Submission No 23

COERCIVE CONTROL IN DOMESTIC RELATIONSHIPS

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Submission to the Parliamentary Joint Select Committee on Coercive Control

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I am a professor in criminal law at The University of Auckland. Prior to taking up my position at Auckland in 1999, I spent ten years as an academic at the University of Sydney. My views, as expressed in this submission, are therefore based on 30 years spent as an criminal law academic with a research specialty in intimate partner violence. They are also shaped by my six years as a member of the New Zealand Family Violence Death Review Committee (NZFVDRC).

Introduction: Defining the problem

If we are to improve the response to family violence then the appropriate starting point for any inquiry must be to ask ourselves what a family violence safety system would look like. At present most jurisdictions do not have such a system, other than by default. In other words, most jurisdictions (like New Zealand) have a fragmented collection of responses to family violence that are part of systems that were designed to deal with things other than family violence. These responses tend to be single issue focussed, depend on victim initiation and are often reactive rather than directed at managing the ongoing patterns of harm that are typical of family violence.

The NZFVDRC, in its fifth report, proposed developing our current "default system" into a functional family violence safety system – that is, a safety system which has no wrong door and which has a raft of multi-agency safety responses tiered according to the risk and dangers presented at any point in time (see chapters 2 and 4 of the FVDRC, *Fifth Report: January 2014 to December 2015*, 2016 NZ Health Quality and Safety Commission (available online)). This would require that all agencies and professionals have an understanding of family violence and have developed a safety response that is appropriate for where they sit within that safety system. Such a response may require working in a multi-agency team to address the complex needs of all members in a family so that hidden victims are not overlooked (sometimes in the death reviews we could see that opportunities for intervention had presented at a prior point in time in relation to victims in the family other than the ultimate deceased).

It is my own view that the criminal justice system needs to be a part of the family violence safety response as it is one forum which can be used to force the person using violence to do things that they would not otherwise choose to do. But the criminal justice system as it currently stands, and by itself, is not a family violence *safety* response. It is a system originally designed to deal with social harms other than family violence. It is directed at proving that clearly defined wrongful behaviour has taken place – whether it be a one off event or even if it be a raft of behaviours over a period of time - and punishing the person found to be at fault.

Punishment per se is not necessarily a helpful response in all cases involving family violence – indeed, certain forms of punishment (depending on the circumstances) could create further harm. And punishment is not a useful aim in this context. In my own view we need to be evolving better and more nuanced responses to those using family violence. The No to Violence and Men's Referral Service in Victoria suggest that we need responses that are designed to contain the predominant aggressor's abusive behaviours, escalate consequences

for continued abusive behaviours and hold those who are using abuse in spaces where if they choose to be accountable appropriate support is available to them (See the submission to the Royal Commission into Family Violence Victoria: "Strengthening Perpetrator Accountability Within the Victorian Family Violence Service", June 2015, at 14). In other words, we need responses to those using violence that are not one-off reactions to events that have taken place in the past and are directed at containing harm and encouraging accountability. This might involve developing different sentencing responses in the criminal justice system – but it will also necessitate responses that involve working with other agencies. And it follows from what I have said that we also need a focus on victim safety. In New Zealand the safety of the victim is not currently even a mandatory or priority consideration when sentencing a family violence offender under the Sentencing Act 2002, despite the fact that we know that intimate partner violence is likely to be a strategic and retaliatory pattern of harm. Of course responses to those using violence may require addressing other issues and, as mentioned, attending to the needs and safety of multiple family members other than the immediate victim.

Criminalising coercive control

We know that most situations involving coercive control also involve the use of physical violence – it is a directly coercive tactic that can be used in addition to threats, surveillance and degradation, as well as the indirect control tactics designed to undercut the victim's independance (such as isolation and microregulation). This physical violence can be extremely brutal or it can be ongoing low level violence that cumulatively wears the victim down. Currently the criminal justice system generally responds, if it does respond at all, to the incidents of physical violence in any pattern of coercive control – reacting to each incident that is charged and proven by setting and administering a punishment that, in theory, is a proportionate response to that incident (as modified by other considerations, such as any prior convictions).

Whilst it is tempting to assume that enacting an offence of coercive control will improve the criminal justice response to intimate partner violence because it allows us to cluster a larger pattern of behaviours into the charge and tailor the punishment accordingly, I think we have to be very careful about this. I have provided my thoughts on the bigger task that faces us (above) in order to make the point that enacting another criminal offence in this manner does not automatically produce a better response to family violence. Depending on how successful the implementation of such an offence is, it may generate a more onerous punishment and/or a punishment in respect of behaviours that would not otherwise be punished, but it does not integrate the criminal justice response into a larger multi-agency safety response and it is unlikely to produce an outcome that is directed at protecting the victim whilst assisting the person using abuse to journey towards accountability.

Furthermore, there are some very real difficulties in successfully responding to a complex issue such as coercive control using a system like the criminal justice system. Upskilling those in the system so that they understand the concept, including the myriad of ways it can play out in practice, and can engage in the kind of detailed investigative work that will be required to successfully charge this kind of behaviour is likely to be difficult and extremely costly. We run the danger that an offence criminalising coercive control will be misused to prosecute those who should not be prosecuted and/or will downgrade the current criminal justice response to those who should be (for example, the same cases are likely to be able to charged for the physical violence *or* the coercive control – if responded to as the latter the

risk is that this will invoke a less urgent and safety orientated police response, as is allegedly occuring in some districts in England since the enactment of their offence). Issues of legality are also raised by the difficulties of definition – fairness requires that the criminal law should be fixed, clear, certain and knowable in advance.

In support of the point that coercive control is a complex concept I note that there is serious confusion in parts of the justice sector in New Zealand about what it is. For example, the Ministry of Justice produced the latest *New Zealand Crime and Safety Survey* in May 2020. Survey participants were asked to "check box" a list of coercive and controlling behaviours, with the report writers noting that these could be seen as "types of psychological abuse". As a consequence of this exercise it was concluded that 17% of men, but only 14.4% of women, had experienced coercive and controlling behaviours from their partners (see page 52 of the survey report). One assumes that this report was produced by intelligent professionals who have educated themselves about intimate partner violence. Despite this, they have clearly failed to understand the concept of coercive control, namely that it is likely to include violence and does not consist of an incident.

Finally, I note that for victims the harms involved in intimate partner violence, and indeed the entrapment experienced, in many instances is larger than the coercive control of the abuser. The abuse may be compounded and supported by the unhelpful responses of those who might be expected to provide assistance and the larger structural inequities associated with poverty, racism and other intersectionalities. For example, for some indigenous women the agencies charged with helping them may inflict more damage than the violence that they experience from their partners (see Denise Wilson, Alayne Mikahere-Hall, Juanita Sherwood, Karina Cootes and Debra Jackson, *Wahine Maori Keeping Safe in Unsafe Relationships*, 28 November 2019 (available over the internet) and such agencies may facilitate their partner's serious abuse towards them (see Jody Gore, as discussed in 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 or Victims) (2020) 32(4) *Current Issues in Criminal Justice* 488). In other words, a strategy based on criminalisation responds to only one part of the harm of family violence and enables us, as a society, to avoid taking accountability for our part.

I attach to this submission some articles and book chapters that may assist the committee in its deliberations.

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Coercive control: To criminalize or not to criminalize?

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Abstract
Criminalizing coercive or controlling behaviour in an intimate relationship, as has been done in England and Wales and is proposed in Scotland, has the advantage of offering an offence structure to match the operation and wrong of intimate partner violence. This article raises the question as to whether other jurisdictions should follow suit. It argues that the successful implementation of such an offence may require a complexity of analysis that the criminal justice system is not currently equipped to provide and will require significant reforms in practice and thinking. If it is not successful such an offence could conceivably operate to minimize the criminal justice response to intimate partner violence and be used to charge primary victims.

Keywords
Coercive control, crime, intimate partner violence

Introduction

In 2015 England and Wales took the bold move of enacting an offence that criminalizes controlling or coercive behaviour within an intimate relationship.[1] In 2017 Scotland proposed a specific offence of domestic abuse, intended to capture the patterns of harm that constitute intimate partner violence (IPV), including behaviours that fall within existing interpersonal violence offences and those that do not.[2]

This is not the first time that attempts have been made to address *patterns of harm*, as opposed to one-off events, in the legal response to IPV (Douglas, 2015). Civil protection orders, for example, were developed for this purpose and were also designed to cover abusive behaviours that are not limited to physical violence. The criminal law has also

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been moving towards criminalizing 'courses of conduct' that encompass a broader range of behaviours than physical violence. For example, the UK[3] and all Australian jurisdictions have offences of stalking,[4] New Zealand has the offence of criminal harassment,[5] while Tasmania introduced the summary offences of emotional and economic abuse in 2004[6] (Douglas, 2015: 456–457). The English and Welsh and the Scottish reforms are a step further in this direction and raise the question as to whether other countries should follow suit.[7] In New Zealand the decision has been made not to (Office of the Minister of Justice NZ, 2016: [26]–[29]) and this article attempts to engage with this broader question, rather than the specifics of any particular reforms or reform proposals.

The potential benefits of criminalizing coercive control have been canvassed elsewhere (Tuerkheimer, 2004) and are summarized next. Essentially such a reform offers an offence structure designed to match the operation and wrong of intimate partner violence.

In this article I sound a note of caution. The criminal justice system was not designed to address IPV and the problems that it presents in this context are deeper and more extensive than simply the fragmentation of long-standing patterns of harm into individual transactions. In the third section of this article I suggest that prosecuting coercive control successfully will necessitate a greater reliance on victim testimony and may require a breadth of evidence and complexity of factual analysis that the criminal justice system is not currently well equipped to provide. Such an offence may therefore be unlikely to deliver in practice on the many benefits that it theoretically promises. In the fourth section I raise the possibility of a worse scenario – that enacting such an offence could operate to further minimize the justice response to IPV, invalidate the experiences of primary victims and form the basis of charges against them. I have based the analysis in this article on the most common manifestation of IPV – in which the predominant aggressor is male and the primary victim is female (FVDRC, 2017).

The aim of this article is to point out the complexity of the issues involved when attempting to respond to the 'wicked' problem that is IPV within a complex system like the criminal justice system. A complex system is an unpredictable space in which reforms frequently have disappointing and/or unexpected outcomes (Morcol, 2012; Snowden and Boone, 2007). Reforms must also be systemic – addressing multiple layers and aspects of system functioning – and participatory (FVDRC, 2016). This is not a domain in which legislative reform alone will provide any kind of panacea.

The Potential Benefits of an Offence of Coercive Control

Interpersonal violence offences are constructed primarily in terms of incidents. As a result the criminal justice system fragments long-standing patterns of IPV into separate offences (Bettinson and Bishop, 2015; Hanna, 2009: 1461). Each incident is taken out of the pattern in which it occurs and proven and responded to in isolation. A corollary of this point is that the criminal offences are primarily constructed in terms of the use of physical violence. This means that IPV is also stripped of much of its overall architecture – those aspects of the pattern of abuse that are psychological and financial, for example, along with the motivations of the abuser and the cumulative effect on the victim. As a consequence, the totality and meaning of the perpetrator's behaviour, the continuing risk

he poses and the weight of harm experienced by the victim are all potentially misunderstood and minimized at every stage of the criminal justice process – investigation, charging, trial and sentencing.

An offence of coercive control, on the other hand, criminalizes what many have suggested is the underlying architecture of IPV (Tuerkheimer, 2004: 959). Stark (2007: 15) theorizes that IPV should be understood as a liberty crime rather than an assault crime, commenting that it is a

> course of conduct that subordinates women to an alien will by violating their physical integrity (domestic violence), denying them respect and autonomy (intimidation), depriving them of social connectedness (isolation) and appropriating or denying them access to the resources required for personhood and citizenship (control).

Criminalizing non-violent manipulation may be important for those victims whose partners 'rule like dictators over their lives' (Hanna, 2009: 1463) but who do not experience much, if any, physical violence (Youngs, 2014). This may assist police officers in responding to cases that are potentially lethal because of high levels of psychological control but where there is no overt physical abuse (Bettinson, 2016: 166). It also places physical violence in context and could mean that the police are supported to provide an escalated criminal intervention in respect of repetitive 'low level' physical offending (Douglas, 2015: 442).

Criminalizing coercive control has the advantage of making the broader context of the relationship evidentially relevant (Bettinson and Bishop, 2015: 191; Hanna, 2009). Because of the current focus on physical violence the 'courts hear only parts of victim's stories' (Kuennen, 2013: 2; Tuerkheimer, 2004: 979–988). It has been pointed out that when the victim's account is taken out of context in this manner it may resemble something other than the truth (Burke, 2007: 574; Tuerkheimer, 2004: 983–984; Youngs, 2014). When hearing only about an isolated incident the jury may also assume that the perpetrator was intoxicated, or that it was a minor event, or that it was an act of self-defence against an 'out of control' female partner (Burke, 2007: 574; Tuerkheimer, 2004: 985–988). Broader accounts of the perpetrator's behaviour may therefore add to the victim's credibility and provide clear evidence of the perpetrator's motives.

Tuerkheimer (2004: 1016) argues that if the victim's view of her relationship with the perpetrator is legally relevant then she is encouraged to recount the full range of her experiences – making the experience of giving testimony validating of her lived experience.

Furthermore, if the victim is encouraged to provide complete information this will assist the court to make better assessments of what is going on. The court can determine who is the primary victim in the overall relationship regardless of who used physical force on this particular occasion (Bettinson and Bishop, 2015: 191), appreciate that the physical violence may not be 'low level' given everything else that the perpetrator is doing and understand that the perpetrator's acts of violence are part of a larger pattern of harm and cannot be accidental or unpremeditated.

It is also suggested that an offence of coercive control captures the full wrong of IPV as perpetrated by the accused and the totality of the harm as experienced by the victim (Bettinson, 2016: 167; Burke, 2007: 588; Douglas, 2015: 465; Youngs, 2014). This

satisfies the principle of fair labelling and ensures that sentencing responses reflect the harm of the offending (Youngs, 2014). Accommodating a history of uncharged (and therefore unproven) behaviour by the perpetrator is difficult at sentencing if the offence was not charged as 'representative' of a broader criminality (ALRC; NSWLRC, 2010: 579, 604–607) or where evidence of uncharged prior abuse has not been admitted in trial as relevant to a fact in issue (ALRC; NSWLRC, 2010: 574). When patterns of harmful behaviour have resulted in past convictions these do not necessarily result in escalated sentences and are, in any case, unlikely to represent the full extent of offending. Furthermore, the very nature of this process relegates to the history of the offence what is actually part of a continuing wrong (Burke, 2007: 575; Tuerkheimer, 2004: 997–998).

Criminalizing coercive control is said to perform an educative function (Youngs, 2014). It may enhance community recognition of IPV, as well as assisting victims to better understand the abuse they have experienced (Douglas, 2015: 465). The UK Law Commission (2014: 126–127) has expressed the hope that fair labelling might contribute to rehabilitation of the offender. When one offence out of a pattern of harm is prosecuted the wrong message is sent; 'that he has only crossed a line into criminality and he therefore needs to step back behind it rather than desist entirely' (Gowland, 2013: 389).

Barriers to Successful Implementation

The benefits of enacting an offence of coercive control are obviously contingent on the successful operation of such an offence and it is here that I want to sound a note of caution. The problems with the criminal justice response to IPV are larger than those presented by the fragmented offence structures for interpersonal violence. For example, there are barriers to reporting acts of IPV that already meet the criteria for the existing offences, and, when these barriers are overcome, there are frequently police and prosecution failures to enforce the existing laws and difficulties in meeting the criminal burden and standard of proof (VLRC, 2006: [4.25]). As pointed out by Hanna (2009: 1468; Home Office, 2014: 11):

> In the vast majority of cases before the courts currently, the problem is not that the defendant's conduct did not violate the law. The problem is that the criminal justice system is overwhelmed and underfunded and, depending on the jurisdiction, under enlightened about the concept that men do not have a legal prerogative to beat their intimate partners.

In England the offence of controlling or coercive behaviour has been enacted along with other measures, such as extensive specialist training of police (McMahon and McGorrery, 2016: 101). Of course, if the law is to be successfully applied, shifts will also be required in the collective response of *all* key criminal justice decision makers, including prosecution lawyers, judges, juries and corrections officers administering sentences.

But the problems presented by the decision-making processes of the criminal justice system go beyond the skill sets and understandings of decision makers. For example, the adversarial system is problematic as a mechanism to determine the truth of what took place and craft a response to IPV, even in respect of traditional violence offences. Judges tend to see themselves as reliant on what prosecution and defence lawyers bring to the

table and unwilling to 'descend into the fray'. Defence counsel view their task as getting their client off the charges. Aggressive pursuit of this agenda may involve objecting to the victim's statement of facts and recasting what took place as benign (e.g. a strangulation may be recast as putting the victim in a head lock to calm her down), advising the defendant to exercise his right to silence and put the Crown to the proof and subjecting the victim to rigorous cross-examination in order to discredit her. The prosecution, on the other hand, may plea bargain – agreeing to significant rewrites of the statement of facts and a discount of the charges in order to resolve the matter (ALRC; NSWLRC, 2010: 563).

Such problems are likely to have particular bite in respect of an offence that is inherently time consuming, complex and difficult to successfully prosecute. Here I point out that the criminalization of coercive control will add conceptual and evidentiary difficulties to criminal prosecution in the IPV context. This is because it requires a sophisticated factual analysis, an evidentiary base that may place additional reliance on victim testimony and a sensitivity to gender roles. It also presents definitional challenges and may be undercut by the unconscious, collectively held, conceptual frameworks used to make sense of facts involving intimate partner violence.

The need for an individualized and nuanced factual analysis

While it is relatively easy to explain the concept of coercive control in theory, it is not possible to undertake a 'one size fits all' factual analysis because each case will involve an individualized package of behaviours developed through a process of trial and error for the particular victim by the person who knows her most intimately (Stark, 2007: 206–208). These behaviours may be subtle and readily understood only by the victim and perpetrator as, for example, when they are designed to exploit fears that are personal to the individual victim or consist of 'gestures, phrases and looks that have meaning only to those within the relationship' (Bettinson and Bishop, 2015: 194). Stark provides the example of a perpetrator who would publicly offer his partner a sweatshirt when she performed well in her sport. This apparently considerate gesture indicated to her that she had violated their agreement not to make him jealous and would later need to cover up the bruising she would receive (Stark, 2007: 229).

Appreciating the harms of coercive control requires a focus not only on what the abusive partner has done, but what the victim has been prevented from doing for herself. The impact of the perpetrator's behaviour on any victim will be cumulative over time, specific to that particular individual and may be contingent on a mix of external influences and personal vulnerabilities (Kuennen, 2013).

One can compare the analysis required here – the potential subtlety and individualized range of behaviours over an expanded period of time that must be examined, as well as the complexity of the analysis required – with what is needed to determine whether there has been the deliberate use of physical violence on any occasion.

Additional reliance on victim testimony

Ritchie (2014) points out that the criminal justice system's need for victim involvement in the prosecution of criminal offending can be both undesirable and dangerous.

Successful prosecution of the existing criminal offences can be heavily reliant on the victim's testimony and yet frequently victims are in dangerous and/or compromised positions when it comes to giving that testimony, especially after the significant but standard delays in criminal proceedings. Delays, trauma and brain injury can also affect the victim's ability to accurately recall the details of their experiences (ALRC; NSWLRC, 2010: 563–564; Douglas, 2015). Furthermore, women, and particularly battered women, have 'credibility obstacles' in the criminal court (Kuennen, 2013: 25).

I have pointed out that coercive control is a (potentially subtle) web of behaviours over an extended period of time, the particular meaning of which may only be discernible to the perpetrator and victim. Prosecution in such instances will therefore depend on victims being 'able to appreciate or verbalise the impact of the harm they are experiencing, having left their "hostage-like" state' (Bettinson and Bishop, 2015: 194). In other words, successful prosecution will necessarily depend on the victim providing a detailed narrative in court. However, recovery may be required before the victim has a realistic understanding about what happened to her. This may not be possible until she is in a position of safety and has had the benefit of skilled support over an extended period of time.

Evidence of physical violence on a particular occasion, particularly when there is documented injury, may be easier to establish independently of the victim's testimony. And if it is necessary to rely on victim testimony: '[f]or many women it is much easier to describe how she suffered an injury than for her to provide a detailed narrative that, as Stark suggests, she herself may not yet understand' (Hanna, 2009: 1466). Tadros (2005: 1012) argues, to the contrary, that an offence of coercive control may overcome the problems of proof presented by the need to rely on the testimony of the victim in respect of the traditional offences in some instances. His example is: 'a victim, who seven times in the last year, has been admitted to hospital with bruising. Each time, when asked how the bruising came about, she reports that the injury was accidental.' He suggests that, while the mens rea for assault may be impossible to prove on any one occasion in this example, considered cumulatively there may be sufficient evidence to convict the accused of domestic abuse characterized by a course of conduct. This example, however, involves drawing inferences from accumulated incidents of physical violence which has caused documented physical injury, rather than the introduction of other forms of coercive and controlling behaviours.

The need for critical understanding of existing gender norms

Applying the concept of coercive control requires a sensitive gender analysis – there is a need to appreciate the manner in which gender socialization and the gendered distribution of resources support patterns of power and domination in heterosexual relationships, particularly in 'the micro-dynamics of everyday living' (Stark, 2007: 30). Stark (2007: 21) comments that:

> the most common targets of control are women's default roles as mothers, home-makers and sexual partners. By routinely deploying the technology of coercive control a significant subset of men 'do' masculinity […] in that they represent both their individual manhood and the normative status of 'men'.

To someone who does not have a critical analysis the perpetrator may, however, simply look like an old-fashioned man – one who expects certain standards in his home and in relation to his children. This can be reinforced by women's traditionally devalued status. Women's roles as wives and mothers involve a measure of unpaid servitude, even in otherwise egalitarian relationships, and this can make a victim's oppression difficult to see:

> Indeed because most women already perform these activities by default, their regulation in personal life is largely invisible. As we've seen, however, the micromanagement of how women perform as women lies at the heart of coercive control and is emblematic of how coercive control violates their equal rights to autonomy, personhood, dignity and liberty. (Stark, 2007: 31)

In other words, male dominance is to some degree *naturalized* because heterosexual norms permit men a certain degree of dominance in the minutia of everyday living even in non-abusive relationships (Bettinson and Bishop, 2015: 195; Youngs, 2014). Decision makers are themselves formed within and thinking through these roles (Butler, 1993). For this reason Stark (2007: 14) describes coercive control as 'invisible in plain sight'.

Definitional difficulties

Not only is a sophisticated analysis on the part of decision makers required in order to render *visible* the manner in which coercive control may exploit existing gender roles, but the concept blurs the line between criminal and non-criminal behaviour (Hanna, 2009: 1461; Kuennen, 2013). If abusive behaviour exploits existing gender norms when does 'normal' end and 'abuse' begin?

The use of physical violence by a man towards his female partner is not currently acceptable and such behaviour is therefore automatically criminalized unless it is consented to. While it is possible for a victim to consent to being physically harmed, the defence of consent can be withdrawn by the court in cases where the harm reaches a certain level.[8]

This is not so for a range of the behaviours potentially utilized as tactics of coercive control. It is not automatically unacceptable, for example, for the male partner to control a couple's finances, to hold joint property in their name, to make major life decisions on behalf of both and to dislike and want to minimize contact with their in-laws. Whether these behaviours are acceptable or not depends on whether they were agreed to and agreement can be the result of a matrix of factors (Kuennen, 2013: 14–17).

Testimony about coercive and controlling behaviours that are wider than the use of physical violence therefore opens the door to cross-examination of the victim about her willing participation in the balance of power in the relationship and about her psychological need/desire to be controlled by her partner (Hanna, 2009: 1467). As a result, any chance of a conviction will rest on the victim's ability to maintain her perspective under cross-examination. This may be difficult when victims themselves are thinking through the framework that has been imposed on them and the experience of what has been done to them (Tadros, 2005: 1007). Ironically a victim who is able to hold her ground under this kind of cross-examination may undercut her claim to have been the victim of coercive control.[9]

The 'interpretative schema' for IPV

Quilter (2011) has presented a compelling analysis of the manner in which 'interpretative schema' in relation to sexual violence can undercut attempts to reform the legal response to sexual violence (see also Temkin, 2002). Interpretative schema are the sets of understandings that practitioners use to make sense of facts to determine the truth of what happened. How decision makers think about a social phenomenon is hugely significant in how they understand that phenomenon when it manifests in any particular instance and is frequently informed by inaccurate thinking.

This also occurs in relation to family violence. For example, relationships characterized by IPV are often understood as 'bad relationships' and relationships are understood to be based on choice and involve mutuality. The solution to a bad relationship is addressing one's own contribution to what is going wrong or leaving that relationship (Lindauer, 2012; Morgan and Coombes, 2016; Stanley et al., 2012). The assumption is that leaving the relationship is a choice based activity for the victim of IPV and is equivalent to ending the abuse. This resonates with a broader assumption – that victims can effectively address the violence that they and their children are experiencing by simply utilizing the range of tools that they are provided with; for example, contacting the police, getting a protection order and going into temporary refuge accommodation. And that it is appropriate to put the burden of addressing criminal offending on the victim, who is likely to be in a state of considerable trauma. It is therefore part of our interpretive schema for IPV to focus on what the victim has done to address that violence (Schneider, 1991: 983). Victims who do not behave in the manner that we expect are understood to be partially responsible for their situation – contributing to the abuse, choosing the abuse, not being honest about the abuse and/or not acting protectively in respect of themselves and their children.[10]

What is missing from the interpretive schema for IPV is an understanding of how the actions of the primary aggressor systematically operate to isolate, frighten and control the victim over time, closing down her options and undermining her choices. Or how responses by those charged with assisting can be ineffectual at best or, at worst, escalate the danger. Rarely articulated in the criminal justice context is the manner in which precarious life circumstances and limited resources – the result of structural inequity and historical trauma – can realistically close off options that are available to others living more privileged lives. In other words, decision makers frequently fail to understand the manner in which IPV, including but not limited to the tactics of coercive control employed in any instance, operates as a form of 'social entrapment'. Ptacek (1999: 10) describes entrapment as having three dimensions:

> (1) […] the social isolation, fear and coercion that men's violence creates in women's lives; (2) […] the indifference of powerful institutions to women's suffering; and (3) […] the ways that men's coercive control can be aggravated by the structural inequalities of gender, class, and racism.

Quilter (2011) discusses the invisible and entrenched nature of interpretative schema. At the most basic level – in the very language that we use – we mutualize IPV, conceal the perpetrator's responsibility and render the victim's resistance invisible when we use phrases such as 'violent relationships' to discuss what are in fact patterns of offending and victimization

(Coates and Wade, 2007; Wilson et al., 2015). In my own experience people who do not understand how entrapment operates – because they have not personally lived the manner in which coercive control can inhibit resistance and who have life experiences that have led them to expect personal safety at all times and for whom calling the police will always be an effective means of achieving this – can be vehement and entrenched in their judgements of victims.

An offence of coercive control *could* challenge this interpretive schema if it was used, in conjunction with an understanding of entrapment, to shift the focus onto the perpetrator's abusive behaviour. However, if victims are understood as complicit in and partially responsible for the serious repetitive *physical abuse* they endure, how much more so will this be in relation to other behaviours? This will be particularly so where a woman has worked hard to placate the perpetrator and maintain a semblance of normalcy, and when the abusive behaviours are on a continuum with 'normal' up one end. It is likely that decision makers will continue to assume that victims who remain in such relationships consent to the overall dynamic of the relationship.

Parallels with sexual violence

The parallels between the issues I have traversed here in relation to the criminalization of coercive control and those which have been documented in the justice response to sexual offending are not confined to the unconscious schema used to understand the phenomenon at a factual level (which have undercut multiple attempts to improve the justice response to sexual violence via legislative reform: Quilter, 2011). For example, sexual offending throws up similar definitional issues because the line between criminal and non-criminal behaviour turns on the consent of the complainant and the reading of that consent by the defendant. Yet consent is frequently obtained under a myriad of pressures that blur the line between a submission without consent and a reluctant consent (Gavey, 2005: 136–165; Raphael, 2000: 48–49), and reduced capacities that blur the line between an uninhibited consent and a complete lack of the capacity to consent. Furthermore, numerous theorists have discussed the manner in which the inequitable power dynamics embedded within the mutually reinforcing practices of sexuality and gender mediate the negotiation of consent to heterosexual sexual connections (Gavey, 2005; MacKinnon, 1987: 5–8, 85–89). These privilege 'assertive' behaviour by men, read permission into what should be irrelevant behaviour by women and make sexual encounters easily 'narrated in ways where the absence of a woman's desire and pleasure is not only permissible, but almost unremarkable' (Gavey, 2005: 17). In other words the line between sexual offending and sex is easily (and on some accounts necessarily) blurred. Sexual offending takes place in circumstances where there are competing realities in respect of events that are likely to have been un-witnessed by all except the complainant and defendant. Successful prosecution will frequently depend on the capacity of the complainant to withstand rigorous cross-examination on the minutia of their account in respect of a traumatic encounter that may have taken place a considerable period of time ago. Certainly it is not reassuring – given the potential similarities noted here – that sexual offending is rarely reported to the police and is notoriously difficult to prosecute successfully, while the trial process is widely documented to be traumatic and gruelling for complainants (Graycar and Morgan, 2002: 354–364; MacDonald, 2005).

In fact, the offence of coercive control could be argued to add to the difficulties presented by the requirement for victim non-consent in the context of sexual violence. This is because, unlike serious sexual offending, the actus reus for coercive control cannot be set out in concrete terms (it cannot, for example, be defined in terms of particular sexual behaviours). Instead an indeterminate range of potential behaviours by the accused, possibly taking place over an extended period of time may or may not satisfy the actus reus requirements. For example, the Statutory Guidance Framework in the UK defines controlling behaviour as:

> a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour. (Home Office, 2015: 3)

Coercive behaviour on the other hand is defined as 'a continuing act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim' (Home Office, 2015: 3). The Framework goes on to set out a *non-exhaustive* list of *17 types* of behaviours which, if they take place repeatedly or continuously and have a serious effect on the victim, could satisfy section 76 of the Serious Crime Act 2015 (Home Office, 2015: 4).

Potential Risks

Here I raise the possibility that if the criminal justice system subverts the concept of coercive control or is unable to properly utilize it, the consequences of enacting such an offence may go beyond a failure to produce the hoped for benefits and include negative effects for victims. This is particularly so in a complex system where reforms must be expected to have unexpected consequences. Two of the risks involved in enacting an offence of coercive control are that it could be used to minimize the criminal justice response to IPV and that it could be used to charge primary victims.

Minimization

Given the complexities involved in applying the concept of coercive control, it is possible that such an offence will be successfully charged only in those cases where the use of physical violence can be established (ALRC; NSWLRC, 2010: 586) and/or where there is independent evidence of levels of coercive control that are overt and extreme (Bindel, 2014). Experience in other contexts would seem to support this possibility. For example, Bettinson and Bishop (2015: 188) point out that judicial applications of course of conduct offending such as stalking frequently lapse back into an examination of individual incidents of assault that can be proven 'and whether or not these, in combination, amount to a course of conduct'. This is an 'incident additive approach' that places a strong continued focus on physical violence.

If this is the case there is the possibility that having an offence of coercive control would exacerbate the current tendency to minimize IPV in the criminal justice response. First, the existence of such an offence could encourage the police to wait for a pattern to

emerge in such cases, rather than responding appropriately to individual acts of abuse (Bindel, 2014). The dilemma for police is that if individual offences are prosecuted then principles of double jeopardy mean that those offences cannot be later included to support charges of coercive control (Crown Prosecution Service, 2015: 12).

Second, if police see the offence of coercive control as the appropriate response in all cases involving IPV, then they may fail to prosecute more serious offences of violence that have occurred in order to focus on establishing coercive control (Douglas, 2015). This phenomenon has been observed elsewhere. Douglas (2015: 436) points out that civil protection orders have become the focus of the police response to domestic violence, with breaches being the most common criminal offence charged even when more serious substantive offences may be applicable.

A third concern is that the offence will decriminalize certain acts of abuse in the domestic context. Kelly and Johnson (2008) have proposed that there are 'typologies' of IPV. Only one of these suggested typologies, 'coercive controlling violence', may be loosely equated with Stark's notion of coercive control. Other 'types' of violence include 'common couple violence' and 'separation engendered violence'.

Whether there are such typologies of IPV is controversial (Gulliver and Fanslow, 2015; Wangman, 2011). Nonetheless this work has the potential to undercut understandings of coercive control in some contexts. For example, during separation, particularly where control was high but there was not much physical violence in the relationship, there is an impulse to assume that one is dealing with a more 'benign' type of violence; 'separation engendered violence' (Jeffries, 2016: 14). This may undermine the successful prosecution of the offence of coercive control on certain sets of facts, and worse, the criminal prosecution of violent offences per se between intimate partners in such instances. For example, if the offence of coercive control is viewed as the appropriate charge but coercive control is not considered to be present on the facts because the violence is interpreted as being of a more 'benign' type then, as pointed out by Douglas (2015: 466) and Rathus (2013: 388–389): 'one of the effects may be to exclude some very valid experiences of domestic violence from criminalization'.

There are a number of other negative effects that could potentially flow on from enacting an offence of coercive control that is only enforceable in the most extreme cases and/or cases involving physical violence. Stark (2007: 144) refers to this phenomenon as 'normalizing lower levels of abuse': for example, the creation of an erroneous impression that few cases of IPV actually involve coercive control because we have few criminal convictions. Another is that, rather than making the criminal justice system *more* hospitable to victims while educating victims, the community and abusers about coercive control, such an offence could do the exact opposite. Those victims who do not have the patterns of harm that they have been subjected to recognized by the criminal justice system may experience the criminal justice process as extremely damaging, while it would be conversely validating for their abuser (Bindel, 2014).

Mutualization

While the English offence of coercive or controlling behaviour is couched in gender-neutral terms, the Home Office (2015: 7) has issued statutory guidelines that point out that coercive control is gendered and underpinned by wider societal gender inequity.

Investigators are directed to take into account gender and 'any vulnerabilities' but avoid making assumptions based on stereotypes (2015: 24). Clearly the intention is that investigators will be sensitive to the social patterns of harm and gendered norms discussed in this article, while remaining open to the exceptional case that deviates from these. Gender-neutral provisions, however, open up other possibilities.

As noted above, Stark (2007: 14) points out that gender roles can render invisible the abusive behaviours of IPV perpetrators. The opposite is not the case. Indeed gender roles may throw women's attempts to assert independence and to equalize power dynamics in their relationships into sharp relief. Furthermore, assertive behaviour by women readily buys into stereotypes of women as demanding and aggressive.[11]

Unless decision makers have a critical understanding of the operation of gender roles (how they shape life experiences, expectations, options and behaviours) and the historical legacy of gendered oppression, there is a danger that reactions to women will be informed by such biases. A classic example can be found in the response to women who attempt to safeguard their children in the context of family separation. Numerous studies have documented the manner in which such women are vulnerable to finding themselves characterized not as 'experts' in the care of their children (based on their past caring experience) and 'protective' of their children's well-being, but as 'obstructive' of the other parent's rights and their children's best interests (Morgan and Coombes, 2016: 57; Salter, 2014; Tolmie et al., 2009: 678). Gender norms include expectations that mothers will bear a disproportionate burden of the unpaid labour of caring for children, including the mediating labour required to assist fathers to exercise their 'rights' to parent, rendering this work invisible (Lacroix, 2006). Mothers' attempts to build the contact parent's access around the child's breast-feeding schedule, for example, or to address neglectful parenting, or insist on access arrangements that reflect the child's developmental phase or to protect their child and themselves from abuse can be interpreted by fathers and family law professionals as 'controlling' and 'alienating' and responded to punitively (Bancroft et al., 2002; Jeffries, 2016: 7; Neustein and Lesher, 2005; Tolmie et al., 2010: 324–326).

It is not surprising then that there are already calls within England for repeated denial of contact by one parent, usually understood to be the mother, to be treated as coercive or controlling behaviour in relation to the other parent (Insideman, 2014; Woodall, 2016). Such measures, however, cannot currently satisfy the elements of section 76 of the Serious Crime Act 2015 once the parties have separated and are no longer living together because of the manner in which the requirement that the parties be 'personally connected' is defined in that section. This does, however, raise the concern that an offence of coercive control will be *applied to* primary victims in the criminal justice context and will thus backfire on victims in a very direct fashion.

Women self-report in population based studies that they use low and moderate levels of physical violence in intimate partnership at the same rate as men, but overwhelmingly women show up in homicide and hospital statistics as victims rather than perpetrators (Tolmie, 2015: 652). While the manner in which gender shapes the use of violence in intimate relationships is contested (Dobash and Dobash, 2004), international literature suggests that women's use of violence in intimate partnerships does not simply mirror men's but is frequently part of their ongoing victimization. In other words, women can

use force to react to, attempt to stop or escape from their male partner's violence (Miller and Meloy, 2006; Swan and Snow, 2006). Much of this, including expressions of frustration about a situation that they are powerless to change and attempts to equalize power in the relationship, is appropriately understood as 'resistance' to their experiences of abuse even when it does not satisfy the legal requirements of self-defence. On the other hand, Stark (2007: 105) says that, while women can and do use physical violence against their male partners, they 'rarely' use coercive control because of an 'asymmetry in sexual power'. Despite this, primary victims who use violent resistance are vulnerable to being understood within the criminal justice system as 'mutual aggressors'.[12]

Dual arrest policies are another example where the dynamics of IPV are 'mutualized'. Such policies can result in both parties being arrested if they have used physical force on a particular occasion, without determining who is the aggressor in the overall relationship. This approach can close down help seeking by primary victims who have used violence to resist their abuse (FVDRC, 2014: 75). It is worth noting that IPV offenders can be highly manipulative; minimizing their actions and recasting themselves as the victim of the abuse that they themselves are perpetrating.

The risk that a victim's resistance to abuse will be read as abuse is arguably greater when the criminalization of IPV is uncoupled from the need to establish physical violence. It will be particularly strong if the concept of coercive control (and the manner in which it employs traditional gender roles) is not properly understood but the concept is instead loosely equated with 'psychological abuse'. Stark (2007: 26), on the other hand, is clear that it is psychological abuse *in the context of coercive control* that is devastating 'because the woman cannot respond or walk away without putting herself at risk', not psychological abuse per se.

The danger in enacting a gender-neutral offence of coercive control which is untethered from the need to prove physical violence is that it will be applied to primary victims. This danger is exacerbated when decision makers lack a sophisticated understanding of the manner in which gender roles, expectations of male entitlement, disparate physical strength and disparate resources can create power imbalances in heterosexual relationships.

Conclusion

It is impossible to determine in advance the benefits of any reform within a complex system and it is still too early to know how section 76 of the Serious Crime Act 2015 will be applied in practice. While acknowledging the potential benefits of criminalizing coercive control, I have sounded a note of caution in this article. Applying the concept of coercive control to particular sets of facts may require a breadth of evidence and complexity of analysis that the criminal justice system is not currently well equipped to provide. Some of the risks involved in enacting an offence of coercive control are that it could be used in a manner that minimizes IPV, invalidates the victim's experiences or, worst of all, recasts their resistance to abuse as abuse.

Even if an offence of coercive control is enacted, the traditional incident based violence offences are likely to continue to operate alongside this offence in the IPV context. This is because, for cases involving very serious levels of violence (e.g. repeated rapes

and assaults with weapons) an offence along the lines of section 76 of the Serious Crime Act 2015 would be a significant downgrade in the criminal justice response that might be expected. In other cases, the difficulties presented in prosecuting an offence of coercive control might necessitate continued reliance on crimes of assault. This may be less so under the Scottish approach, which allows the prosecution under the proposed domestic abuse offence (which also has significantly higher maximum penalties than the English offence) of behaviour that would currently satisfy one of the interpersonal violence offences.

What this means, however, is that enacting an offence of coercive control cannot be understood as the complete solution to the problem of fragmentation in the criminal justice response to IPV. It also, somewhat paradoxically, means that many of the conceptual and evidentiary challenges presented by the concept of coercive control should be addressed in respect of all IPV offending. This means that traditional interpersonal violence offending in the context of IPV must be understood in the context of the wider patterns of harm in which it occurs and evidence on such patterns should be routinely presented at trial.[13] It also means that if we are concerned about victim safety then all sentencing responses to IPV offending, including traditional offending, should take into account the perpetrator's pattern of harm. Without reform, sentences will continue to be a limited reaction to those aspects of the abuse that have been cordoned into the particular offence under consideration.

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1. Section 76 of the Serious Crime Act 2015.
2. Section 1, Domestic Abuse (Scotland) Bill.
3. Protection from Harassment Act 1997 (UK).
4. Criminal Code Act 1899 (Qld), s. 33A; Crimes 1900 (ACT), s. 35; Crimes (Domestic and Personal Violence) Act 2007 (NSW), s. 13; Criminal Code Act 1983 (NT), s. 189; Criminal Law Consolidation Act (SA), s. 19AA; Criminal Code Act 1924 (Tas), s. 192; Crimes Act 1958 (Vic), s. 21A; Criminal Code Compilation Act 1913 (WA), s. 338E.
5. Sections 3, 4 and 8 of the Harassment Act 1997 (NZ).
6. The Family Violence Act 2004 (Tas), ss. 8, 9.
7. A number of European jurisdictions have enacted a specific offence of family violence (ALRC; NSWLRC, 2010: 566).
8. In New Zealand this will occur when, for example, there was an obvious power imbalance in the relationship: *S v R* [2017] NZCA 83. In England it will occur in respect of certain categories of behaviour: *R v Brown* [1994] 1 AC 212.
9. On the other hand, it has been argued in relation to sexual violence that complainants who

can model their rape on the witness stand are more likely to be credible to juries (Larcombe, 2002).

10. A stark example of this can be seen in the sentencing remarks in *R v Paton* [2013] NZHC 21, [5].
11. For example, 'the shrew', an ill-tempered woman who is nagging and aggressive is a stock character in western folklore (Vasvári, 2002).
12. See, for example, *R v Wihongi* [2011] NZCA 592, [36].
13. See, for example, *R v R* [2015] NZCA 394.

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CONSIDERING VICTIM SAFETY WHEN SENTENCING INTIMATE PARTNER VIOLENCE OFFENDERS

Julia Tolmie

This paper raises one of the *many* problems that the criminal justice system presents in the intimate partner violence (IPV) context – the difficulties in accommodating victim safety when sentencing for criminal offending.

These problems stem from the fact that the criminal justice system was never designed to respond to IPV. It constructs violent crime as a decision to use non-consensual physical force on a particular occasion. The system is therefore focused on proving that an incident of physical violence took place and responding with punishment that matches the wrong that occurred. Because it atomises patterns of harm into incidents, offenders whose behaviour is responded to on more than one occasion are characterised as 'recidivists' (Sentencing Advisory Council 2016: 1).

IPV, on the other hand, is not best analysed as a series of independent incidents. Instead, it is a pattern of harm with an overall architecture larger than the sum total of any acts of physical abuse that occur (Family Violence Death Review Committee [FVDRC] 2014: 78; Sentencing Advisory Council 2016: 25). This pattern of harm is likely to continue if not disrupted and has an effect on the victim that is cumulative and compounding over time (FVDRC 2014: 79). Evan Stark suggests that IPV should be understood as a liberty crime rather than an assault crime (2007: 15). It is a suite of coercive and controlling

tactics tailored for the individual victim and directed at removing her autonomy and closing down her acts of resistance (Stark 2007: 13, 130–1).

The mismatch between IPV and the paradigm that informs the criminal justice system means that sentencing responses are not well designed for IPV. By way of example, imagine a family violence perpetrator who has three successive partners over several decades. In each relationship, he is convicted of several minor assaults that do not cause physical harm. Eventually the victim terminates the relationship and takes out a protection order. The affidavits that accompany the protection order applications suggest multiple risk indicators for IPV lethality. After separation, he breaches the protection order – by phone calls, threats and stalking – and is charged and convicted of several breaches. In the first two relationships, he is convicted of breaches of a protection order and possession of an offensive weapon after the police intercept him travelling to the victim's house with a weapon and a suicide plan in place. Unfortunately, the police are not able to intercept him in time in respect of his third partner and he kills her.

The criminal justice response over the trajectory of his violent history is to keep *reacting* to each *incident* – assigning the punishment that is deemed proportionate to that particular incident taken out of the context of the broader pattern of harm in which it occurs. It is likely that his offences are seen as 'low level' because they do not cause physical harm to the victim. Historically, it would be likely, given the principles that govern sentencing, that his offences would still be attracting community sentences, even at the end of his trajectory of offending (but prior to the homicide).[1]

That family violence is a pattern of harm has implications for how such conduct should be understood, but also for what considerations should inform the criminal justice response. First, the gravity of the offence in issue cannot be realistically assessed without an understanding of the overall pattern of harm of which it is a part. For example, an assault is not 'impulsive' or 'unplanned' when it is part of a pattern of coercive control.[2]

Second, the fact that IPV is a pattern of harm means that at sentencing there are likely to be ongoing safety issues for the victim, other hidden victims (such as the children of the victim) and potential victims (future partners or children) (FVDRC 2014: 76–7).

These two issues are related because past patterns of harm are significant in understanding what kind of behaviour the offender is capable of in order to assess the protective measures that should be put in place for the victim. In the hypothetical above, it is relevant in responding to any 'minor' breach of a protection order to know that separation from two prior partners resulted in what look like failed homicide attempts. A period of imprisonment might be given in response to offences that take place during the very high-risk time of separation because of the perpetrator's history of escalation at separation (Sentencing Advisory Council 2016: xvi). This would give the victim a window of physical safety during which she could attempt to disengage her life from his.

In Part I of this paper I point out that victim safety is not an express or mandatory sentencing consideration in cases involving IPV in New Zealand. In fact, I suggest that

the manner in which the principles of sentencing and the decision-making structure for sentencing have been framed make it difficult to consider victim safety in sentencing. I use the position in New Zealand as illustrative because it represents a traditional approach to this issue.[3] In Part II, I suggest that, even if victim safety were a mandatory sentencing consideration, the process of factual proof at sentencing, combined with the nature of IPV, means that in most cases sentencing judges are not equipped to make informed safety decisions. The irony is that the same barriers do not exist when decisions are made about bail[4] – despite the fact that bail decisions are made at a time when the offender has not yet been proven to the criminal standard of proof to have predated against the victim.

I have two motivations in engaging in this exercise. The first is the suggestion by the New Zealand Family Violence Death Review Committee (FVDRC) that there is a need for those agencies charged with responding to family violence to assume some responsibility for victim safety (FVDRC 2016: 32, 45–7). Currently the philosophy that underpins the approach generally adopted is the notion of victim empowerment. This places responsibility for victim safety on the victim and focuses on assisting her to keep herself and her children safe. What is not acknowledged in this approach is that IPV is a form of social entrapment – meaning that the perpetrator's actions operate to close down victim resistance – along with the lack of useful responses from agencies when victims engage in help-seeking and the larger structural inequities that operate to exacerbate these difficulties for many victims (FVDRC 2016: 37–49). Requiring the criminal justice

system at the point of sentencing to take some responsibility for victim safety is, of course, different from advocating this system as the best way to achieve safety.

A second related motivation is that we currently do not have a system designed to respond to family violence. When victims seek help they must navigate a range of systems (such as health, family law and criminal justice) that are designed to address other phenomena. Reforming this complex and fragmented 'default' system so that it is reconfigured as a 'family violence safety system' is a difficult task (FVDRC 2016: 23–33, 61–90). Complexity theory suggests that the appropriate approach is to start to nudge the system in directions in which we would like to see it develop and then monitor and respond to what happens (FVDRC 2016: 62–3). Requiring and better equipping judges to accommodate victim safety at sentencing may be one such nudge.

Establishing victim safety as a mandatory sentencing consideration in cases involving IPV will have implications for other parts of the system. For example, under section 24A of the *Sentencing Act 2002* restorative justice is now built into all District Court sentencing processes in New Zealand where there has been a guilty plea. However, there are serious concerns about how restorative justice may operate in the IPV context (Stubbs 2014). Requiring judges to prioritise victim safety when sentencing will give the judiciary responsibility for assuming an oversight role in relation to restorative justice processes in IPV cases. Mandating victim safety as a sentencing consideration could also provide an impetus for the development of sentencing options that permit the ongoing management of risk in cases involving IPV. This may also have implications for how

stopping violence programmes are delivered as part of the sentencing process. New Zealand stopping violence programmes are not currently integrated into an overall multi-agency safety response and are still reliant to a large degree in their assessments of risk and change on perpetrator self-reporting (FVDRC 2013: 57–65; Ministry of Justice 2014a). And victim safety is not built into the requirements for the delivery of these programmes. In other jurisdictions, like the United Kingdom, perpetrator programmes that are accredited are linked into a multi-agency response and have parallel advocacy services for victims (Blacklock and Debbonaire 2012).

Sentences designed with victim safety in mind should not always be *longer* sentences so much as sentences that are *crafted differently*. For example, when sentencing an offender to a curfew at a separate address, instead of tailoring that around the offender's sporting activities a focus on victim safety might prioritise the need to provide the victim and her young children with a zone of safety so that she can pick the children up from school, feed them and get them to bed, knowing that the offender is not at large. In other words, rather than a curfew starting from 8 o'clock at night to allow him to get to the gym after work, the curfew might commence at a time that is reasonable for her to take the children home each afternoon.[5] This point ties into the need to develop better sentencing options for family violence offenders. It is important that victim safety is not automatically conflated with increased incarceration, particularly in light of the over-imprisonment of Indigenous men.

Victim safety might also dictate the avoidance of certain types of sentences. For example, fines do not fulfil the purpose of community protection and may compound the harm experienced by the victim if she is in a relationship of financial interdependence with the offender by withdrawing resources from the family as a whole (Royal Commission into Family Violence [RCFV] 2016: 208).

Victim safety needs are, of course, complex and holistic. For example, victims who occupy 'dangerous social positions' (FVDRC 2014: 87) may face danger from a number of human sources, including other men within their social circle. Other family members whom the perpetrator has contact with, such as the victims' parents and children, may also face danger. Victims may also be dealing with dangers from non-human sources, such as potential homelessness and difficulty in meeting basic survival needs. Safety issues for women who are not in a position to leave their abusive partner will present unique challenges (Marcus 2012).

It is also important to note that involving victims in an assessment of risk and safety is something that has to be approached with skill, so that the victim's views can be safely ascertained and respected without giving them responsibility for decision-making. The nature of IPV is coercive and victim statements may or may not reflect their true or long-term position.[6]

Considering the safety of IPV victims at sentencing raises many challenges not addressed here. For example, there are no risk assessment mechanisms that precisely predict future

harm. Whilst there are validated assessment instruments that provide over-inclusive predictions for intimate partner re-assault or lethality, there are challenges involved in using these in the sentencing context that have been well traversed in the literature (Roehl and Guertin 2000; Chanenson and Hyatt 2016).[7]

Part 1: Sentencing purposes, principles and decision-making structures

In this section, it is pointed out that victim safety is not an express or mandatory sentencing consideration in cases involving IPV offenders in the New Zealand *Sentencing Act 2002*. The rationales for punishment, the statutory principles, and the common law limitations on these principles are described using a victim safety lens.

The rationales for punishment

Some rationales for punishment are retrospective, whilst others have a preventative focus. Retribution, denunciation and reparation are retrospective. Retribution in the modern context manifests in the notion of 'just deserts' (Hall 2014). This sentencing rationale focuses on assessing the gravity of the offender's past wrong and matching the sentence to that gravity. The idea is that an offender should be given the punishment they inherently deserve for the nature of the wrong they committed.[8] Because there is no science in this process, such an approach places a high value on what similar acts of offending have attracted by way of penalties in other cases and therefore consistency in sentencing (Hall 2014: 102). Denunciation is built into this approach – the sentence

should reflect society's abhorrence of the offence. Reparation, also backward looking, is about providing compensation for the harm sustained as a result of the offending.

The remaining rationales (deterrence, rehabilitation and incapacitation) contemplate the use of punishment to prevent future harms. Deterrence envisions the punishment acting as dissuasion for future offending by reminding people of the possibility and pain of punishment for the purposes of influencing their behavioural choices – both the specific offender and others who might be contemplating similar actions (Bagaric 2000). Rehabilitation sees the motivation for punishment as reformation of the offender – investing in changing their attitudes, coping skills and lifestyle in an attempt to resocialise them so that they no longer wish to offend (Hall 2014: 135). Incapacitation is directed at using the coercive powers of the criminal justice system to directly pre-empt future offending by incarceration or 'close supervision in the community through enforced compliance with conditions of supervision or parole' (Hall 2014: 126).

All of the forward-looking rationales for punishment have implications for victim safety. However, incapacity is most concerned with the specific victim's immediate safety needs and can be achieved by incarceration, community detention and supervisory sentences. Deterrence and rehabilitation, on the other hand, are directed at changing the perpetrator's choices and are not as well served in respect of IPV by the current sentencing options (RCFV 2016: 208–9). For example, the deterrence literature suggests that it is not the punishment per se but the chance of being caught that operates as a deterrent (Bagaric 2000), and yet IPV offending is not likely to result in charges or a

conviction. What is needed are sentences that place many eyes on the offender with certain and escalating responses to continued abuse (along with ongoing support for the victim).

The sentencing legislation

The rationales for punishment find expression in the purposes and principles set out in the *Sentencing Act 2002* (NZ). However, when victim interests are mentioned in the legislation they are characterised in terms that are consistent with responding to harm that has already taken place.[9] For example, the purposes of the *Sentencing Act 2002* are set out in section 3, and only one refers to victims: ‘to provide for the interests of victims of crime’ (subs (d)). Section 7 of the *Sentencing Act 2002* describes the ‘purposes’ for which a court may sentence an offender. Consistent with section 3, the court may ‘provide for the interests of the victim of the offence’ (subs (c)). Whilst the interests of the victim could include their ongoing safety, these are equally consistent with the aims of reparation or denunciation. Most of the other sentencing purposes specific to victims contained in section 7 involve reacting to past harm. For example, holding the offender accountable for harm done to the victim (subs (a)) is not a consideration of the victim’s safety needs going forward.[10]

By way of contrast, community protection is an overt sentencing consideration. Section 7(g) of the *Sentencing Act 2002* provides that the court may sentence to ‘protect the community from the offender’. However, whilst community protection should encompass

victim safety, this is not made explicit.[11] And, in fact, community protection is interpreted to encompass a range of sentencing rationales that do not include the specific victim's future safety needs.[12] Geoff Hall points out that community protection is conceived in the most general terms: it 'may be achieved by the adoption of any one or any combination of the various purposes of punishment' (Hall 2014: 100–1). In other words, the protection of the community is understood as consistent with the retrospective rationales for punishment and does not demand a preventative focus.

Furthermore, even if community protection did require a consideration of the particular victim's safety needs, it is only one of a range of other (potentially countervailing) considerations set out in the Act. Section 7(2) makes it clear that none of the sentencing purposes has priority over any of the others. This means that victim safety, even if it can be read into the sentencing purposes via the 'interests' of victims or 'community' protection, is, at best, an optional consideration. As a result, whilst individual judges who are knowledgeable about IPV can, and do, use aspects of the legislation to give expression to victim safety, this will not automatically occur in all cases.

The Family and Whanau Violence Legislation Bill (NZ) proposes to amend section 9 of the *Sentencing Act 2002* to include as an aggravating factor that the offence was 'a family violence offence committed whilst the offender was subject to a protection order against a person who was a protected person under that order'. However, this proposal is insufficient to address the safety issues raised here. First, and most obviously, not all victims of IPV will obtain a protection order, yet victim safety should be a priority

whether or not a protection order has been obtained. Otherwise protection orders become simply another hurdle that victims have to surmount in discharging the onus that is placed on them to achieve safety for themselves and their children. Second, as noted above, victim safety does not necessarily require longer sentences. Rather, it might require sentences that are crafted differently.

The common law

The common law further limits how the principles set out in the legislation are to be applied. Specifically, the value that is given predominance in the New Zealand case law is ‘proportionality’ – the need to make the punishment fit the gravity of the crime, as measured against similar acts of offending in other cases.

First, the case law expressly states that proportionality must limit any considerations of community safety when setting the appropriate sentence. The leading case is *R v Ward*[13], in which the court commented that:

> the protection of the public against those likely to offend repeatedly can all too easily be seen as an additional punishment for past offences. For these reasons the law has sought to preserve the preventative aspect being given too much importance. The controlling principle which it has developed to prevent it taking charge in a dominant way is that a reasonable relationship to the penalty justified by the gravity of the offending must be maintained.

What the strong emphasis on proportionality means is that, if the court considers the incident of offending to be 'low level', then the sentence is limited to what might be considered appropriate to that incident in light of what sentence has previously been given to similar decontextualised incidents.[14] This is so regardless of how serious the victim's safety concerns might be – for example, that the offender has a past pattern of escalating harm at separation or that there are multiple risk indicators for IPV lethality. This principle is reinforced by the rule that the court must impose the least restrictive outcome that is appropriate in the circumstances (section 8(g), *Sentencing Act 2002* (NZ)).

Second, the decision-making structure devised by judges for sentencing prioritises proportionality and renders victim safety difficult to accommodate in sentencing. The courts first set a 'starting point sentence'.[15] This incorporates aggravating or mitigating factors particular to the act of offending, conceptualised as the decontextualised incident that comprises the offence. The focus is on, for example, whether a weapon was used, how it was wielded, which part of the victim's body was struck, whether injury was caused and whether the act was 'premeditated' (Hall 2014: 153). The courts compare the offender's act with similar acts committed by other offenders in the case law and adopt a similar starting point to those considered comparable in culpability. This first step gives expression to the value of proportionality and the rationale of retribution (Hall 2014: 142). The starting point sentence is then adjusted up or down to accommodate aggravating or mitigating factors personal to the offender.[16] Whether or not there has

been a guilty plea or assistance provided to the authorities may be a third step adjustment.[17]

Considering victim safety requires a departure from this decision-making structure. This is because it is neither directly relevant to the act of offending, nor is it a matter that is personal to the offender or implicated in a guilty plea.

When the perpetrator's offending is a pattern of harm over a period of time prosecuted together as a series of offences, the 'correct approach' is to identify the 'lead offence'. The court then determines a starting point sentence that reflects the gravity of that 'lead offending', before making 'uplifts' to reflect the other offences, and then adjusting on a totality basis (if necessary) to ensure that the starting point reflects the gravity of the offending overall. Thus, in *Cash v Police*[18], the defendant had been issued with a police safety order in respect of his pregnant partner and later that day dragged her by the arm down the street, only desisting upon police intervention. Two months later, whilst on bail in respect of this assault, he was issued with a protection order and several days later sent more than 50 violent text messages to the victim, threatening to drive a car into her house, forcibly abort her baby and send gang members after her, in addition to phoning her more than 50 times over a six-hour period. A few weeks later he again phoned her, stating that he would be visiting her address with other men and would kidnap her and force an abortion by kicking her in the stomach. He then showed up in person and, when he was prevented from entering the property by other people, threw a rock through a window. Rather than seeing this as a pattern of retaliation and intimidation in response to

the victim's attempts to protect herself that did not escalate to more serious violence only because others were on hand to protect her, the court characterised the lead offence – the assault – as 'relatively minor; it involved not more than Mr Cash taking hold of the victim's arm and propelling her in a direction in which she did not wish to go'.[19] The threats, whilst 'frightening', 'were made in the context of a volatile relationship in which the victim had not always behaved well and at a time when Mr Cash was under some emotional pressure'.[20] The court held that four months' home detention and 80 hours community work was 'manifestly excessive' for one assault, one wilful damage and two convictions for behaving threateningly, and the sentence was reduced on appeal to 42 days' home detention. As this example demonstrates, taking an atomised approach to sentencing for the purposes of applying the proportionality principle loses the meaning of patterns of harm and their implications for victim safety, even when offences are prosecuted together. Furthermore, this particular judgement is unlikely to enhance victim safety, given that it minimises and excuses the offender's abuse and apportions blame to the victim. It is thus likely to be read by a perpetrator who is seeking to avoid taking responsibility as a partial vindication.

Part II: Information on patterns of harm

The second issue raised here as relevant to victim safety is the information that sentencing judges have available to them about past patterns of harm in IPV cases. This information is necessary to assess risk and respond to a victim's safety concerns when sentencing those who have used violence against them (Sentencing Advisory Council

2015). Also of relevance in assessing what sentencing arrangements might best support victim safety, but which is not addressed here, is information about the victim's circumstances, such as her relationship status, whether she has dependent children, her financial position, her living arrangements, and her level of family and community support, including protective factors in her life.

Section 9(1)(j) of the *Sentencing Act 2002* (NZ) sets out as an aggravating factor in sentencing 'the number, seriousness, date, relevance, and nature of any previous convictions of the offender'.[21] This suggests that only abuse that results in a criminal conviction should be considered for the purposes of increasing (as opposed to modifying) a sentence. The court is likely to interpret section 9(1)(j) to include charges that have been proven but have resulted in a sentence of 'discharge without conviction'.[22]

In fact, even though sentencing judges have been specifically directed to consider past convictions as an aggravating factor, the courts have expressed caution in doing so. In this regard, it has been pointed out that section 9(1)(j) has to be balanced against section 26(2) of the *Bill of Rights Act 1990* (NZ), which provides that no one who has been finally convicted of an offence shall be punished for it again. In *Ward*[23], the court suggested that giving pre-eminence to the principle of proportionality safeguards against this eventuality.[24] However, the courts have begun, especially in the IPV context, to give significance to past convictions that indicate a tendency to commit the particular type of offence for which the offender is being sentenced and a disregard for court orders.[25]

Of course, a list of past convictions may not reveal which involve family violence and, significantly, in the absence of a narrative of events, but even with such a narrative, the convictions can fail to reveal the serious nature of the underlying offending. Even if the offender has criminal convictions these may not be obviously related to IPV. Furthermore, those that are may not fully reflect the serious nature of the underlying behaviour. The FVDRC has noted, for example, that non-fatal strangulation assaults in New Zealand have tended to result in assault convictions (FVDRC 2014: 99) – in other words, a conviction for non-consensual touching that fails to capture either the risks or harm of the behaviour. In the first hypothetical provided earlier in this paper, convictions for breach of a protection order look like attempted homicides in their narrative detail. However, behaviour is frequently plea-bargained down in the process of arriving at an agreed statement of facts. In this process a punch can become a slap, and a strangulation to unconsciousness can become putting the victim in a 'sleeper hold to calm her down' (Sentencing Advisory Council 2015: 36).

A deeper problem is that past convictions are likely to be the tip of the iceberg in terms of the overall pattern of harm that has taken place. Many of the abuse tactics employed to isolate and intimidate the victim in any particular instance may not register as a criminal offence. And even those aspects of the abuse that do satisfy the requirements for an offence will rarely result in a conviction. This is because, in part, the abuse is unlikely to be reported to the police (Sentencing Advisory Council 2015: 2; Ministry of Justice 2014b: 107) and, if reported, will infrequently result in charges being laid, particularly in instances where there are no witnesses to the abuse or evidence of physical injury to the

victim (New Zealand Family Violence Clearinghouse 2017). For example, Karen Gelb comments that, whilst victims of IPV are often 'repeat victims', 'they suffer multiple incidents of violence before calling police or coming to court' (Gelb 2016: 24).

Furthermore, establishing that an offence took place at trial requires discharging the high criminal standard of proof. Relying on the testimony of the victim in this process can be fraught – particularly for those women who remain in coercive circumstances and the longer the period of time that has elapsed between the original incident and the trial. As the Victorian Sentencing Advisory Council (2016: 34) has noted:

> Even if an incident is reported, victims of family violence may find it difficult to continue with the prosecution; for example, they may feel under pressure not to give evidence in court even if they have made a statement to the police. While the prosecution can still go ahead if there is other evidence, the unwillingness of the victim to give evidence can lead to charges being withdrawn.

This means that not only are the dynamics of IPV not captured by the manner in which we have criminalised interpersonal violence, but even when criminal offences do regularly take place as part of this pattern, they are unlikely to result in convictions. It follows that, in the IPV context, much of the historical offending that may have taken place may not be registered in the criminal conviction history of the perpetrator and will thus be hidden from the view of the courts.

If there are no prior convictions on the offender's record then this presents a significant obstacle to the consideration of past patterns of harm for the purposes of making a realistic assessment about what might be required to support victim safety at sentencing. Additional difficulties will be presented when the history of unconvicted abusive behaviour is in respect of prior partners.

Issues of proof

At sentencing, the facts essential to guilt in respect of the particular incident that resulted in the conviction do not have to be proven. In respect of other facts, section 24(2) of the *Sentencing Act 2002* (NZ) provides that if one party asserts a fact that is relevant to the determination of a sentence that is disputed by the other then they may 'adduce evidence as to its existence unless the court is satisfied that sufficient evidence was adduced at the trial' (subs (b)). The burden lies on the prosecution to prove any disputed aggravating fact, and to negate any disputed mitigating fact, beyond a reasonable doubt (subs (c)). Either party may cross-examine any witness called by the other party (subs (e)).

What this means is that the burden will lie on the Crown, to the very high standard of criminal proof, to prove at sentencing any past patterns of harm that have not resulted in convictions – to the extent that these have not been already established to have occurred in the original trial. And, given that past abuse is likely to be understood as irrelevant to the incident that forms the basis of the particular offence charged, then it is unlikely that it will be established to have occurred in the trial. As a result, if the defence objects to

any suggestion that there is a past pattern of harm at sentencing, then any evidence that suggests that the abuse context is larger than the incident in question is likely to be put aside at this point, unless the Crown insists on a disputed fact trial.

For example, the New Zealand sentencing courts are reluctant to consider evidence of previous police family violence call-outs. In *Oliva v Police*[26], the High Court accepted that the sentencing judge should not have taken into account police records of previous family violence call-outs in which Oliva was recorded as being the offender because none of the call-outs resulted in convictions. The fact that the offender had had police safety orders granted against him on prior occasions was also 'put aside' in *Tuumaga v Police.*[27]

The court is required under section 8(f) of the *Sentencing Act 2002* (NZ) to take into account any information it has concerning the effect of the offending on the victim. A 'victim impact statement' will inform the sentencing judge of 'any physical or emotional harm', 'loss of or damage to property' and 'other effects of the offence on the victim'.[28] However, statements by the victim outlining a past history of abuse by the defendant that has not resulted in convictions will not be considered at sentencing. In *Parker v Police*[29], the defendant pled guilty to the offence of male assaults female after 'sustained attacks'[30] to his partner's head, leaving her with injuries. When he attempted to say that this was a one-off incident, the sentencing judge referred to the victim impact statement where the victim said that this was not the first time the offender had assaulted her. Even the Crown accepted that the judge was wrong to refer to this statement at sentencing and, on appeal, the High Court 'firmly' put the statement to one side.

In New Zealand, the affidavit evidence that is attached to applications for a protection order is held in the Family Court. These affidavits contain the victim's account of the history of abuse that has led to her applying for a protection order, including risk indicators for IPV lethality or threats to the children. Such evidence provides the context for any subsequent breach of that protection order. For example, ringing someone in breach of a protection order several times after separation looks like a minor infringement if you are not aware that the person making contact has repeatedly raped the person they are contacting, has degraded them in multiple other ways and has repetitively violated any boundaries that the victim has tried to set throughout their relationship. When that context is considered, not only does the breach no longer seem 'low level', but any excuses for the breach can also be understood as a refusal on the part of the offender to acknowledge the impact of his behaviour on the victim or take responsibility for it.

Whilst protection order affidavits are not routinely made available to the criminal court, under Rule 432 of the Family Court Rules, the Registrar of a court that is dealing with a criminal proceeding may obtain information that has accompanied a protection order made against the defendant or pending. However, as with the other evidence listed above, should the defendant object to the use of this evidence on the basis that it is an unproven account by the victim that he disputes, then the sentencing court will have to disregard it unless there is a trial of fact in order to allow the Crown to prove the allegations to the required standard. In this case, section 24 of the *Sentencing Act 2002* would likely require the Crown to put the victim on the stand and allow them to be cross-examined by the

defence in order to test the veracity of their account. Accurately and plausibly recounting this history under the pressure of cross-examination will be challenging for the victim if the events in issue have occurred many years in the past and are highly traumatic, particularly if the victim has head injuries or has self-medicated with drugs or alcohol as a result of their abuse history.

Judicial reluctance to accommodate past patterns of abuse at sentencing may well be because of the fear that the extra resources and time required to conduct disputed fact trials within every sentencing process would bring the criminal justice system to a halt. Furthermore, there are obvious difficulties in relying on the victims of IPV to provide testimony under rigorous cross-examination long after the event in a process that will end up affecting the sentence of the perpetrator. However, it is equally obvious that *not* considering evidence of patterns of harmful behaviour by the offender means that judges are making sentencing decisions in response to artificially decontextualised incidents of harm. This is potentially dangerous for victims.

Issues of fairness

An additional complication in this context is the 'fundamental and important principle' articulated in *The Queen v De Simoni*[31] that 'no one should be punished for an offence of which he has not been convicted'. In *De Simoni*, this manifested in the rather narrower principle that 'circumstances of aggravation not alleged in the indictment could not be

relied upon for the purposes of sentence if those circumstances could have been made the subject of a distinct charge'.[32]

Still moot is whether, as a matter of procedural fairness, the broader rule articulated in *De Simoni* applies. In *Weininger v R*[33], the High Court of Australia held that it would have been open to the sentencing judge to conclude beyond reasonable doubt that the appellant in this case had previously committed other crimes that he had not been charged with or convicted of. Whilst this would have warranted a heavier sentence, this would not have been to wrongfully sentence him for crimes he had not been convicted of. Rather, it would have been no more than to:

> give effect to the well-established principle … that the character and antecedents of the offender are, to the extent that they are relevant and known to the sentencing court, to be taken into account in fixing the sentence to be passed.[34]

Some of the past patterns of harm that should be considered at sentencing may not fit within the definition of any criminal offence. However, it should not be the case that, when crafting sentences that address victim safety, those that do meet the criteria for a criminal offence should be arbitrarily disqualified from consideration on this basis. The purpose here is not to punish the perpetrator for unconvicted harms but to tailor punishment in respect of the offence that they are convicted for in a manner that prioritises the victim's safety.

Potential reforms

There are a number of reform options that would address the need to consider the defendant's harmful pattern of behaviour at sentencing. One is to simply insist on disputed fact hearings within sentencing decisions in cases involving IPV – regardless of the cost, time and likely success in proving overall patterns of harm.

Another is to craft offences that better capture patterns of offending – for example, creating an offence of coercive control – for the purposes of facilitating sentencing responses to the entire pattern of harm perpetrated by the offender and experienced by the victim. The many challenges involved in successfully implementing this strategy have been explored elsewhere and will not be revisited here (Tolmie forthcoming). Suffice to say, it is likely that, even if such an offence were enacted, the courts would still need to respond to victim safety concerns in respect of those elements of the abuse that are prosecuted as traditional criminal offences.

Another option is to regularise processes of gathering information about the overall pattern of harm during investigation of the offence in order to put this before the trier of fact during the trial. This would mean that this information had been through a 'truth testing' process in the trial, that any objections had been heard, and that it would be available to inform the sentencing response. Such an approach would require employing a 'whole-of-story approach' to taking victim testimony and gathering other evidence – similar to that developed in relation to sexual violence in Victoria (Barnett 2013). Such a radical shift in current practice would require legislative mandate. It would also require

considerable development in expertise at every level of the criminal justice system (Sheehy forthcoming). There is, however, some precedent for taking such an approach. For example, in *R v R*[35], the Crown was permitted to lead evidence of the defendant's overall domination, control and abuse of his family in his trial for individual offences. A final reform possibility is changing the standard of proof at sentencing in respect of issues relevant to victim safety for the purposes of accommodating victim safety in crafting sentences. For example, in many integrated family violence courts, information is free flowing between the family and criminal functions of the court, except for the purposes of establishing guilt under the criminal law. Once guilt is established, however, information that has been generated via family law proceedings can inform sentencing decisions (Lawton 2017: 16). This supports the distinction suggested here between the establishment of guilt and the subsequent sentencing consequences.

Conclusion

In this chapter I have described two impediments in New Zealand to responding to victim safety in IPV cases in the sentencing process. One is the fact that victim safety is not an explicit or mandatory sentencing consideration and, in fact, requires some effort to accommodate within the current decision-making framework. The second is that the offender's overall pattern of abusive behaviour is unlikely to be before the sentencing judge. Judges may therefore only be equipped to react to the act of offending as an isolated incident.

This represents a waste of the opportunity provided by a sentencing intervention to take responsibility for the ongoing safety issues likely to be experienced by IPV victims (Centre for Innovative Justice 2015: 54). It calls for a shift in the paradigm that currently underlies the criminal justice sentencing process.

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[1] This has shifted in more recent years in relation to successive convictions for breaches of protection orders; *Mataiti v Police* [2014] NZHC 1675.

[2] Cf. *R v Kimiora* [2015] NZHC 1940.

[3] The position in New Zealand is similar to that in a number of Australian jurisdictions. See *Crimes (Sentencing Procedure) Act 1999* (NSW), s 3A; *Sentencing Act* (NT), s 5; *Crimes (Sentencing) Act 2005* (ACT), ss 6-7; *Sentencing Act 1988* (SA), s 10 (where community protection is a mandatory sentencing consideration); *Sentencing Act 1995*

(WA), s 6 (in which proportionality is legislated as the dominant sentencing principle). The position is different in Queensland, where ss 3(b) ad 9(3) of the *Penalties and Sentences Act 1992* mean that victim safety (and matters that bear on victim safety) are primary considerations when sentencing for violent offences. In Victoria, for offences involving high levels of physical violence (Clause 2 of Schedule 1), s 6D of the *Sentencing Act 1991* provides that the protection of the community takes precedence and overrides the principle of proportionality. The Victorian Sentencing Advisory Council has produced guiding principles for the sentencing of contravention orders (2015), [4.6]. See also s 3 of the *Family Violence Act 2004* (Tas).

[4] Prominence is given to victim safety when making bail decisions: ss 7, 8(1)(a)(iii), (2)(d), (5) of the *Bail Act 2000* and ss 29, 30 of the *Victims Rights Act 2002*. Furthermore, New Zealand is piloting judges' 'bail information packs' which provide judges with all the information held by police on the defendant's criminal and family violence history, including police call-outs, safety orders or protection orders, any breaches of those orders, and victims' views on bail.

[5] *R v Puhi* [2015] NZDC 9648.

[6] *Sterjov v Police* [2015] NZHC 3103, [40].

[7] Also not examined are the various regimes designed to manage the risks posed by particular offenders – for example, preventative detention (ss 87–90, *Sentencing Act 2002* (NZ)), the three strikes regime (ss 86A-I, *Sentencing Act 2002* (NZ)), and public safety orders (*Public Safety (Public Protection Orders) Act 2014* (NZ)).

[8] *R v Aston* [1989] 2 NZLR 166, 171; *R v Puru* [1984] 1 NZLR 248, 250, 254; *R v Hiha* [1987] 2 NZLR 119, 121.

[9] It is arguable that s 5(1)(b) of the *Domestic Violence Act 1995* (NZ), setting out the objects of the Act, might require consideration of victim safety when sentencing for breaches of protection orders: *Aberahama v Police* [2017] NZHC 1179, [9].

[10] See also s 8(f) of the *Sentencing Act 2002*.

[11] *Joseph v Police* [2016] NZHC 2974, [23]; *Beck v Police* [2014] NZHC 931, [20].

[12] Jeffries and Bond (2015: 467) suggest that IPV offenders could be seen 'as less threatening' to the community because of 'the emotional triggers often attributed to violence' which suggest 'minimal danger to those outside of the relationship'.

[13] [1976] 1 NZLR 588, 591.

[14] *Gifkins v Police* [2017] NZHC 1399, [30].

[15] *R v Tauariki* CA455/03, 15 July 2004, [8].

[16] *R v Taueki* [2005] 3 NZLR 372.

[17] *R v AM* [2010] NZCA 114, [15].

[18] [2016] NZHC 2748.

[19] Ibid, [22].

[20] Ibid, [23].

[21] Pre-sentence reports will provide information about an offender's circumstances, including past offending and the offender's response to previous sentences (Hall 2007: 191).

[22] *Olivia v Police*, HC Auckland CRI-2010-404-086, [11].

[23] [1976] 1 NZLR 588.

[24] Ibid, 591; *R v Columbus* [2008] NZCA 192, [15].

[25] *Beckham v R* [2012] NZCA 290, [84].

[26] HC Auckland CRI-2010-404-086, [4] - [5]. See also *Tuumaga v Police* [2015] NZHC 1695, [31].

[27] [2015] NZHC 1695, [31].

[28] *Victims' Rights Act 2002*, s 17(1).

[29] [2016] NZHC 2524, [14].

[30] Ibid, [15].

[31] [1980-1981] 147 CLR 383, 389.

[32] Ibid, 389. Some jurisdictions have abolished this principle: s 7(3), *Sentencing Act 1995* (WA). Others have codified it: s 34(b), *Sentencing Act 2005* (ACT).

[33] [2003] 212 CLR 629.

[34] Ibid, [32]. See s 16A(2)(m) of the NSW *Crimes Act 1900*.

[35] [2015] NZCA 394.