using a carriage service to menace, harass or cause offence*).

In terms of offences that can capture ongoing patterns of domestic violence and abusive non-physical behaviour, the Discussion Paper identifies s13 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) 'Stalking or intimidation with intent to cause fear of physical or mental harm'. Notably s7(2) and 'Meaning of intimidation' and s8 (2) 'Meaning of Stalking' identify that:

> For the purpose of determining whether a person's conduct amounts to [intimidation or stalking], a court may have regard to any pattern of violence (especially violence constituting a domestic violence offence) in the person's behaviour.

While the offence of 'Stalking or intimidation with intent to cause fear of physical or mental harm' does not require the prosecution to prove that the victim of the stalking or intimidation actually feared physical or mental harm (s13(4)), the prosecution must prove that the accused stalked or intimidated the alleged victim with the intent to cause the alleged victim to fear physical or mental harm (s13(1)); it is sufficient for the prosecution to prove that the accused knew that the conduct s/he engaged in is likely to cause fear in the other person (s13(3)).[14] This is a reasonable high bar and creates some limitations for its prosecution.

Cases have determined that s13(1) identifies a 'specific intent',[15] so evidence that the accused intended to cause the victim to fear physical or mental harm will be required. It will not be enough for the evidence to show that the accused intended to upset or disappoint the victim or cause the alleged victim to feel anger or regret.[16] It will also be insufficient to prove the behaviour was 'mischievous or uncalled for.'[17] Where evidence is the word of the accused against the word of the alleged victim, as is often is in cases of domestic violence, intent may be difficult to prove, especially given that the trier of fact will have to be satisfied of the requisite intent beyond reasonable doubt.[18] Thus while the behaviours of intimidation and stalking are defined quite widely and cover many forms of non-physical behaviour often associated with domestic violence (like sending numerous text messages or 'any conduct that causes a reasonable apprehension of injury' or watching or following a person), the intent requirements make this offence difficult to prove. Forms of domestic violence like gas-lighting, isolation, insults and emotional abuse and reproductive coercion may not be covered in this offence (or in other available offences in NSW) – and for the reasons outlined earlier – it is not clear that they should be.

[14] *Martin v R* [2017] NSWDC 82 at [99].
[15] *McIlwraith v DPP (NSW)* [2017] NSWCCA 13 at [30]-[32]; see also for example: *Spence v R* [2020] NSWDC 442 at [51]; *Martin v R* [2017] NSWDC 82 at [66].
[16] *Spence v R* [2020] NSWDC 442 at [55].
[17] *Dowling v R* [2015] NSWDC 205 at [14]
[18] *Spence v R* [2020] NSWDC 442 at [61]. Martin v R [2017] NSWDC 82 at [95].

NSW is yet to follow the recommendations of the ALRC in introducing a definition of domestic and family violence into their protection order legislation that clearly sets out that domestic and family violence may include coercive and controlling behavior and this creates real limitations in the civil protection order system in NSW (see question 10).

4. Could the current framework be improved to better address patterns of coercive and controlling behaviour? How?

It would be useful to enshrine a definition of domestic and family violence in NSW law (ideally it would be an Australia-wide definition) that can inform all areas of response to domestic and family violence. The definition would be used by health, education, child protection, policing, corrections and legal processes (such as sentencing, bail and evidence). If there was a single, clear definition used across all areas of response and service provision this would assist in ensuring there was agreement and broader understanding about the definition. It would assist in campaigns around broader public education and in professional training. There is already some movement towards this in NSW but this could be assisted with a legislative definition. Justice responses do not necessarily have to entail criminalization per se and the proposed definition could influence legal responses in general (including bail, sentencing, directing juries about what domestic violence entails etc.)

5. Does the law currently provide adequate ways for courts to receive evidence of coercive and controlling behaviour in civil and criminal proceedings?

- **In civil proceedings (ie for AVOs)**

I have noted elsewhere suggestions for improvement with this legislation (see question 2, 4 and 11).

- **In criminal proceedings**

In criminal proceedings the court can admit evidence about the relationship between the accused and the victim.[19] This type of evidence can't be used for propensity reasoning (ie he did it last time therefore he did it this time) but can be used to provide the background to the offending.[20] (See my comments in answer to question 4, 11.)

6. Does the law currently allow evidence of coercive control to be adequately taken into account in sentence proceedings?

The NSW Sentencing Bench Book recognizes several key principles in sentencing offences that take place in the context of domestic violence: [21]

- the 'special dynamics of domestic violence. A victim of a domestic violence offence is personally targeted by the offender and the offence is usually part of a larger picture of

[19] Section 95 Evidence Act 1995.
[20] This is discussed in the Criminal Trials bench Book [4-200] – [4-220] https://www.judcom.nsw.gov.au/publications/benchbks/criminal/tendency_and_coincidence_evidence.html
[21] See Judicial Commission of New South Wales, Sentencing Bench Book available at: https://www.judcom.nsw.gov.au/publications/benchbks/sentencing/domestic_violence_offences.html [63-500]-[63-520]

physical and mental violence in which the offender exercises power and control over the victim'[22]

- the offender often has a 'genuine, albeit irrational, belief of being wronged by the victim and also believes the violence is justified'[23]
- there is a 'continuing threat to the victim's safety even where the victim becomes estranged from the offender'[24]

Important in these principles is the recognition of the continuing and controlling nature of domestic violence. While these principles are not specifically reflected in sentencing legislation, they are reflected in several reported judgments which suggests that the principles are applied by at least some sentencing judges.

In *R v Aumash*[25] the offender and victim had been in a relationship and the victim ended the relationship because of the offenders and '*anger and controlling behaviour*' [at 2]. Despite her ending the relationship Aumash continued to contact her, attended at her home and act in an intimidating way including using abusive language towards her.

The offender was charged two charges of entering a dwelling house without the consent of the victim (s 111 Crimes Act 1900 NSW – aggravated offences of entering a dwelling house, 14yrs max penalty and 1 charge of using a carriage service to menace, harass or cause offence in relation to various SMS messages and 488 phone calls (s 474.17 (1) *Criminal Code Act 1995* (Cmth)). In sentencing the offender to serve a period of imprisonment of 3 years and 3 months (with a non-parole period of 2 years), Judge Haesler SC DCJ observed:

> I have to sentence a former partner who has failed to understand how serious a crime it is to invade a woman's home and otherwise intimidate her. As the facts in this matter make clear Aumash… sought to *exercise coercive power and control over* [the victim] … As a result of such actions women learn to fear and may never truly feel truly safe from being personally targeted. They lose a feeling of security even in their own home [at 3]. The sentencing judge noted that *no offence should be assessed devoid of context*' [at 32] and the 'court's obligation to vindicate the dignity victim of domestic violence and to express the community's disapproval of that offending. Men must be held responsible for their actions' [at 62].

In *R v Edwards (No 3)*[26] the offender was convicted of murder of his wife of 33 years. His wife had left him and started a new relationship. The judge commented:

> The offender *could not accept that Ms Edwards had a right to autonomy*; a right to choose her own course in life. He could not accept that she no longer wanted to be in a relationship with him and was *enraged by her choice* to engage in a relationship with Mr Mills. He considered himself entitled to insist that Ms Edwards conform to his wishes rather than pursuing her own.

[22] Referring to: *R v Burton* [2008] NSWCCA 128 at [97]
[23] Referring to *Xue v R* [2017] NSWCCA 137 at [53]; *Ahmu v R* [2014] NSWCCA 312 at [83]
[24] Referring to *R v Dunn* (2004) 144 A Crim R 180 at [47]
[25] *R v Aumash* [2020] NSWDC 168
[26] *R v Edwards (No 3)*[26] [2019] NSWSC 1815

R v Barnett[27] the offender was sentenced for offences of detaining a person and contravention of an AVO and the judge commented:

> I also accept that the circumstance that the offence occurred in connection with domestic violence … more properly treated as an aggravating factor… I find the purpose of the detention was to *exert psychological control* … The offender was exerting or trying to *exert emotional ascendency.*

In *R v Ragg*[28] the victim and offender had been in a relationship for 12 years and had three children together. The offender carried out a range of both physical and non-physical offences (threats) over a period of time. In sentencing the offender to a sentence of 18 years, King SC DCJ stated:

> As a general observation it is most frequently the case that the perpetrators of sexual offences commit such offences to obtain sexual gratification, and that there is often an overlay of a desire to also obtain psychological gratification by *exercising the power of domination and control,* often exercised by demeaning and degrading acts forcefully imposed on the victim.

In *R v June Oh Seo*[29], where the offender was convicted of murder, the judge commented:

> His *controlling nature* with women appears to be of long standing, and even the intervention of the criminal justice system in 2016 did not give the offender pause for thought. He continued in an attitude that his romantic partner was his to dictate to.

If the answer is no to either q5 or 6, how could the law be improved to ensure the evidence is admissible and is given adequate weight in civil and/or criminal proceedings?

While there are some judicial officers who recognize the patterns and dynamics of domestic and family violence there may be more consistency if there was specific recognition of coercive control in sentencing guidance. Further the suggestion of a whole of NSW definition of domestic and family violence (see question 4) may be applicable to the sentencing context as well.

7. What are the advantages and/or disadvantages of creating an offence of coercive control?

In many ways the introduction of an offence of coercive control brings with it the same advantages and disadvantages associated with use of the criminal justice system in response to domestic violence generally.

[27] *R v Barnett* [2020] NSWDC 193 at [21]
[28] *R v Ragg* [2020] NSWDC 210 at [33]
[29] *R v June Oh Seo* [2019] NSWSC 639 at [85]

Disadvantages:

- Net-widening, especially for marginalized people.
- Inapplicability to certain groups and contexts- coercive control is but one form of domestic and family violence.
- Minimization of offending / use to negotiate offences.
- Misapplication to victims of coercive control.
- Women pressured into the criminal justice process as complainants.
- Redirection of more resources into the criminal justice process.
- Generally, ineffectiveness of criminal responses to deter / rehabilitate/ or protect from offending.

Given the current lack of recognition of many forms of coercive control there is likely to be wider group of people caught up in the criminal justice process ('net-widening') as a result of the introduction of this offence.

Like all criminalization, the criminalization of coercive control is likely to disproportionately effect marginalized groups (Aboriginal and Torres Strait Islander people[30], culturally and linguistically diverse people[31] and people who use illicit drugs, people who are homeless or highly visible.) A criminal conviction has significant implications for people's employment for the long term and thus their ability to contribute to the family's support and it has implications for the offender (and in some cases the victim's) immigration status if visas are insecure. The effects of penalization (including fines,[32] community supervision[33] and incarceration) on employment are also greater for those who are already marginalized.[34] If incarcerated, especially for a short period, the offender is unlikely to get access to rehabilitative programs.

There is some evidence that coercive control is not a concept that is a good fit with certain groups of people in the community, including Aboriginal and Torres Strait Islander people.[35] Notably Harry Blagg and colleagues argues that 'coercive control' is only one form of family violence. They explain:

[30] Heather Douglas and Robin Fitzgerald 'The Domestic Violence Protection Order System as Entry to the Criminal Justice System for Aboriginal and Torres Strait Islander People' (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 41-57. doi: 10.5204/ijcjsd.v7i3.499 Note also non-fatal strangulation statistics in Queensland where 21% of people charged with non-fatal strangulation are Aboriginal and Torres Strait Islander people, see Queensland Sentencing Advisory Council, *Sentencing Spotlight Choking, Suffocation Or Strangulation In A Domestic Setting.* Available at: https://www.sentencingcouncil.qld.gov.au/__data/assets/pdf_file/0004/614749/sentencing-spotlight-on-choking-suffocating-or-strangulation-in-a-domestic-setting.pdf (viewed 25 January 2021).

[31] Emma Brancatisano and Lin Elvin, 'Push to criminalise coercive control in relationships sparks concern for migrant and refugee women.' SBS News, January 2021, https://www.sbs.com.au/news/push-to-criminalise-coercive-control-in-relationships-sparks-concern-for-migrant-and-refugee-women?cid=news:socialshare:twitter

[32] Julia Quliter and Russel Hogg, 'The hidden punitiveness of fines' (2018) 7 (3) *International Journal For Crime, Justice and Social Democracy* 10-40.

[33] Robin Fitzgerald et al, 'Sentencing, Domestic Violence, and the Overrepresentation of Indigenous Australians: Does Court Location Matter?' (2019) *Journal of Interpersonal Violence*, online first: doi: 0.1177/0886260519885916

[34] Christy Visher, Sara Debus-Sherrill and Jennifer Yahner, 'Employment After Prison: A Longitudinal Study of Former Prisoners' (2011) 28 *Justice Quarterly* 696-718, https://www.tandfonline.com/doi/full/10.1080/07418825.2010.535553

[35] Heather Nancarrow, *Unintended consequences of domestic violence law: Gendered aspirations and racilaised identities*. Palgrave, 2019.

> While mainstream models of intervention favour approaches, such as the Duluth model, that explicitly champion increased use of mainstream penalties to leverage men into behaviour change programs, the critical literature suggests that this approach does not work for Aboriginal and Torres Strait Islander families. This is because it advances mono-causal explanations for family violence—patriarchal male power, coercive control, gender inequality—and avoids engaging in difficult debates about colonial violence, collective disempowerment, trauma, alcohol abuse, mental health, and disability; and because Aboriginal and Torres Strait Islander men and women are simply not deterred by the threat of mainstream sanctions.[36]

If coercive control can be heard in the magistrate's court and attracts a lower level penalty, the offence is likely to be used to negotiate a plea of guilty away from one of the traditional offences (eg. stalking, non-fatal strangulation, bodily harm type assaults etc) in order to attract that lower level penalty. Arguably, this may have the effect of minimizing offending and encouraging a less serious response to domestic and family violence offending that is currently penalised.[37]

Many commentators have been concerned about the potential misapplication of a coercive control offence to people who have experienced domestic and family violence rather than perpetrated it.[38] Researchers have identified this problem in the context of breaches of protection orders, which may currently be the most similar offence to a potential coercive control offence.[39] A study by the NSW women's Legal service in 2014 reported an increase in women being identified as perpetrators of domestic and family violence in protection order cases.[40] Notably, women from marginalized groups are likely to be more at risk of misidentification. [41]

In circumstances where there are finite resources, the introduction of a new offence necessarily directs resources towards it, to policing, lawyers, court staff and processes and corrections. All of these professionals need to be trained and retrained, and implementing the offence obviously requires time and other costs (interviews; evidence collection; support to keep victims engaged in the process; file/record keeping; attending court for bail applications, adjournments, directions, hearing, sentences; perhaps accessing expert reports). Thus the introduction of the offence will direct resources away from other women's safety responses. The criminal law response also requires that survivors' resources are also directed towards planning, preparing for and attending

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[36] Harry Blagg et al *Understanding the role of Law and Culture in Aboriginal and Torres Strait Islander communities in responding to and preventing family violence* (ANROWS Report, 2020) at 62. Available at: https://20ian81kynqg38bl3l3eh8bf-wpengine.netdna-ssl.com/wp-content/uploads/2020/07/Blagg-RR-LawCulture.1.pdf (visited 25 January 2021)

[37] Julia Tolmie, 'Coercive control: To criminalize or not to criminalize?' (2018) 18 (1) *Criminology & Criminal Justice* 50-66 at 51.

[38] Hayley Boxall, Christopher Dowling and Anthony Morgan, *Female perpetrated domestic violence: Prevalence of self-defensive and retaliatory violence.* Trends and Issues No. 584, January 2020, Australian Institute of Criminology; Leigh Goodmark, *Decriminalizing domestic violence: A balanced policy approach to intimate partner violence*. (2018, Oakland, California: University of California Press); Tolmie ibid.

[39] Ellen Reeves, Family violence, protection orders and systems abuse: views of legal practitioners. (2019) 32 *Current Issues in Criminal Justice* 91-110; Alicia Jillard and Julia Mansour, Women victims of violence defending intervention orders. (2014) 39(4) *Alternative Law Journal* 235-240

[40] Julia Mansour, Women defendants to AVOs: What is their experience of the justice system? 18 March 2014 https://www.wlsnsw.org.au/law-reform/women-defendants-to-avos/

[41] Heather Douglas and Robin Fitzgerald 'The Domestic Violence Protection Order System as Entry to the Criminal Justice System for Aboriginal and Torres Strait Islander People' (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 41-57. doi: 10.5204/ijcjsd.v7i3.499 .

more court.[42] There are emotional and material costs invested in this.[43] In a context of limited resources directing resources away from women's safety services, including public housing and counselling may not be considered the best use of resources. It is also questionable from the justice perspective whether, if law is the right way to direct resources, whether family law responses might not be better supported instead.

Women maybe be pushed into the criminal justice system by well-meaning police and others, and in circumstances where their evidence is not needed to prove the offence, they may have no control over the process. There is a real risk then, depending on how the offence is framed and how prosecution policies around the role of victim's views are taken into account, that women will experience further coercion and control through the prosecution process. Research suggests that women are generally reluctant to engage with the criminal law for a range of reasons beyond fear of their perpetrator, including fear of the process, financial and time costs associated with giving statements and coming to court, the risk of loss of income, children, accommodation, status and shame.[44] These risks and losses are disproportionately experienced by marginalized women. In this context, Aya Gruber has pointed out that victims' and perpetrators' interests are not always zero-sum:

> A battered woman's desire to be free from violence conflicts with her abuser's desire to batter. But as members of socioeconomically marginalized group the couple may have convergent interests in economic security. As racial minorities they may have convergent interests in freedom from police over-reach. As immigrants they may have convergent interests in stemming the tide of anti-immigrant fervor. Many victims and perpetrators have convergent interests in maintaining their marriage and family. Yet domestic violence law, in the name of women's interests makes it easier for the state to arrest, deny low income housing, deport immigrants and impose [separation].[45]

Imprisonment may provide some respite from further violence for a period of time, imprisonment also makes re-offending more likley. The high cost of justice responses and imprisonment in Australia is well-known – imprisonment costs approximately $107,300 per year or $293 per day.[46] Justice responses may be more expensive than, for example, a full time social work case worker position (median wage $65,000 per year in Australia), a year of rent (approximately $36,000 per year) . The indirect costs of prison are include that prison worsens the physical and mental health of the inmate, their ability to return to work declines with length of prison term as does the likelihood of homelessness – the Queensland productivity Commission indicates indirect costs equal approximately $40,000 per year on top of the direct costs, recidivism is also more likely through

[42] Heather Douglas, 'Legal Systems Abuse and Coercive Control' (2018) 18 (1) *Criminology & Criminal Justice* 84-99.
[43] Judith Herman, 'The mental health of crime victims: Impact of legal intervention'. (2003) 16 *Journal of Traumatic Stress* 159–166. doi:10.1023/A:1022847223135; see also Heather Douglas, 'Domestic and family violence, mental health and well-being and Legal Engagement' (2018) 25 (3) *Psychiatry, Psychology and Law* 341.
[44] Lucy Williams and Sandra Walklate, 'Policy Responses to Domestic Violence, the Criminalisation Thesis and 'Learning from History'' (2020) 59 (3) *The Howard Journal of Crime and Justice* 305-316.
[45] Aya Gruber, *The feminist war on crime: The unexpected role of women's liberation in mass incarceration*. University of California Press,194
[46] Queensland productivity Commission, Inquiry into imprisonment and recidivism, (QPC, 2019), 67, https://qpc.blob.core.windows.net/wordpress/2019/02/Imprisonment-and-recidivism-Draft-Report.pdf ; Productivity Commission, 2020. Corrective Services, *Report on government services*, Part C Section 8. Table 8A.18. https://www.pc.gov.au/research/ongoing/report-on-government-services/2020/justice/corrective-services; see also Anthony Morgan, *How much does prison really cost? Comparing the costs of imprisonment with community corrections* . AIC, 2018.

prison. [47] Studies on the use of criminalisation /prosecution to stop domestic violence offending / improve safety have mixed results, with some studies showing increased victimisation after prosecution.[48]

Advantages:

There are at least three important advantages to the introduction of a criminal offence. Because the introduction of such an offence is backed by the criminal justice system (including police and courts) it is a fast track way to:

- Clearly recognize the experience of victims
- Publicly denounce this type of behaviour.
- Contribute to broader public education about this type of behavior.
- Possibly effect resourcing of support programs

Many who experience domestic and family violence find that coercive control is the worst aspect of the domestic and family violence. In the many interviews I have undertaken with women who have experienced domestic and family violence the non-physical forms of abuse including the put downs, belittling, the slow isolation and the degrading demands are the worst aspects of the abuse. When I asked 60 women from diverse backgrounds what the worst aspect of their abuse was, 44 of them (73%) said it was the non-physical forms of abuse they experienced with most (n40) highlighting emotional abuse.[49] Many of the women I spoke to were frustrated about the lack of recognition of the effects of this form of abuse both in the community, and in the justice process particularly by police and by magistrates and judicial officers in protection order matters and in the family courts.

I think it is true that the introduction of the non-fatal strangulation offence in Queensland brought all the positive advantages listed above and there would now be few magistrates, police, criminal lawyers and domestic violence workers who would not understand the high risks associated with non-fatal strangulation. Furthermore, women who have experienced the deep fear and terror associated with non-fatal strangulation now have that experience recognized more widely. One might expect there would be similar effects from the criminalization of coercive control. Many of the supporters of the introduction of a coercive control offence identify these four advantages in their arguments for support of a new offence of coercive control. Some have also argued that another reason they want an offence of coercive control included in criminal legislation is that it will encourage better understanding in the family courts and domestic violence protection order courts about this form of violence. Others claim that resources for support programs will improve once it is recognized in the criminal law.

Notably, the introduction of coercive control offences in other countries has not led to high levels of prosecution. For example, there were 59 prosecutions of the coercive control offence equivalent in Ireland in 2020.[50] It may be argued that the risk of over use is ill-conceived and that simply having

[47] Queensland productivity Commission, Inquiry into imprisonment and recidivism, (QPC, 2019), 68.
[48] Lorraine Mazerole et al, *Criminal Justice Responses to Domestic and Family Violence* (2018, UQ), 48-49; 137 available at: https://www.courts.qld.gov.au/__data/assets/pdf_file/0006/586185/systematic-review-of-criminal-justice-responses-to-domestic-and-family-violence.pdf viewed 26 January 2021.
[49] Heather Douglas, *Women, Intimate Partner Violence and Law*. OUP 2021, chapter 3.
[50] Conor Lally, 'Number of people charged with domestic violence surges amid pandemic' 26 January 2021 *The Irish Times – r*eporting on police data. See also Sandra Walklate and Kate Fitz-Gibbon, 'The criminalisation of coercive control: The power of law?' (2019) 8 (4) *International Journal of Crime Justice and Social Democracy* 94.

the offence on the books is the main aim and by itself (without significant numbers of prosecutions) will help to positively influence other aspects of the domestic violence response. It is risky however to use the criminal law simply 'send a message'. If introduced, it should be assumed coercive control would be utilized regularly by police.

It is not clear that criminalization would lead to improved resourcing of other programs. For example, it is not clear that support programs for women who had experienced non-fatal strangulation or rehabilitation programs for those who perpetrated it changed in response specifically to the introduction of the offence in Queensland.

I think the advantages cited for the introduction of a coercive control offence are extremely important but there may be other more direct ways to effect them. For example, a general definition of domestic violence as outlined in response to question 4 above may be an option.

Public education campaigns that extend to schools and the wider community have been shown to be helpful. For example, an evaluation of the 'one punch can kill' education campaign in Queensland found the campaign *itself* was extremely effective in improving people's understanding of this issue.[51]

8. How might the challenges of creating an offence of coercive control be overcome?

The negative effects associated with the introduction of this offence would be difficult to overcome. Many years of consideration of how to reduce the over-criminalisation of Aboriginal and Torres Strait Islander people has not resulted in change. Indeed, in some places in Australia it is becoming worse.

Many of the negative effects of the introduction of an offence of coercive control could be ameliorated with significant training provided to police, magistrates and support workers, a significant injection of funding into prison and remand programs and prison to work programs, improved metal health services attached to criminal justice interventions and so on but the cost would be significant. There are strong arguments that, on a cost benefit analysis- which has not been done in any jurisdiction that has introduced a similar offence- the safety of women and children and the rehabilitation and change in perpetrators could be better effected in other ways through community based education, interventions and supports rather than through the criminal justice system.

[51] Debra Haszard and Celia Farnan, *One punch can kill assault reduction campaign: Online survey and qualitative exploration.* 2011, available at: https://cabinet.qld.gov.au/documents/2011/nov/one%20punch%20can%20kill/Attachments/Attachment%201%20-%20One%20Punch%20Can%20Kill%20campaign%20research.PDF (viewed 25 January 2021.) The Archers radio program in the UK was also identified as being extremely important in highlighting this form of abuse: see Evan Stark, "The 'Coercive Control Framework': Making Law Work for Women," in Marilyn McMahon and Paul McGorrery, *Criminalising coercive control*. Springer, 2020, 38.

9. If an offence of coercive control were introduced in NSW, how should the scope of the offence be defined, what behaviours should it include and what other factors should be taken into account?

I am not convinced a new offence is what is needed to respond to the concern that coercive control is not recognized in the community, or that an offence will improve women's safety. I think there are preferred ways to promote this.

However, if an offence is introduced into the criminal law to capture the forms of non-physical abuse that cause psychological harm and limit personal freedom, my preference would be to avoid the language of coercive control, given its complexity and that it is only one cause of domestic and family violence.[52] I would prefer to use language that is easier to understand for most people, covers a broader range of causes of non-physical forms of violence and extends to relationships beyond domestic and family violence.

I see several problems with the language of the NSW Bill[53], beyond the use of the language of coercive control. The proposed offence is extremely wide. For example, in a relationship a person who takes control of the banking and finances is likely to make the other person dependent. Certainly, there is a defence of reasonableness proposed, but that would not stop the initial charge from being made, it places the onus on a potentially highly under resourced accused to prove the behavior was reasonable. Further, given that the prosecution is likely to be backwards looking, in the sense of occurring after the victim has decided to separate, it might be difficult to prove that the behaviour was reasonable at the time. There is no requirement for the offender to have a particular intent towards the victim, rather the offence is wholly based in an ordinary person's perceptions of events. This offence may open up the possibility of the state acting in a 'patriarchal' / oppressive way in the 'best interests' of women (or men) who do not know what's good for them, in prosecuting their partners for coercive control. The woman's evidence may not be needed so it might be difficult for her to withdraw from the criminal justice process even if she wants to. It would be enough potentially for her well-meaning relative to give evidence of his refusal to let her see them, or for the bank representative to give evidence that even though her salary went into the joint account she never accessed it or sought to access it. The language of the proposed offences brings significant risks.

I note that the 'gold standard' of the coercive control offence is said to be the *Domestic Abuse (Scotland) Act.* It sets out an offence using the terminology 'domestic abuse'. This language is less technical and complicated than 'coercive control' and easier to understand. It captures the on-going nature of domestic violence ('course of behaviour' section 1) and identifies Domestic Abuse as 'behaviour' directed at the victim that is 'violent, threatening or intimidating' (section 2(2)). The offence set the 'relevant effects' of the domestic abuse (section 3) that include 'creating dependence or subordination'; 'isolating the victim'; 'controlling, regulating or monitoring' or 'frightening, humiliating, degrading of punishing' the victim. This criminal offence is limited to 'domestic abuse' and includes a number of conditions including that an ordinary person would consider the course of behaviour would be 'likely' to cause physical or psychological harm' to the victim *and* the accused either intended to cause the harm or was reckless about it (section 1). The

[52] Harry Blagg et al, *Understanding the role of Law and Culture in Aboriginal and Torres Strait Islander communities in responding to and preventing family violence* (ANROWS Report, 2020) at 62. Available at: https://20ian81kynqg38bl3l3eh8bf-wpengine.netdna-ssl.com/wp-content/uploads/2020/07/Blagg-RR-LawCulture.1.pdf (visited 25 January 2021)

[53] *Crimes (Domestic and Personal Violence) Amendment (Coercive Control—Preethi's Law) Bill 2020*

offence does not require the victim to suffer harm (section 4). On some levels this is important as it means the victim doesn't have to prove harm, the offence is focused on the actions of the accused but is also means it covers a very wide range of behaviours that the victim may not even have seen as problematic. The offence includes a stratified form – with higher and lower penalties available depending on whether it is dealt with summarily.

I have argued elsewhere that the Queensland offence of 'torture', which is often applied to cases of domestic violence in that state could be a helpful starting point for the creation of another offence that could be called 'cruelty' – or something along those lines.[54] The stratified approach (of the more serious crime or torture with the less serious crime of cruelty and associated penalties) reflects the approach of Scotland.

The Queensland crime of torture (section 320A *Criminal Code*) is defined as 'the intentional infliction of severe pain or suffering on a person by an act or series of acts done on 1 or more than 1 occasion'. The provision states that pain and suffering may be permanent or temporary and may be physical, mental, psychological or emotional. This offence can be charged where the accused engages in a course of conduct involving a series of controlling and coercive actions intended to cause, and causing, severe pain and suffering to the victim. The form of injury is notably broad and does not require physical injury. It has been applied to a number of cases involving domestic violence, notably in *R v HAC,*[55] HAC was found guilty of torture of his wife over a six-month period. Incidents underpinning the torture charge included physical violence and also forcing her to swallow chillies; to lick up her own vomit; burning her with a hot poker; making her sleep on the veranda, calling her a dog; disallowing her use of the shower and toilet; forcing her to use an outside hose to wash; and spitting and urinating on her. The offence of Torture in section 320A of the *Criminal Code (Qld)* states:

> (1) A person who **tortures** another person commits a crime.
> Maximum penalty – 14 years imprisonment.
> (2) In this section –
> **"pain or suffering"** includes physical, mental, psychological or emotional pain or suffering, whether temporary or permanent.
> **" Torture "** means the intentional infliction of severe pain or suffering on a person by an act or series of acts done on 1 or more than 1 occasion."

The limitations of the torture offence are that the prosecution must prove that the accused intentionally inflicted severe pain or suffering. Pain or suffering would also have to be proved beyond reasonable doubt. Because of its high penalty it must be heard in the District Court and this creates significant delay.

I have elsewhere suggested that a new offence be introduced to the Criminal Code that would be limited to the context of domestic and family violence, could capture lower level domestic and family violence and could be heard in the magistrate's courts (potentially subject to the magistrate's discretion). I referred to this offence as *Cruelty* and suggested it would be placed immediately after Torture in the code at section 320B:

[54] Heather Douglas, 'Do we need a specific domestic violence offence?' (2015) 39 *Melbourne University Law Review* 434 available at: https://law.unimelb.edu.au/__data/assets/pdf_file/0011/1774550/02-Douglas.pdf
[55] [2006] QCA 291

(1) A person who commits cruelty to another person commits a crime. Maximum penalty — x years imprisonment.
(2) If the person commits cruelty to a person in a relevant relationship the offender is liable to imprisonment for x years [higher penalty than for (1)].
(3) In this section —
"pain or suffering" includes physical, mental, psychological or emotional pain or suffering, whether temporary or permanent.
"Cruelty" means the infliction of pain or suffering on a person by an act or series of acts done on 1 or more than 1 occasion.
"relevant relationship" means a relevant relationship under the Domestic and Family *Violence Protection Act 2012* (Qld) s 13.

In common law jurisdictions I suggested it may be appropriate to include a statement of mens rea in the proposed provision. For example the following words might be employed: 'cruelty means the infliction of pain or suffering on a person by an act or series of acts done on 1 or more than 1 occasion in circumstances where the offender knew or ought reasonably to have known that pain or suffering would be likely to be a consequence of the act or series of acts.' I note that a significant limitation of this offence may be that harm would need to be proved, so this would have limitations on the range of scenarios that could be effectively prosecuted.

10. Could the current legislative regime governing ADVOs better address coercive and controlling behaviour? How?

The definition of domestic / family violence in the *Crimes (Domestic and Personal Violence) Act* 2007 is unclear and should be written in plain language and ideally it should be consistent with other jurisdictions. This was a recommendation of the Australian Law Reform Commission in 2010 where the commission recommended that the definition of domestic / family violence should be:[56]

Family violence is violent or threatening behaviour, or any other form of behaviour, **that coerces or controls a family member or causes that family member to be fearful**. Such behaviour may include but is not limited to:
(a) physical violence;
(b) sexual assault and other sexually abusive behaviour;
(c) economic abuse;
(d) emotional or psychological abuse;
(e) stalking;
(f) kidnapping or deprivation of liberty;
(g) damage to property, irrespective of whether the victim owns the property;
(h) causing injury or death to an animal irrespective of whether the victim owns the animal; and
(i) behaviour by the person using violence that causes a child to be exposed to the effects of behaviour referred to in (a)–(h) above.

Other jurisdictions like Victoria[57] and Queensland[58] statutes reflect this definition. See my comments in response to question 4.

[56] ALRC 2010 Rec 5-1.
[57] Section 5 *Family Violence Protection Act 2008* Vic.
[58] Section 8 *Domestic and Family Violence Protection Act 2012* Qld.

11. **Should the common law with respect to context and relationship evidence be codified within the CPA (or other relevant NSW legislation) to specifically govern its admissibility in criminal proceedings concerning domestic and family violence offences? If yes, how should this be framed?**

I think it would be useful to include a legislative provision with respect to context and relationship evidence in a way that is consistent with the common law. This has occurred in Victoria[59] and more recently in Western Australia.[60]

The Western Australian provisions (ss38-39G *Evidence Act* 1906 WA), introduced in 2020, were introduced after significant research[61] and discussion and manage to capture the various dimensions of social entrapment experienced by many who live through domestic and family violence: coercive control, issues associated with the family violence safety response and structural intersectionality.[62] If such a provision is introduced it should endeavor to capture these overlapping issues as they all impact significantly on the victim/survivors experience of (and response to) domestic and family violence. Section 38 of the *Evidence Act* 1906 WA states:

> 38 What may constitute evidence of family violence
> 1. For the purposes of sections 39 to 39G, evidence of family violence, in relation to a person, includes (but is not limited to) evidence of any of the following —
> a) the history of the relationship between the person and a family member, including violence by the family member towards the person, or by the person towards the family member, or by the family member of the person in relation to any other family member;
> b) the cumulative effect of family violence, including the psychological effect, on the person or a family member affected by that violence;
> c) social, cultural or economic factors that impact on the person or a family member who has been affected by family violence;
> d) responses by family, community or agencies to family violence, including further violence that may be used by a family member to prevent, or in retaliation to, any help-seeking behaviour or use of safety options by the person;
> e) ways in which social, cultural, economic or personal factors have affected any help-seeking behaviour undertaken by the person, or the safety options realistically available to the person, in response to family violence;
> f) ways in which violence by the family member towards the person, or the lack of safety options, were exacerbated by inequities experienced by the person, including inequities associated with (but not limited to) race, poverty, gender, disability or age;

[59] Section 322 J Crimes Act 1958 Vic; *The Queen v Donker* [2018] VSC 210 at [99]; see also Heather Douglas, "Social Framework Evidence: Its Interpretation and Application in Victoria and Beyond" [2015] ELECD 140; in Freiberg, Arie; Fitz-Gibbon, Kathe (eds), "Homicide Law Reform in Victoria" (The Federation Press, 2015), 94

[60] Sections 37-39G *Evidence Act 1906* WA

[61] Stella Tarrant, Julia Tolmie and George Giudice, *Transforming legal understandings of intimate partner violence: Final report* (ANROWS, 2019).

[62] See Heather Douglas, Stella Tarrant and Julia Tolmie, 'Social Entrapment Evidence: Understanding Its Role In Self-Defence Cases Involving Intimate Partner Violence' forthcoming 2021 *University of New South Wales law Journal.* See also Heather Douglas, Hannah McGlade, Stella Tarrant and Julia Tolmie, 'Facts seen and unseen: Improving justice responses by using a social entrapment lens for cases involving abused women (as offenders and victims)' (2020) *Current Issues in Criminal Justice* online first: 10.1080/10345329.2020.1829779

g) the general nature and dynamics of relationships affected by family violence, including the possible consequences of separation from a person who commits family violence;
h) the psychological effect of family violence on people who are or have been in a relationship affected by family violence;
i) social or economic factors that impact on people who are or have been in a relationship affected by family violence.

The WA evidence provisions also include sections which are directed at expert evidence, self defence, and jury directions. While it is early days, these provisions offer a promising model, which should be considered in any review of the current NSW law.

12. Would jury directions specifically addressing domestic and family violence be of assistance in criminal proceedings? If so, what should a proposed jury direction seek to address?

Not answered.

13. Should provisions with respect to sentencing regimes be amended? If so, how?

See question 4 and question 6.

14. Are there any other potential avenues for reform that are not outlined or included in the questions above?

Not answered.

15. What non-legislative activities are needed to improve the identification of and response to coercive and controlling behaviours both within the criminal justice system and more broadly?

Generally, see my comments in response to Question 4. New South Wales government agencies already identify coercive and controlling behaviour in their online information to victims suggesting that there is already considerable knowledge about this type of violence in some agencies at least at the policy level, for example NSW Legal Aid[63] and NSW Police.[64] Greater knowledge of coercive control is important and may be advanced by the introduction of a broad definition of domestic violence that could be applied across services and responses.

It would be extremely problematic if the only way to ensure improved safety responses is through criminalisation (for the reasons I have outlined), but it is very clear that safety responses and resources for those who have experienced family violence should be significantly improved. For example, there is lack of both emergency and continuing accommodation for those leaving or thinking about leaving violence. Financial support is often insufficient and lack of financial support may be an obstacle to seeking safety. Many women find it difficult to access limited domestic and family violence support services, sometimes giving up because they have to wait too long. The legal aid tests are too stringent, and many women go without and self-represent as a result – increasing

[63] Legal Aid NSW website: https://www.legalaid.nsw.gov.au/publications/factsheets-and-resources/charmed-and-dangerous-factsheet-1-understanding-domestic-and-family-violence
[64] NSW Police website: https://www.police.nsw.gov.au/crime/domestic_and_family_violence/what_is_domestic_violence

their trauma or scrounge for funds to pay private lawyers, increasing their debt.[65] Men's behavior change programs, mental health and drug rehabilitation programs are under-resourced. The case loads for magistrates and judicial officers in the protection order and family law context are too high.[66] Specialised domestic violence courts should be available across NSW.[67] The churn of child protection officers is too high, in part because they are under-resourced which forces them into a risk averse (rather than strengths based) model.

Thankyou again for the opportunity to contribute to this inquiry.

Yours sincerely,

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[redacted]

[65] Heather Douglas, 'Family violence, lawyers and debt.' (2020) 33(3) *Australian Journal of Family Law* 264.
[66] Eg: see Australian Law Reform Commission, *Family Law for the future- An inquiry into the family law system.* (ALRC, 2019), 398
[67] Lorraine Mazerole et al, *Criminal Justice Responses to Domestic and Family Violence* (2018, UQ), vi, 66; available at: https://www.courts.qld.gov.au/__data/assets/pdf_file/0006/586185/systematic-review-of-criminal-justice-responses-to-domestic-and-family-violence.pdf viewed 26 January 2021.