Submission No 116

COERCIVE CONTROL IN DOMESTIC RELATIONSHIPS

Name: Dr Jane Wangmann

Position: Senior Lecturer

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UTS UNIVERSITY OF TECHNOLOGY SYDNEY

Dr Jane Wangmann
Senior Lecturer
Faculty of Law
University of Technology Sydney
15 Broadway, Ultimo NSW 2007

T: +61 2 9514 3224
[redacted]

PO Box 123
Broadway
NSW 2007 Australia
www.uts.edu.au

UTS CRICOS PROVIDER CODE 00099F

Joint Select Committee on
Coercive Control
Parliament of NSW

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Submission to the Joint Select Committee on Coercive Control

Thank you for this opportunity to make a submission to your inquiry into coercive control in domestic relationships.

I am a senior lecturer in the Faculty of Law at UTS with extensive experience in legal responses to domestic and family violence. This experience has been multiple and varied over more than 25 years: as a legal practitioner with the then Domestic Violence Advocacy Service, in law reform positions with the Australian Law Reform Commission (ALRC), as a government policy officer in the then Attorney General's Department and as a researcher and academic. In my work I focus on a wide range of legal responses to domestic and family violence (including civil protection orders, criminal law and family law) and am interested in how the law conceives of, understands and responds to this harm. Since 2014, I have been a non-government sector expert member of the NSW Domestic Violence Death Review Team (DVDRT).

In support of my submission I draw the Committee's attention to my work in this area that relates to the terms of reference of the Committee and the scope of its work:

- ***On coercive control***

Jane Wangmann, 'Coercive control as the context for intimate partner violence: The challenge for the legal system' in Marilyn McMahon and Paul McGorrery (eds), *Criminalising Coercive Control: Family Violence and the Criminal Law* (Springer, 2020), 219-242. I have attached a copy of this chapter to this submission (see Appendix A).

- ***On differences in men and women's experiences of and use of violence (of relevance to understanding coercive control and concern around misidentification of women as offenders)***

Jane Wangmann, Lesley Laing and Julie Stubbs, 'Exploring gender differences in domestic violence reported to the NSW Police Force (2020) 32(3) *Current Issues in Criminal Justice* 255-276.

Jane Wangmann, 'Incidents v context: How does the NSW protection order system understand intimate partner violence' (2012) 34(4) *Sydney Law Review* 695-719.

Jane Wangmann, 'Gender and intimate partner violence: A case study from NSW' (2010) 33(3) *University of NSW Law Journal* 945-969.

- ***On drawing distinctions between different forms of violence that takes place in intimate relationships***

Jane Wangmann, 'Different types of intimate partner violence – what do family law decisions reveal?' (2016) 30(2) *Australian Journal of Family Law* 77.

Jane Wangmann, 'Different types of intimate partner violence: An exploration of the literature', Australian Domestic and Family Violence Clearinghouse, Issues Paper 22 (Oct 2011).

- ***Generally on Australian responses to domestic and family violence***

Julie Stubbs and Jane Wangmann, 'Australian perspectives on domestic violence' in Eve Buzawa and Carl Buzawa (eds), *Global Responses to Domestic Violence* (Springer 2017), pp. 167-188.

Julie Stubbs and Jane Wangmann, 'Competing conceptions of victims of domestic violence within legal processes' in Wilson & Ross (eds), *Crime, Victims and Policy: International Contexts, Local Experiences* (2015), pp. 107-132.

In this submission I do not specifically address the questions that are raised in the NSW Government's discussion paper on coercive control (2020), instead I focus on some of the tensions and challenges for effective law reform in response to a gendered harm such as domestic and family violence.

The key argument I raise with the Committee is that whether and how to recognise coercive control is far more complex than simply creating a criminal offence even if that offence is accompanied by extensive and thorough training for police and other key professionals. This is not an argument for or against; rather it is a call to recognise the entrenched complexity of law reform that is designed to address the harms women[1] experience. Experience with law reform to date across multiple areas that seek to address the harms women experience – for example domestic violence, sexual assault and sexual harassment – tells us that the focus needs to be on implementation, and in particular how to address or counter the resilience or stubbornness of the implementation gap, including unintended consequences, that has been encountered in these past law reform efforts.[2]

Recognising coercive control brings this implementation gap to the fore in key ways and raises important questions about how to do law reform better:

- How do you translate a concept drawn from what women have described as their experience within their current and former intimate relationships into one able to be recognised and actioned by law and its actors?
- How do you do so without replicating the structures and systems that are already at play in the criminal law?
- How do you ensure that any recognition of coercive control in the criminal law benefits the diversity of women who experience harm in their current or former intimate relationships?
- How does any reform to the criminal law interact with the many other areas of law that women engage with to address domestic and family violence (for example family law, child support, child protection, civil protection orders, and immigration)?

Law is only one element in how we assist victims of domestic and family violence; in this way, understandings of coercive control need to extend beyond law. A holistic and well-resourced response is essential, including for those victims who never approach the law for assistance.

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[1] I use gendered language in this submission, referring to women as victims and perpetrators as men. This gendered language recognises that women comprise the vast majority of victims across a wide range of data sources: See Royal Commission into Family Violence (Victoria), Report and Recommendations: Vol, I (Victorian Government, 2016); for homicide data see NSW DVDRT, *Report 2017-2019* (2020); for general population data see ABS, Personal Safety Survey, Australia, Cat No 4906.0 (ABS, 2016). The use of gendered language does not mean that I do not recognise that men may be victims and women perpetrators of violence in heterosexual or same-sex relationships – they can and are.

[2] See similar arguments raised in Michelle Burman and Oona Brooks-Hay, 'Aligning policy and law? The creation of a domestic abuse offence incorporating coercive control' (2018) 18(1) *Criminology & Criminal Justice* 67, 78. See also Rosemary Hunter, Domestic violence law reform and women's experiences in court: The implementation of feminist reforms in civil proceedings (Cambria Press, 2008), pp. 5-9.

1. Time frame and process for the Inquiry

How the legal system should respond more appropriately to coercive control is a complex issue. The work of this Committee is wide in scope and involves many questions, issues and tensions. The time frame for making submissions was short (most of the time extending across the school holiday break) which may have impacted on the capacity of individuals and organisations to allocate sufficient time to addressing all the issues that they might have wanted to address.

I urge the Committee to **extend its time for submissions, hearings and reporting** to ensure that this important issue is not rushed and that sufficient time is made available for as many voices as possible to be heard and considered in this process.

In addition, the scope of the work of the Committee involves many tensions and debates that would benefit from discussion in a format other than the individual submission/evidence format that is traditionally adopted by parliamentary inquiries. I recommend that the Committee consider holding a **series of roundtables** where people from diverse organisations, backgrounds and experiences, and importantly including victim/survivors, can be heard in a respectful format.

2. Arguments in support of criminalizing coercive control

The key argument for creating an offence like coercive control (the term used in England and Wales) or domestic abuse (the term used in Scotland) is the recognition that the traditional focus of the criminal law has been on incidents of largely physical violence, and that this leaves much of the behaviour victims of domestic and family violence report (and frequently cite as the most harmful) beyond the reach and attention of the criminal law.[3] It is worth noting in this context that the critiques of the incident-based framework of the criminal law, are the same critiques that saw the development of civil protection orders across Australia in the 1980s as a better way to both address a broader spectrum of behaviours and to provide a legal mechanism to protect women that had a lower standard of proof.[4]

The intention then is to create a criminal offence that better captures both the non-physical forms of violence and abuse as well as the patterned and repetitive nature of domestic and family violence. This is an important aim and one that is clearly designed to respond to the harm that many women experience in their intimate relationships.

It is, however, not accurate to state that all non-physical forms of abuse are currently beyond the reach of the criminal law (there are, for example, a range of offences to address the use of carriage

[3] Deborah Tuerkheimer, 'Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence' (2004) 94(4) *Journal of Criminal Law & Criminology* 959, 959. See also Vanessa Bettinson and Charlotte Bishop, 'Is the creation of a discrete offence of coercive control necessary to combat domestic violence' (2015) 6(2) *NILQ* 179.

[4] Jane Wangmann, 'Coercive control as the context for intimate partner violence: The challenge for the legal system' in Marilyn McMahon and Paul McGorrery (eds), *Criminalising Coercive Control: Family Violence and the Criminal Law* (Springer, 2020), 227.

services[5] to threaten and harass,[6] other threats of various kinds,[7] intimidation to coerce a person to have (or not have) a termination of pregnancy,[8] or to criminalise a wider range of behaviours that form breaches of civil protection orders[9]) and there are also some offences designed to address patterned forms of behaviour (for example, stalking and intimidation in NSW[10]).

The key point of difference from existing offences, and key to moves to criminalise coercive control, is the move away from prosecuting single incidents to more clearly put within the view of the law the pattern of behavior that is experienced as domestic and family violence. This is important because some behaviours when articulated in isolation might appear minor or trivial, but when viewed together in context, are able to be seen as part of the apparatus of coercive control.

The push to criminalise coercive control seeks to address what is seen as a 'gap'[11] in the criminal law to create an offence that better fits women's experiences and enables a full picture of harm to be presented to the court. Criminalising coercive control is also seen as part of a 'fair labelling' process that plays an important role in educating the community about what is domestic and family violence and what society sees as behaviour warranting the attention of the criminal law.

These arguments are significant. At the same time, however, there are key questions and challenges about whether the criminal law is the most appropriate site for this recognition, and whether in focusing on a criminal offence it will deliver the safety and responsiveness victims of domestic and family violence seek if they decide to approach the law.[12]

The remainder of this submission raises challenges for the implementation and practice of this offence to achieve its aims. In this way it is not an argument against, but rather a challenge to do law reform better in this space; to do it in a way that:

- responds to what we already know about the operation of the criminal and civil legal systems in NSW and Australia more generally;
- responds to the unique circumstances of the NSW and Australian contexts; and
- enhances the safety of the wide diversity of women who experience domestic and family violence.

Otherwise we risk introducing an offence that might assist some women but may have unintended consequences for women who are more marginalised, and an offence that might change police and

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[5] This is defined in *Telecommunications Act 1977* (Cth) s 7 and includes telephone services, internet access services, voice over internet protocol services (eg Skype): https://techsafety.org.au/blog/legal_articles/legal-guide-to-image-based-abuse-legislation-in-nsw/ (accessed 22 January 2021).

[6] For example, to make a threat to kill a person or to cause serious harm to a person (Criminal Code (Cth) s 474.15), to menace, harass or cause offence (Criminal Code (Cth) s 474.17)

[7] For example, ending documents containing threats (*Crimes Act 1900* (NSW) s 31; threatening to record or distribute an intimate image (*Crimes Act 1900* (NSW) s 91R; threats to destroy property (*Crimes Act 1900* (NSW) s 199); threatening or intimidating victims or witnesses (*Crimes Act 1900* (NSW) s 315A)

[8] See *Crimes Act 1900* (NSW) s 545B.

[9] See *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 14.

[10] See *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13.

[11] For a discussion of the limitations of gap analysis see Julia Quilter, 'Evaluating criminalisation as a strategy in relation to non-physical family violence' in Marilyn McMahon and Paul McGorrery (eds), *Criminalising Coercive Control: Family Violence and the Criminal Law* (Springer, 2020) 124-126.

[12] See Sandra Walklate and Kate Fitz-Gibbon, 'Why criminalise coercive control? The complicity of the criminal law in punishing women through furthering the power of the state' (2021) *International Journal for Crime, Justice and Social Democracy*. Advance online publication.

other actors' response in relation to that specific offence but fail to respond to the need for the legal system more widely to understand coercive control.

3. 'Coercive control' is not a new concept

We need to take care not to present coercive control as something new. While the language of coercive control might be relatively new in more popular discourse on domestic and family violence it is not a new concept. There is in fact an extensive body of work that emphasises the context in which violence between intimate partners takes place, and that this violence is not limited to physical assaults but rather includes a wide range of controlling and psychologically abusive behaviours that together function to control the victim. This work has emphasised the ways in which domestic and family violence is far more than isolated incidents of violence and abuse, rather it is the cumulative and patterned environment in which these acts and behaviours take place that effectively limits the victim's freedom and space for action. Over time this context for acts and behaviours that form the experience of domestic violence has been given different terms, such as power and control, social entrapment[13] and coercive control.[14]

The recent action on coercive control is influenced by the significant work of Evan Stark. In his 2007 book Stark seeks to 'reframe' intimate partner violence as a from a focus on one-off violent events, to one that recognises the 'multidimensionality of oppression' in the lives of women experiencing domestic and family violence.[15] In this way, coercive control is 'ongoing and perpetrators use various means to hurt, humiliate, intimidate, exploit, isolate, and dominate their victims' over time. It involves a wide range of acts and behaviours including physical and sexual abuse but importantly other means of control, deprivation and isolation.[16]

Coercive control then is not a list of non-physical behaviours (such as limiting who a woman can see, whether she can work, what she can wear and so on) rather it is the context for, or function of, those behaviours. This contextual understanding of what is coercive control is important as it may indeed include acts already recognised by the criminal law such as physical violence, sexual violence, property damage and stalking, as well as those that are not criminalised. This contextual understanding asks us to focus, not on the individual acts and behaviours themselves but rather on the way in which they function together as a patterned, repetitive cumulative environment that serves to limit a victim's freedom and space for action.

So what is new is not the 'discovery' of coercive control, rather what is new are the discussions around criminalisation of this patterned form of behaviour.

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[13] It is significant that work on 'social entrapment' goes further than recognising the context for, and function of, various acts and behaviours that are perpetrated as part of domestic and family violence and also look to the operation of the service delivery system and social inequities (such as gender, race, class and disability) which also exacerbate their experiences of coercive control and impact on the extent to which women are able to take action: see Stella Tarrant, Julia Tolmie and George Giudice, *Transforming legal understanding of intimate partner violence*, ANROWS Research Report (2019), pp. 17-22.

[14] See work by Ellen Pence and Michael Paymar, *Education groups for men who batter: the Duluth model* (Springer, 1993); Rebecca Dobash and Russell Dobash, *Violence against wives: A case against the patriarchy* (Free Press, 1979); Susan Schecter , *Women and male violence: The visions and struggles of the battered women's movement* (Pluto Press, 1982); James Ptacek, *Battered women in the courtroom: The power of judicial responses* (Northeastern University Press, 1999).

[15] Evan Stark, *Coercive Control: How men entrap women in personal life* (Oxford University Press, 2007), p.5.

[16] Ibid.

4. Complex understandings of the nature of domestic and family violence have not necessarily translated to practice

In the Australian context there is widespread community and professional understanding that domestic and family violence involves far more than physical abuse.

In a summary of the key points of the National Community Attitudes to Violence against Women Survey, ANROWS notes that 'Australians are more likely to understand that violence against women involves more than just physical violence in 2017 than they were in 2013 and 2009'.[17] For example, 83% of respondents to the survey in 2009 agreed that controlling the 'social life by preventing partner from seeing family/friends' is domestic violence; this increased to 85% in 2013 and to 91% in 2017.[18] Similarly, 71% of respondents to the survey in 2009 agreed that controlling 'the other partner by denying them money' is domestic violence; this increased to 81% in 2017.[19] Other forms on non-physical violence saw similar positive shifts in the recognition that they are part of domestic and family violence. ANROWS concluded that 'although more Australians are now aware of the many different forms violence against women can take, there is still more work to do to emphasise that it can be more than physical violence'.[20]

Importantly the policies and procedures that assist the police have also recognised the broad breadth of forms of behaviour that might comprise domestic violence. For example, the *NSW Police Force Code of Practice for Responding to Domestic and Family Violence* states that:

> Domestic and family violence (DFV)… is a crime that takes many forms including emotional and psychological abuse, intimidation, harassment, stalking, physical and sexual assault, and can include animal abuse targeting pets, and damaging personal or joint property.
>
> It is the most under reported of crimes because the perpetrator knows the victim intimately through a long term, close or developing relationship. The perpetrator relies on developing, during the early stages, a strong bond through friendship, love, trust and loyalty to create a high degree of co-dependence. The underlying behavioural traits of power and control are then employed as tactics to commit the crime. Traditional stereotypes about gender deeply embedded in community attitudes can reinforce what is considered appropriate or normal behaviour between perpetrator and victim.[21]

The NSW Judicial Commission's Bench Book on *Equality Before the Law,* designed to assist all judicial officers in NSW, also explicitly provides a broad understanding of domestic and family violence in its discussion about the range of different terms that may be used to describe this form of violence:

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[17] ANROWS, *Are we there yet? Australian's attitudes towards violence against women and gender equality: Summary findings from the 2017 National Community Attitudes towards Violence Against Women survey (NCAS)*, (ANROWS, 2018), p. 2. Available at https://20ian81kynqg38bl3l3eh8bf-wpengine.netdna-ssl.com/wp-content/uploads/2019/02/ANROWS_NCAS_Summary_Report.pdf

[18] Ibid, p. 6.

[19] Ibid.

[20] Ibid.

[21] NSW Police Force, *Code of Practice for the NSW Police Force Response to Domestic and Family Violence* (2018), p. 2. Available at https://www.police.nsw.gov.au/__data/assets/pdf_file/0016/165202/Code_of_Practice_for_the_NSWPF_response_to_Domestic_and_Family_Violence.pdf . See also the statement by Assistant Commission Mark Jones APM, Corporate Sponsor for Domestic and Family Violence in the NSW Police Force, Domestic and Family Violence Policy (2018), p. 7. Available at https://www.police.nsw.gov.au/__data/assets/pdf_file/0006/477267/Domestic_and_Family_Violence_Policy_2018.pdf

> **"Domestic violence"** can be understood as "a set of violent or intimidating behaviours usually perpetrated by current or former intimate partners, where a partner aims to exert power and control over the other, through fear". It can include physical, sexual, emotional, psychological and financial abuse and violence. Violence includes attempted or threatened violence. Emotional abuse can include controlling or preventing a person from having contact with friends and family; constant insults, shouting or verbal abuse intended to humiliate; using lies to turn the victim's children against them; and, threatening to take children away.
>
> The term "**domestic abuse**" is being increasingly preferred in the literature because it takes the emphasis away from violence in its physical form. It is inclusive of the range of forms abuse can take, whether or not physical violence is also present. However, "domestic violence" is the term used in NSW case law and legislation.
>
> **"Coercive control"**: There has previously been a tendency to understand domestic violence or abuse as a single incident of (usually physically) violent behaviour, even if occurring multiple times. By contrast, coercive control refers to "a pattern of domination that includes tactics to isolate, degrade, exploit and control them, as well as to frighten them or hurt them physically". It is through the framework of coercive control that an eight-stage progression towards domestic homicide has recently been identified. There are laws that criminalise coercive control in jurisdictions in the United Kingdom, but there is no such offence in any Australian jurisdiction (footnotes omitted).

The reason I mention these things here is to draw our attention to the fact that there is knowledge amongst the community and key professional groups that non-physical behaviours form part of domestic violence, as well as knowledge about the way in which these behaviours function to control the victim. The new language of coercive control may be confusing in this context; by coming across as something new, rather than something that has long been known, this potentially shifts attention away from questions about why this knowledge is not being currently actioned. The deeper and more challenging questions are:

- **Why has this knowledge not translated into better and more substantive outcomes for victims across a range of social, legal and other policy responses?** Does this failure to translate perhaps point to more entrenched problems than is able to be addressed through the creation of a discrete offence?
- **How do we improve and transform education and training for key professionals so that this knowledge is able to be translated and actioned in the work setting?** This is far more than content delivery, but rather content that is responsive and adaptive to the workplace setting.

5. 'Gaps' in existing responses

Recent homicide cases, inquiries and research reports continue to highlight gaps and problems in the existing criminal justice system response from police, legal practitioners and judicial officers. These have highlighted inconsistency in responses, as well as failures to take action when required.

Recent homicide cases (for example the coronial inquest into John Edwards suicide and killing of his two children,[22] and the recent coronial report into the death of Fabiana Yuri Nakamura Palhares in Queensland[23]) raises questions about the extent to which some legal actors are bringing this broader

[22] Editorial, *The Sydney Morning Herald* (25 September 2020) available at https://www.smh.com.au/national/harrowing-inquest-exposes-failures-to-stop-domestic-violence-20200925-p55zd5.html (accessed 22 January 2021)

[23] Non-inquest findings into the death of Fabiana Yuri Nakamura Palhares, Coroners Court (Southport, Qld), 20 January 2021.

understanding of the nature of domestic and family violence to their work, if at all.[24] Both of these cases have demonstrated gaps in the police response including not acting on offences currently available, not recording reports made to them, failing to assess the escalating risk, failing to ascertain the history of offending by the perpetrator in the present as well as past relationships – all steps required now.

While a new charge of coercive control might have been able to be laid in these cases, this was not the most substantial 'gap'. **The gap was the failure to do what is already required and possible despite limitations in the current legislative framework**. One of the risks of focusing on a new offence as *the measure* that will fill the gap in legal responses to domestic and family violence is that this "may impliedly endorse the idea…that *physical* family violence is currently well policed and adequately addressed by the criminal law".[25] This is simply not the case. The cases considered by the NSW Domestic Violence Death Review Team (DVDRT) not only reveal the extent to which homicides were preceded by coercive and controlling violence, but also continuing gaps and failures to do what is required within the current service delivery system.

Work on social entrapment emphasises that 'gaps' in legal responses are not merely about what offences are available and how they are drafted, but rather that gaps are also created and maintained by the lens through which legal actors view the facts and 'evidence' in various legal processes. In a recent article Heather Douglas and colleagues[26] powerfully illustrate the difference that a social entrapment lens can make through two cases; one involved a woman from a Filipino background who was killed by her violent partner[27] and the other involved an Aboriginal woman who killed her violent partner.[28] What is significant about the social entrapment lens is that it not only brings to the fore the coercive control experienced by the woman, but 'an examination of the realistic safety options available to the victim' and the way in which 'structural inequality may exacerbate the coercive control of the person using violence and weaken the safety options available to the victim'.[29]

A number of recent Australian inquiries have considered the question of a dedicated domestic violence offence, such as coercive control, and have decided not to do so. Instead these inquiries have pointed to the ongoing inadequacies evident in current responses, noting that a new law will not necessarily address these. For example, the Special Taskforce on Domestic and Family Violence in Queensland noted that:

> …the difficulties with prosecuting domestic and family violence offences relate more to problems with evidence gathering, witness cooperation, police practice and court processes. It is these elements which have undermined the effective use of existing Criminal Code provisions. The Taskforce was particularly concerned that simply creating a dedicated offence of domestic and family violence would not alleviate these barriers. Enacting a new offence specifically for domestic and family violence that faced the same

[24] See also cases 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 and victims' (2020) 32(4) *Current Issues in Criminal Justice* 488.

[25] Quilter, above n11, p. 126.

[26] Douglas et al, above n24. See also Tarrant et al, above n13.

[27] *R v Dickson* [2016] QSC 42 (sentencing decision); the authors contrasted this to the approach taken in the coronial inquest.

[28] *The State of Western Australia v Gore* [2016] WASCR 229.

[29] Douglas et al, above n24, p. 489.

> evidentiary and process issues, would still not achieve the goal of protecting victims or increasing accountability of perpetrators.[30]

Similarly the Victorian Royal Commission into Family Violence (RCFV)m noting deficiencies in the implementation of current laws, emphasised that laws are only effective in terms of how they are practiced, and that simply changing the law cannot, on its own, address these 'underlying deficiencies'.[31] The RCFV concluded that improving training and education including 'embedding best practice and family violence specialisation in the courts, is likely to be more effective than simply creating new offences…'.[32]

In my recent chapter on coercive control,[33] I discuss how the NSW civil protection order system – a system specifically designed to move beyond incidents – has not succeeded in doing so. I argue that this 'reveals a great deal about the practice of law in this intersecting criminal/civil space around the harm of IPV [intimate partner violence] and is suggestive of greater and more profound challenges about how to move away from the dominance of incidents than can be addressed by simply creating a new offence'.[34] The experience with civil protection orders is particularly important in the Australian setting given its relative dominance as the legal tool to address domestic and family violence (unlike some other overseas jurisdictions), the fact that it was designed to capture and address more than single incidents, and that it has also been a key site in which women have been misidentified as domestic and family violence perpetrators when they were in fact the predominant victim. I recommend the Committee read work on this issue by Heather Douglas,[35] Heather Nancarrow,[36] Ellen Reeves,[37] and myself.[38]

There is a pressing need to **examine the training and education that key actors in the criminal justice system currently receive and how this can be translated more effectively in the work setting.** Despite significant improvements in policing and other legal responses, one of the most consistently repeated recommendations across domestic and family violence inquires since the 1980s is the need for police and other key professionals to have improved training around domestic and family violence.[39] I argue that this repetition 'points to greater challenges with the adequacy of

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[30] *Special Taskforce on Domestic and Family Violence in Queensland, Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland. (2015), pp. 14-15.*

[31] Royal Commission into Family Violence (Victoria). *Report and Recommendations: Vol III*. Royal Commission into Family Violence (Victoria), 2016), p. 228.

[32] Ibid, p. 189.

[33] Wangmann, above n4. See Appendix A.

[34] Jane Wangmann, 'Coercive control as the context for intimate partner violence: The challenge for the legal system' in Marilyn McMahon and Paul McGorrery (eds), *Criminalising Coercive Control: Family Violence and the Criminal Law* (Springer, 2020), 229.

[35] Heather Douglas and Robin Fitzgerald, 'Legal processes and gender violence: Cross-applications for domestic violence protection orders' (2013) 36(1) *UNSW Law Journal* 56.

[36] Heather Nancarrow et al, *Accurately identifying the 'person most in need of protection' in domestic and family violence law*, ANROWS Research Report, (ANROWS, 2020); Heather Nancarrow, *Unintended consequences of domestic violence law: Gendered aspirations and racialized realities* (Palgrave, 2019).

[37] Ellen Reeves, 'Family violence, protection orders and systems abuse: Views of legal practitioners' (2020) 32(1) *Current Issues in Criminal Justice* 91.

[38] Jane Wangmann, 'Incidents v context: How does the NSW protection order system understand intimate partner violence' (2012) 34(4) *Sydney Law Review* 695-719; and Jane Wangmann, 'Gender and intimate partner violence: A case study from NSW' (2010) 33(3) *University of NSW Law Journal* 945-969.

[39] Wangmann, above n4, 230.

responses to IPV than can be satisfied through the implementation of a single offence and training about that offence.[40] Training and education of key professionals must also be viewed within the context of adequate resourcing for the criminal justice system. Not only does effective education take time and financial resources, to be able to act on that **education also requires that the system itself is adequately resourced at every level.**

6. Factors that need to be considered in discussions around the criminalisation of coercive control

While there are significant arguments for the need to criminalise coercive control and the benefits that might be attained from doing so, there are a number of factors that I submit the Committee needs to consider in its work. Most significantly the Committee needs to recognise the unique Australian context when considering adopting a law reform initiative that has been implemented overseas.

(a) The history of colonisation and its continuing impacts

The history of colonisation and its continuing impacts on Aboriginal and Torres Strait Islander people needs to be recognised in developing any response to domestic and family violence. Aboriginal and Torres Strait Islander women experience domestic and family violence at much higher rates and higher levels of severity when compared to the general population.[41] There also remains high levels of under-reporting.[42] At the same time Aboriginal and Torres Strait Islanders are 'over-represented in the criminal justice system,… particularly in family violence incident reports'.[43] Historical and current experiences with the police continue to impact on levels of reporting and engagement not only with the police but also with other services, the linkage between police involvement and the involvement of child protection services remains a barrier for Aboriginal and Torres Strait Islander women seeking assistance:

> In Aboriginal and Torres Strait Islander communities and family networks, perceptions of historical injustices, especially the forced removal of Aboriginal and Torres Strait Islander children from their families, have shaped a generational lack of trust towards police services and the criminal justice and social service systems and, in the light of the Stolen Generations, a lack of trust in child protection services. These are primary factors in a reluctance to report violence and to access the services available for all Australians. The failure of criminal justice responses to family violence is exacerbated in Aboriginal and Torres Strait Islander communities on account of this lack of trust.[44]

The over criminalisation of Aboriginal and Torres Strait Islander men and women point to issues around the practice of the criminal law that may not be the feature of some overseas jurisdictions. In its 2017 report on incarceration rates of Aboriginal and Torres Strait Islander people the ALRC emphasised the poor response Aboriginal and Torres Strait Islander women experience when making reports about family violence to the police. The ALRC expressed concern that Aboriginal and Torres

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[40] Ibid.

[41] See data presented in Marcia Langton, Kristen Smith, Tahlia Eastman, Lily O'Neill, Emily Cheesman and Meribah Rose, *Improving family violence legal and support services for Aboriginal and Torres Strait Islander women*, ANROWS Research Report 25 (2020a), p. 22.

[42] Ibid, 33.

[43] Marcia Langton, Kristen Smith, Tahlia Eastman, Lily O'Neill, Emily Cheesman and Meribah Rose, *Family violence policies, legislation and services: Improving access and suitability for Aborignal and Torres Strait Islander men*, ANROWS Research Report 26 (2020b), p. 20.

[44] Ibid.

Strait Islander women, rather than being assisted as victims of violence, were instead being criminalised due to the police failing to identify who is the predominant aggressor, or that they were being charged with breaching civil protection orders or charged with aid and abet offences. Heather Douglas and Robin Fitzgerald in their 2018 research in Queensland argued that the civil protection order system which is designed to protect victims of family violence is instead operating as an entry point to the criminal justice system, particularly for Aboriginal and Torres Strait Islander women.[45] Emphasising the risk of misidentification Heather Nancarrow, in her study of civil protection orders in Queensland, found that 'Indigenous women were more often than Indigenous men and non-Indigenous women to have been identified by the police as a victim of violence before the police sought DVOs [domestic violence orders] naming them as the perpetrator'.[46]

It is vitally important that the Committee consults directly with Aboriginal and Torres Strait Islander people with lived experience of family violence and engagement with the legal system, Aboriginal and Torres Strait Islander service providers and workers, and Aboriginal and Torres Strait Islander scholars and advocates who work in this area.

(b) the dominant role of civil protection orders in Australia

The **dominance of civil protection orders and police involvement in applying for these orders** in Australia also points to **key differences in the legal landscape with the UK.** The different protection order landscape in the UK is outlined by Lis Bates and Marianne Hester in a recent article.[47] In the UK there are different types of civil protection orders available: including restraining orders (only able to be issued on conviction or acquittal for a criminal offence), non-molestation orders which can be applied for by the victim, and domestic violence protection orders or notices that can be sought for by the police and are short term only.[48] It is significant to note that these latter orders that involve the police where only introduced in 2014.

The significant role that civil protection orders play in Australia, particularly in terms of the police role in applying for these orders, positions the Australian states and territories quite differently to many overseas jurisdictions. Protection orders already give police scope to move beyond incidents, and move beyond physical violence. Importantly some Australian jurisdictions, although notably not NSW which does not have a definition of domestic violence, already specifically define domestic and family violence to include coercive and controlling behaviours. For example the Victorian legislation provides:

> (1) For the purposes of this Act, ***family violence*** is—
>
> (a) behaviour by a person towards a family member of that person if that behaviour—
>
> (i) is physically or sexually abusive; or
>
> (ii) is emotionally or psychologically abusive; or
>
> (iii) is economically abusive; or

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[45] Heather Douglas and Robin Fitzgerald, 'The domestic violence protection order system as entry to the criminal justice system for Aboriginal and Torres Strait Islander people' (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 51.

[46] Heather Nancarrow, *Unintended Consequences of Domestic Violence Laws: Gendered Aspirations and Racialised Realities* (Palgrave Macmillan, 2019), p. 113

[47] Lis Bates and Marianne Hester, 'No longer a civil matter? The design and use of protection orders for domestic violence in England and Wales' (2020) 42(2) *Journal of Social Welfare and Family Law* 133-153.

[48] Ibid, pp. 134-136.

(iv) is threatening; or

(v) is coercive; or

(vi) in any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person; or

(b) behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of, behaviour referred to in paragraph (a).

…

(3) To remove doubt, it is declared that behaviour may constitute family violence even if the behaviour would not constitute a criminal offence.[49]

In comparison, the NSW approach is offence driven.[50] **The absence of a clear definition of domestic and family violence in the NSW legislation leaves NSW out of step with other Australian jurisdictions that have more recently modernised their legislation around civil protection orders. This presents a clear opportunity for law reform in this space.**

While Victoria does provide a definition of domestic and family violence that includes coercive and controlling behaviours, it is important to note that it has not done so in a contextual way (ie coercive and controlling behaviours are listed as a separate item, rather than the context in which acts and behaviours take place). As noted in the recent ANROWS policy brief, citing Women's Legal Services Victoria, this has left this legislation open to misidentification of victims.[51] Any discussion about reform in this area should return to the ALRC and NSWLRC detailed consideration of this issue and in which a contextual definition was recommended in its common interpretative framework.[52]

(c) *Risk that the legal recognition of coercive control is confined to the discrete offence.*

There is a risk in legislating a discrete offence that it is seen as *the singular site* for recognising coercive control, rather than part of a wide range of offences and legal processes that are all designed to respond in some way to the harm of domestic and family violence including family law, child protection and immigration. I have expanded upon this point in my recent chapter on coercive control and the challenge for the legal system (attached to this submission).[53] As I argued in that chapter:

> While creating a new offence may assist in moving the legal system in a more responsive direction, unless an understanding of coercive control is extended across all areas and levels – for example, understanding how victims may respond to the violence and abuse they experience, how safety is considered at all levels – then any positive change might be more circumscribed than is hoped for. James Ptacek's work (1999, p.174) on social entrapment is also important here as he draws attention to the role of institutions in maintaining, facilitating and replicating social entrapment.[54]

Multiple inquires and research point to the way in which women seeking legal redress for domestic and family violence have to engage with multiple areas of law (including criminal law, civil protection orders, family law, child protection, immigration, child support, tenancy, debt and more). Christine

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[49] *Family Violence Protection Act 2008* (Vic) s 5. See also *Domestic and Family Violence Protection Act 2012* (Qld) s 8.

[50] See *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 11 which defines a 'domestic violence offence'.

[51] ANROWS, *Policy Brief: Defining and responding to coercive control* (February 2021), p. 3.

[52] ALRC & NSWLRC, Family Violence: A National Legal Response – Final Report, ALRC Report No. 114 and NSWLRC Report No. 128 (2010), rec 5-1, pp. 246-7.

[53] Wangmann, above n4.

[54] Ibid, p. 231. See Ptacek, above n14 and see discussion at n13.

Coumarelos found that people who experienced domestic and family violence in the 12 months prior to the Legal Australia-Wide (LAW) survey 'were 10 times more likely than others to experience other legal problems, including a wide range of family, civil and criminal law issues'.[55] Despite this there is no shared understanding of domestic and family violence across these spheres. In 2010 the ALRC and NSWLRC in their joint report on family violence recommended a common interpretive framework,[56] with the exception of the *Family Law Act*[57] which did amend its definition of family violence in line with the ALRC & NSWLRC recommendation, this has not been acted upon.[58] In a forthcoming chapter, Heather Douglas illustrates the impact of the differing definitions and approaches women encounter across different legal spheres when seeking a response to the same harm of domestic violence.[59] Not only do women face different definitions, they are also positioned differently and required to perform differently in these different legal spheres.[60] When we consider how many areas of law women might encounter to respond to domestic and family violence we start to see the extent to which an understanding of coercive control, not only in terms of definitions but in terms of responses that understand the nature and impact of that violence, is required to extend beyond the criminal law.

(d) *Whether it will assist victims who do not fit more stereotypical conceptions of victims.*

One of the key issues that arises in existing research on the misidentification of women as offenders in criminal and civil law responses is that women who do not fit within stereotypical conceptions of victims and how they are expected to respond may not be afforded the protection of the law or may have it used against them. For example, women who fight back, use alcohol and other drugs, are 'mouthy' or appear strong. This has two aspects: not being identified as a victim of coercive control, and being misidentified as an offender. Concern has been raised from multiple quarters about the risk of misidentification, a risk that is of heightened concern for women from marginalised communities.[61]

Nancarrow and colleagues have recently noted the 'continuing influence of the ideal victim stereotype on police assessments of whether someone was in need of protection'.[62] This has particular negative

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[55] Christine Coumarelos, 'Quantifying the legal and broader life impacts of domestic and family violence', Law and Justice Foundation of NSW, *Justice Issues,* Paper 32 (June 2019).

[56] ALRC & NSWLRC, above n52.

[57] *Family Law Act 1975* (Cth) s 4AB.

[58] See discussion in ANROWS, above n51, p. 1-2.

[59] Heather Douglas, 'Promoting safety and accountability: Clarity, consistency and interconnected laws' in Ramona Vijeyarasa (ed) *International Women's Rights Law and Gender Equality: Making the Law Work for Women* (Routledge, Taylor and Francis, forthcoming 2021).

[60] See Marianne Hester, 'The 'three planet model' – Towards an understanding of contradictions in approaches to women and children's safety in contexts of domestic violence' (2011) 41 *British Journal of Social Work* 837; and Julie Stubbs and Jane Wangmann, 'Competing conceptions of victims of domestic violence within legal processes' in Wilson & Ross (eds), *Crime, Victims and Policy: International Contexts, Local Experiences* (2015), pp. 107-132.

[61] See discussion about Aboriginal and Torres Islander women in the next section. See also Emma Brancatisana and Lin Elvin, 'Push to criminalise coercive control in relationships sparks concern for migrant and refugee women', SBS News (20 January 2021), https://www.sbs.com.au/news/push-to-criminalise-coercive-control-in-relationships-sparks-concern-for-migrant-and-refugee-women (accessed 5 February 2021); Julia Tolmie, 'Coercive control: To criminalise or not to criminalise?' (2018) 18(1) Criminology & Criminal Justice 50, pp. 60-62.

[62] Nancarrow et al, above n36, p. 76.

impacts for Aboriginal and Torres Strait Islander women seeking assistance from police who face the interaction of racist and racialised assumptions with conceptions about 'ideal' victims.[63]

7. What do we know about how these new offences are operating in the UK

In short we know very little about how these new offences are operating in the UK. While there is some data on reports made to the police, prosecutions, and to a lesser extent convictions – this data tells us very little about how these new offences are working in practice. The other main source of information about these offences is found in newspaper reports, there being very few reported decisions.

The limited research/reporting available on implementation in England and Wales has continued to point to patchy responses from police,[64] missed opportunities to prosecute coercive control, perceived problems in evidence gathering, continuing emphasis on incident frameworks, continued emphasis on physical violence, the need to ensure training of key legal professionals beyond the police,[65] and a high rate of attrition.[66] One of the few studies that has reported on implementation and practice recommended that the England and Wales offence move away from its gender-neutral framing of the offence, the need for 'greater resourcing and training' and that this must extend beyond frontline police and include emergency call handlers and the Crown Prosecution Service.[67]

It has been suggested that evidence from Scotland is more promising (although again there are no reported studies to support this conclusion) and is largely linked to the different framing of the Scottish offence and the extensive and longer term investment in training of police and other key personal prior to the operationalisation of the offence. Here one might also raise questions about whether it is the significant improvements in training (separate from the offence) that is key to the improvements in the Scottish response rather than the offence per se (although it may be that the ability to link the training to the offence was important). A key question for the Scottish experience will be the extent to which the deeper knowledge that the police now have about the nature of coercive control improves all aspects of domestic abuse offence policing beyond the new offence.

I submit to the Committee that the following are key questions that need to be considered in assessing how the new offences are operating in practice:

- Key issues are **whether the new offences are indeed shifting practice away from incidents to consider the cumulative impact and experience** of a wide range of behaviours that may form coercive control. It would be incredibly informative in any move to legislate this offence in

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[63] Ibid. See also discussion about 'responsible subjects' and 'blameless victims' in Walklate et al, above n12, pp.8-9.

[64] McCleneghan & Boutard, 'Questions raised over patchy take-up of domestic violence law. *The Bureau of Investigative Journalism*. (24 November 2017) Available at https://www.thebureauinvestigates.com/stories/2017-11-24/coercive-control-concerns (accessed 5 February 2021). See also Charlotte Barlow and Mandi Whittle, Policing Coercive Control Project Report, British Academy funded project (September 2019), p.3.

[65] Charlotte Barlow, Kelly Johnson, Sandra Walklate and Les Humphreys, 'Putting coercive control into practice: Problems and possibilities (2019) 60(1) *British Journal of Criminology* 160. See also Charlotte Barlow, Sandra Walklate, Kelly Johnson, Les Humphreys and Stuart Kirby, 'Police response to coercive control', N8 Policing Research Partnership (June 2018).

[66] Vanessa Bettinson and Jeremy Robson, 'Prosecuting coercive control: Reforming story telling in the courtroom' (2020) 12 *Criminal Law Review* 1107, 1108.

[67] Barlow et al, above n65, p. 175.

Australia, to find out whether the approach to the new offences in the UK has remained one of documenting and adding incidents together (ie the incident frame has been retained, but there is simply more of them), or whether it is indeed promoting a cumulative and contextual understanding of coercive control. The small study by Barlow and colleagues in one police area of England found that there was a continuing tendency of the police to focus on incidents with 'many [drawing] upon the description of several discrete domestic abuse incidents in an attempt to evidence the presence of coercive control'.[68]

- **Whether the new offences have assisted in enhancing safety beyond counting convictions**? Here women's views of the new offence are critical to understanding how the offence is operating. I note with great interest the recent announcement of a research project to be undertaken by Kate Fitz-Gibbon and colleagues at the Monash Gender and Family Violence Prevention Centre, exploring 'victim-survivor's views on the need for, benefits and impacts of criminalisation', which is due to commence in early 2021.[69]

  Data on prosecutions and convictions reveals very little about whether the new laws are serving to enhance safety, nor how victim-survivors are experiencing the new offence and the legal processes that go with any prosecution. Concern has been raised that victims may become more central to a successful prosecution,[70] this is added to the long standing concern about the way in which victims are experience the criminal justice system and other legal processes.[71] Walklate and colleagues in their cautionary discussion about a new offence point to the problematic nature of the adversarial culture in which a perpetrator of violence is unlikely to let the victim's account of violence go 'unchallenged in court'.[72] This potentially can play out in multiple ways through legal processes, not only in terms of the traumatic experience of cross-examination, but multiple delays, and potential appeals.

- **Whether there is any information from the UK about how the new offences are being used by, or experienced by, women who may be more marginalised** – for example women with disability, women from culturally and linguistically diverse backgrounds including refugee women. Are the new offences assisting more marginalised women? Are they responsive to the different kinds of coercive controlling behaviours that may be evident in different relational contexts? Are more marginalised women being supported adequately in their reporting of coercive control? Are there any unintended consequences for different groups of women?

- **How the new offences interact with other doctrinal areas – has it assisted in shifts in practice in those spheres?** It is important to consider how a new offence of the kind proposed interacts with other areas of law – including other criminal offences, civil protection orders, family law, child protection and immigration. Is there any information about whether and how the offences in the UK are interacting with the other areas of law that women encounter as they seek a response to the domestic and family violence they have experienced? As I have argued above,

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[68] Barlow et al, above n65, p. 174. See also Barlow & Whittle, above n64, p. 9.

[69] See https://www.monash.edu/arts/gender-and-family-violence/research-and-projects/completed-projects/changing-legal-responses-to-family-violence

[70] Tolmie, above n61, pp. 54-5.

[71] See list of references in the National Domestic and Family Violence Benchbook available at https://dfvbenchbook.aija.org.au/fair-hearing-and-safety/victim-experience-of-court-processes/kl (accessed 8 February 2021).

[72] Sandra Walklate, Kate Fitz-Gibbon and Jude McCulloch, 'Is more law the answer? Seeking justice for victims of intimate partner violence through the reform of legal categories' (2018) 18(1) *Criminology and Criminal Justice* 115, p. 123.

Stark's articulation of coercive control is important for all areas of law that respond to domestic and family violence.

- **To what extent is the offence being used as a stand-alone offence** (ie not as a back-up charge).
- **To what extent have the new offences been used in circumstances of only non-physical abusive behaviours**? Or has the tendency to date been to add non-physical behaviours to those that are already recognised as offences? The limited scholarship available,[73] would suggest that the predominant use of the new offences to date have included serious incidents of physical violence. This is not to suggest that physical violence is not part of coercive control, rather to raise questions about the extent to which the new offences are addressing the need to target behaviours that are currently not criminalised, particularly for those victim/survivors who do not experience physical violence.

  Early research by Barlow and colleagues in a police district in England and Wales found that while a range of behaviours that were not previously criminalised were outlined in reports of coercive control (eg 'the use of digital surveillance technologies, sustained verbal threats and abuse, including so called 'revenge-porn' style threats, practices of isolation…and deprivation and economic abuse'[74]) many also included acts and behaviours that were already criminalised (eg 'false imprisonment, criminal damage, rape and physical assault'[75]). The researchers found that physical assault was mentioned in 63% of the coercive control matters.[76] The authors noted that:

  The high levels of physical violence in these cases could be reflective of the behaviours that typically feature as part of coercive control. However, this could also suggest officers were identifying physical violence more readily (qua Robinson et al. 2016) rather than a web of abusive behaviour as constituted in the new legislation.[77]

- **Need to keep attentive to risk of misidentification of victims as offenders.** One of the key risks that has been raised in the context of the proposed new offence is the risk of misidentification of victims as offenders (discussed in the context of Aboriginal and Torres Strait Islander women above). While early data from the UK indicates that this has not happened,[78] this is early data captured at a time when training and awareness about the new offence is high (or higher) than might be the case as the offence becomes a more regular feature of the criminal law landscape. It is after the first rounds of intensive training when the focus on the new offence becomes more normalised that we may need to assess whether the new offence continues to operate in such a way that it minimises misidentification.

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[73] See Paul McGorrery and Marilyn McMahon, 'Prosecuting controlling or coercive behaviour in England and Wales: Media reports of a novel offence' (2019) *Criminology & Criminal Justice* 1 (82 of the 107 successful prosecutions 'involved some form of physical of sexual violence': p. 7); Barlow et al, above n65, p. 168-169.

[74] Barlow et al, above n65, p. 168.

[75] Ibid.

[76] Ibid, p. 169.

[77] Ibid.

[78] McGorrery and McMahon, above n73, p. 5-6.

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It is important in any reform in this area that we remain attentive to the fact that law alone is not sufficient to address domestic and family violence. Many victims of domestic and family violence never approach the police for assistance. While a new offence may encourage some victims to make such reports given the reasons for non-reporting we would expect that high rates of non-reporting will continue. It is therefore important to ensure holistic, multifaceted, well-resourced responses which addresses needs beyond law.

Please do not hesitate to contact me if you require further information or have any questions arising from my submission.

Yours faithfully

Dr Jane Wangmann
Senior Lecturer
Faculty of Law
University of Technology Sydney
[redacted]

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Coercive control as the context for IPV: The challenge for the legal system

Jane Wangmann

The last thirty years has seen considerable change in the legal landscape to better address the harm of intimate partner violence (IPV), including the introduction of stalking and intimidation offences, as well as civil protection orders, yet many gaps and issues remain. The creation of an offence that seeks to capture the harm of coercive control is presented as one way in which to fill some of the gaps between the experience of IPV and the way the criminal law has traditionally conceived of this harm. In this chapter I raise questions about whether such an offence will achieve its aims if attention is not also paid to the practice and implementation of current (and new) laws. In particular I discuss the dominance of the incident framework not only in terms of criminal law responses, but also in terms of those responses designed to better address the pattern of IPV, namely civil protection orders. A key concern of this chapter is the conceptual gap that emerges between the intentions of law reform and the practice or implementation of that law. In so doing I draw on recent cautions voiced by Julia Tolmie (2018a) and Sandra Walklate and colleagues (2018). I argue that an understanding of coercive control is necessary for all legal engagements that seek to address the harm of IPV and that if attention were centred on whether there should be a discrete offence it may distract from the need to simultaneously do more work to ensure that a deeper understanding of coercive control informs all areas of legal practice.

I. INTRODUCTION

The response of the criminal justice system to intimate partner violence (IPV) has been the subject of extensive criticism on multiple fronts – from what acts and behaviours the law defines as criminal, to the practice and implementation of the law. Many of these criticisms centre on the tendency of the criminal law to focus on primarily physical or visible forms of violence, and the reliance on an incident framework when such acts are criminalised. This, however, is not the way in which IPV is experienced; rather than being an incident, or even a series of incidents, IPV is a patterned and repeated form of behaviour(s) exerted to coerce and control the victim. It also involves far more than physical or visible forms of violence; it includes emotional or psychological abuse, financial abuse, and other controlling behaviours. As a result, the traditional criminal law response has left unrecognised and unaddressed multiple other forms of abuse that are experienced as part of IPV, 'bear[ing] little resemblance' to the lived experience of IPV (Tuerkheimer, 2004, p.959). Critically the focus on incidents of 'violence' has also meant that any appreciation of, let alone response to, the context in which those acts and behaviours operate has been absent from criminal justice responses. This effectively 'decontextualizes' IPV and 'conceals the reality of an ongoing pattern of conduct occurring within a relationship characterized by power and control' (Tuerkheimer, 2004, pp.960-61).

As a result of this disconnect, a number of scholars (e.g. Stark, 2007; Tuerkheimer, 2004; Burke, 2007) and more recently some legislatures, have sought to construct a criminal offence that better captures both the non-physical forms of violence and abuse as well as the patterned and repetitive nature of IPV. In England and Wales this offence seeks to criminalise 'controlling or coercive behaviour in an intimate relationship' which is constructed as continuous or repeated behaviour that coerces or controls another person where that behaviour has a 'serious effect' on the victim, and the alleged perpetrator of the behaviour knew, or ought to have known, that their behaviour would have this effect (*Serious Crimes Act 2015* (UK) s 76). Ireland also introduced an 'offence of coercive control' which has similarities to the English and Welsh offence requiring that the coercive or controlling behaviour has a 'serious effect' on the victim and that a 'reasonable person' would consider it likely that the behaviour would have that effect (*Domestic Abuse Act 2018* (Ireland) s 39). In Scotland the offence is one of 'domestic abuse'; defined as a 'course of behaviour' which is abusive to the victim, where a 'reasonable person would consider the course of behaviour is likely to cause' the victim 'to suffer physical or psychological harm' (*Domestic Abuse (Scotland) Act 2018* (Scot) s 1). These offences are designed to fill some of the gaps between the lived experience of IPV and the traditional response of the criminal law, and as such potentially represent a significant positive change.

In this chapter I raise questions about whether the introduction of such offences will be as effective as desired if attention is not also paid to the practice and implementation of current (and new) laws. This is essentially an argument about the continuing problems of practice and implementation that has 'dogged' much feminist engagement with law reform around IPV and other harms experienced predominantly by women (Hunter, 2008, p.6). In her work on civil protection orders and family law proceedings, Rosemary Hunter (2008, pp.6–8) canvassed some of the reasons why feminist law reform efforts encounter implementation problems. These include: the nature of legal culture(s), the process of 'translation' of the harms women experience into 'existing legal forms and concepts', and the way in which feminist claims may be 'co-opted to serve other interests' (see also Hunter, 2006, p.737-739; Smart, 1986; Thornton, 1991; Graycar and Morgan, 2005). In this chapter I explore the conceptual gap that emerges between the intentions of law reform and the practice or implementation of that law through a discussion of the dominance of the incident framework not only in terms of criminal law responses, but also in terms of those responses designed to better address IPV, namely civil protection orders. I draw on recent cautions voiced by Julia Tolmie (2018a) and Sandra Walklate and colleagues (2018) who collectively highlight the continuing problems with implementation of existing offences, as well as the particular challenges for implementation of these new offences, and the potential risks or unintended consequences that might flow from the creation of such new offences.

In the first part of this chapter I canvas the reasons why there have been moves to create a discrete offence that better captures the harm of IPV. I briefly discuss some of the literature which has emphasised the broader contextual nature of IPV; particularly work by Evan Stark (2007) in which he has argued that the domestic violence movement has stalled as a result of its focus on violence and not coercive control. I then turn to a discussion of the implementation gap that continues to be an issue of concern in law reform around IPV. Here I present a case study on civil protection orders where despite the promise of capturing the *patterned* nature of IPV, *incidents* continue to dominate (Wangmann, 2012; Hunter, 2008). In the final section I turn to potential problems and unintended consequences that might arise with the implementation of the newly created offences in England/Wales, Scotland and Ireland. I raise

cautions about whether centring efforts on a discrete offence may distract from the extent to which a deeper understanding of coercive control is necessary for all legal responses including adequate implementation of the new offences. Here I draw on developments in family law and civil protection orders, as well as the criminal law, to emphasise the extent to which an understanding of coercive control is required at all levels – in legislation, practice and procedure, and responses to victims and perpetrators more generally.

II. CRIMINALISING COERCIVE CONTROL

One of the key arguments in favour of introducing a dedicated offence of IPV is that such offences fill an important gap in the existing criminal law, which to a large extent remains focused on incidents of largely physical or visible forms of violence (Bettinson and Bishop, 2015, p.185). These new offences represent potentially positive developments in how the criminal law responds to IPV. For example, in describing the new Scottish offence Michele Burman (2018, p.45) stated that it 'carries with it the aspiration of facilitating a criminal justice response that is less incident-based and more appreciative of the ongoing patterns of behaviour which characterise abuse'. There are questions, however, about whether the newly created offences can achieve this, as well as a more fundamental question about whether the problems with the criminal law's response to IPV 'are deeper and more extensive than simply the fragmentation of long-standing patterns of harm into individualised transactions' (Tolmie, 2018a, p.51).

The recent debate and action on criminalising coercive control across different jurisdictions has been linked to the influential work of Evan Stark. Stark (2007, p.10) seeks to 'reframe' IPV from a focus on one-off violent events, to one that recognises the 'multidimensionality of oppression in [the] personal life' of women; that is, coercive control. Stark (2007, p.5) explains that coercive control is 'ongoing and its perpetrators use various means to hurt, humiliate, intimidate, exploit, isolate, and dominate their victims', that victims are 'frequently deprived of money, food, access to communication or transportation, and other survival resources even as they are cut off from family, friends, and other supports', and that 'coercive control is personalized, extends through social space as well as over time'. Stark's understanding and articulation of coercive control is explicitly gendered: 'it relies on women's vulnerability *as women* due to sexual inequality' (p.5, emphasis in original) and recognises that 'the main means used to establish control is the microregulation of everyday behaviors associated with stereotypic female roles, such as how women dress, cook, clean, socialize, care for their children, or perform sexually' (p.5).

It is important to recognise, as Stark (2007, p.11) also does, that this understanding of IPV as 'coercive control, 'power and control', or 'entrapment' is not new; the 'use of the phrase "coercive control" stretches back to …the 1970s' (Rathus, 2013, p.377) in the work of Rebecca and Russell Dobash where they argued that 'violence in the family should be understood primarily as coercive control' (Dobash and Dobash, 1979, p.15). Susan Schechter (1982, p.224) described battering as a way to 'maintain or establish control' and drew connections to women's position in the family and society more broadly. Similarly other scholars and practitioners have used the phrase 'power and control' to describe the way IPV functions (Pence and Paymar, 1993); the power and control wheel (and its various iterations) developed as part of the Domestic Abuse Intervention Project (Duluth, USA) remains an effective illustration of the nature of IPV and how it functions (see https://www.theduluthmodel.org/wheels/). In another way James Ptacek (1999, p.10) has

used the concept of 'social entrapment' to emphasise 'the inescapably social dimension of women's vulnerability to men's violence, women's experience of violence, and women's abilities to resist and escape'. What is fundamental to all of this theoretical work is that this understanding of control came from the accounts provided by women themselves.

B. Traditional emphasis on physical or visible forms of violence

Stark's articulation of coercive control illustrates the disjuncture between the criminal law's traditional emphasis on incidents of physical or visible forms of violence, and the other forms of abuse that women experience as part of the ongoing, repeated and cumulative experience of IPV.

The initial emphasis on physical violence in the translation of IPV into 'legal claims' might be seen as a 'strategic' one, legitimising 'the notion that women were subjects of abuse and that physical battering was something serious and unique that happened to women' (Schneider, 2000, p.65). However, as Elizabeth Schneider emphasises, 'feminists did not intend to limit the concept of abuse to solely physical harm' and these moves to translate women's experiences into something that could be actioned by law was 'premised on an understanding of coercive behaviour and power and control…rather than "number of hits".' (2000, p.65).

Over time the criminal law has continued to develop, often in response to feminist-informed critique to create new offences that better capture some of the non-physical forms of violence and abuse experienced as part of IPV. The creation of the new offences in England/Wales, Ireland, and Scotland represent the most recent attempts in this area, but there have been other significant and often innovative changes in the area of criminal law (and indeed other legal responses to IPV) to take account of these criticisms; these have included the creation of some course of conduct offences (such as stalking), aggravated forms of existing offences where they have been perpetrated in a domestic or family relationship, the flagging of offences as domestic or family violence offences, and the creation of offences (in a small number of jurisdictions) that capture economic or emotional abuse (ALRC and NSWLRC, 2010, [13.10]).

The criminalisation of stalking is the most notable and widespread of these developments. Criminalised in England and Wales by the *Protection From Harassment Act 1997* (UK), in Scotland by the common law and the *Criminal Justice and Licensing (Scotland) Act 2010,* and in various jurisdictions in Australia from 1993, stalking offences are arguably capable of capturing a wide range of behaviours that women complain about as part of IPV. The extent to which this is possible has, of course, been determined by the practice and interpretation of the law. For example in England and Wales there has been some particularly narrow interpretations of the offences of stalking and harassment (Bettinson and Bishop, 2015, p.187-190) where the court has found it difficult to recognise the behaviour complained about as a 'course of conduct' if it took place in an ongoing relationship in which there were periods of 'affection' between the victim and the alleged offender (Bettinson and Bishop, 2015, p.188). Australian scholars have also debated to what extent stalking, harassment and intimidation offences can adequately address forms of non-physical IPV. On the one hand Marilyn McMahon and Paul McGorrery (Chapter 5) highlight the limitations of these offences to address non-physical forms of IPV between current intimate partners, however other scholars have pointed to the flexibility of these provisions to capture some forms of behaviour (see Douglas and Burdon, 2018, who argue that the recording and monitoring of a victim by a

perpetrator using a smartphone would fit within the various Australian stalking offences). The scope of these provisions depends on their construction and implementation. For example, in New South Wales (NSW), Australia, the offence is one of 'stalking *or* intimidation' (*Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13(1), emphasis added). The inclusion of intimidation defined as 'conduct amounting to harassment or molestation of the person' and 'any conduct that causes a reasonable apprehension of injury … or of violence or damage to any person or property' (*Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 7) extends the reach of the provision beyond typical stalking behaviours. The legislation further provides that 'for the purpose of determining whether a person's conduct amounts to intimidation, a court may have regard to any pattern of violence … in the person's behaviour' [s 7(2)].

Other jurisdictions, such as Tasmania, have gone substantially further and introduced offences of emotional and economic abuse (*Family Violence Act* 2004 (Tas) ss 8–9. See Barwick et al., Chapter 7). This approach in Tasmania is distinctive; whilst other jurisdictions may include economic and emotional abuse as a possible ground for seeking a civil protection order, Tasmania is the only Australian jurisdiction to have 'taken the road of criminalisation' (Murray and Powell, 2011, p.112). While the emotional abuse offence is described as such in the heading to the provision, it in fact seeks to address a 'course of conduct' that is likely to control, intimidate, cause the victim mental harm or to be fearful. In this way this offence represents an early example of the more expansive offences recently introduced in England/Wales, Scotland and Ireland. The Tasmanian offences have been criticised in terms of their scope and evidential difficulties (urbis 2008, pp.11-12; Douglas, 2015, p.457; McMahon and McGorrery, 2016, pp.7–9, 13–22). There have been very few prosecutions (discussed below).

Another key development in criminal law practice has been the ability in some jurisdictions to flag offences as domestic violence related. For instance, in NSW offences that are perpetrated in a domestic violence context are flagged as such (*Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 12). This can be useful in determining bail, and in stalking offences to determine whether a person's behaviour amounts to a pattern, amongst other matters. This flagging also enables us to see the wide range of offence categories that are used in cases of IPV, not all of which involve physical and visible forms of violence (see, e.g. Ringland and Fitzgerald, 2010, p.2). In this way, this administrative measure facilitates the construction of a more complete picture of IPV beyond what might be the presenting incident/charge currently before the court.

i. Incident framework

The traditional incident frame of the criminal law runs counter to the patterned, repetitive experience of IPV and has a number of consequences for the adequacy of the response to this harm. It means that while a perpetrator may have used violence and abuse on multiple previous occasions, as well as multiple forms of violence and abuse in a given event, that person may only be charged with offences that address a single form of behaviour or act of violence (although they may of course face multiple individual charges that respond to different forms of violence used in that event). As Tolmie has emphasised, the focus on incidents means that behaviours that form part of IPV are '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' (2018a; p.51). This,

in turn, enables the incident to be portrayed as one-off, isolated, out-of-character and minor, where such a 'decontextualized examination of disaggregated incidents can leave a case in shreds' (Hunter, 2008, p.41). Not only does the traditional frame of the criminal law cast IPV in this way, this also tends to be the way in which violent men describe their acts of violence that have come to the attention of the law (Kelly and Westmarland, 2016, p.116).

The new offences in England/Wales, Scotland and Ireland seek to address this 'fleeting snapshot' (Hirschel and Buzawa, 2002, p.1457), through the creation of an offence that requires more than one form of violence and abuse over time – the law in England and Wales refers to the coercive or controlling behaviour being used 'repeatedly or continuously' (*Serious Crime Act 2015* (UK), s 76(1)(a)); in Scotland the provision requires a 'course of behaviour' (*Domestic Abuse (Scotland) Act 2018*, s 1(1)(a)); and in Ireland reference is made to the behaviour being 'persistently engage[d] in' (*Domestic Abuse Act 2018* (Ireland) s 39(1)). A key question will be whether these new offences manage to shift the gaze from an incident frame to a contextual one; these are fundamentally different.

Given the dominance of incident framework in criminal law, there is a risk that rather than looking contextually, the offence will be practised as an 'additive' one, where incidents are simply added together (Tolmie, 2018a, p.59). This has been seen in other 'course of conduct' offences, such as stalking, where individual incidents are examined and proven to determine whether they 'add up to' a course of conduct (Bettinson and Bishop, 2015, p.189). As Kelly and Westmarland (2016, p.114) have emphasised there is a fundamental difference between considering an 'ongoing pattern of behaviour' compared to 'one, two, or three isolated "incidents"'. A contextual frame pays attention to the fact that acts and behaviours only have the 'potential' to be part of IPV, that it is through the way those acts and behaviours interact and give meaning to each other, within the relationship and its history, that such acts attain their meaning for the victim and the perpetrator (Cavanagh et al., 2001, pp.698-699). While Bettinson and Bishop (2015, p.191) argue that the decision not to use 'course of conduct' in England and Wales might assist in a shift away from assessing individual incidents, it is difficult to see how this will eventuate given references to 'repeatedly', and to 'acts' in the policy definitions of controlling and coercive behaviour (Home Office, 2015, p.3).

There is also tension between recognising an *ongoing* form of behaviour (coercive control) and enabling it to be evidenced by a series of acts and behaviours as a singular offence. This implies a time-bound approach to these offences, whereas coercive control, by its very nature, extends beyond the acts and behaviours that might be packaged together to prove the offence; it is ongoing and embedded 'without clear beginning or end, nonetheless has a demonstrable impact that is cumulative over time and across social space on … victims whose lives and liberties become severely constrained' (Stark and Hester, 2019, p.96). This links to the problem identified by Sandra Walklate and colleagues (2018) about the inherent difficulty in translating a clinical concept into a legal one.

It is also important to consider that the criminal law is not confined to how particular offences are defined in law; but is also shaped by its practice and procedure. One area in which there has been progress is in terms of the admission, in some contexts, of relationship evidence. The admission of this type of evidence can be very useful to place a single assault that would otherwise appear to be 'out of the blue' as '[]explicable' (*Roach v The Queen* (2011) 242 CLR 610, [42]). *Roach* demonstrates the potential for this kind of evidence. This case concerned a single charge of assault occasioning actual bodily harm in Queensland in which the trial judge admitted evidence of previous uncharged assaults pursuant to *Evidence Act*

1977 (Qld) s 132B, 'on the basis that, without it, the jury would be faced with a seemingly inexplicable or fanciful incident' (*Roach* at [19]). The potential for relationship evidence to add much needed context to support individual charges is further illustrated in the NSW case of *Pasoski v R* [2014] NSWCCA 309 in which the defendant had been charged with physical and sexual assaults and the relationship evidence admitted related to behaviours that were controlling (for example, limiting the victims contact with friends and family, checking up on her at work, and telling her 'what to wear and how to do her hair and makeup') (*Pasoski* at [12]).

While it is still the single incident that is the focus of the trial, *Roach* and *Pasoski* demonstrate how relationship evidence can be useful to add the context needed in the successful prosecution of individual IPV offences. However, other cases and research point to the fact that the use of this evidence is not necessarily widespread and is variable and inconsistent. For example, in *The Queen v Grant* [2016] NTSC 54, a Northern Territory case, a distinction was drawn between those acts that were similar to the charged acts (that is, uncharged physical assaults) and those that were not (verbal abuse and threats) where the latter forms of behaviour were not admissible as relationship evidence being 'too far removed from the matter at issue in this case' (*Grant* at [59]). In Victoria, a study of intimate partner homicides perpetrated by men between 2005-2014 found that 'a history of family violence is not always fully recognised in homicide prosecutions' for a 'variety of reasons' including that the police may not have collected the evidence, it may have been deemed inadmissible, or it may have been removed as a result of a plea negotiation (McKenzie et al., 2016, pp.74–75). McKenzie and colleagues further note that '[m]isunderstandings about the nature, causes, dynamics and impact of family violence may also influence what evidence is considered relevant in a homicide prosecution' (McKenzie et al., 2016, p.75).

III. A GAP IN LEGISLATION OR A GAP IN IMPLEMENTATION?

It is important to ask whether the gap that is sought to be filled by the creation of a dedicated IPV offence is purely a legislative gap, or whether it is also, and more fundamentally, an implementation gap. As noted above, the 'implementation problem' has been a critical one for feminist-engaged law reform. A key concern in any move to criminalise coercive control is whether the creation of a new offence simply leaves unchallenged the more complex and ingrained problems associated with implementation and practice.

Lessons might be learnt from the implementation of civil protection order legislation in Australia – a legal response designed to address many of the same gaps in the traditional criminal law response that the new offences seek to fill.

A. Other measures that have been designed to address the limitations of the criminal law: Civil protection orders

Civil protection order schemes were introduced across multiple jurisdictions in order to address some of the limitations of the criminal law discussed above. Such schemes tend to possess a range of progressive elements that provide scope to better capture the 'lived experience' of IPV, such as: the broad range of behaviour that might ground an order, the consideration in some jurisdictions about how acts and behaviours function (for example, to cause fear), the lower standard of proof, the focus on future protection, and in some

jurisdictions the inclusion of an objects clause or preamble which recognises the gendered nature of IPV.

The various Australian state and territory legislation that provides for the making of such orders generally recognise a wide range of behaviours within their respective definitions of domestic or family violence. For example, in Tasmania family violence is defined as including 'threats, coercion, intimidation or verbal abuse', 'economic abuse', or 'emotional abuse or intimidation' (*Family Violence Act 2004* (Tas) s 7); and in Queensland domestic violence is defined as including behaviour that is 'emotionally or psychologically abusive; 'economically abusive; 'coercive', or in 'any other way controls or dominates' the person seeking protection and causes that person to be fearful for their 'safety or wellbeing' or that of any other person (*Domestic and Family Violence Protection Act 2012* (Qld) s 8).

Unlike the incident frame of the criminal law, the complaint for a civil protection order enables an applicant to include a wide range of information about acts and behaviours perpetrated over time. This means that it is possible to detail events that might otherwise be construed as minor or not warranting the attention of the law, however, when seen together reveal a patterned and cumulative experience able to be comprehended as IPV warranting the making of an order.

Despite this promise, questions have been raised about whether the civil protection order system has been successful in moving away from incidents (Hunter, 2008; Wangmann, 2012). A study of cross applications in civil protection order proceedings in NSW found that the incident framework continued to dominate (Wangmann, 2012). Many of the complaint narratives examined in that study focused on a single incident (which may have involved multiple forms of violence and abuse). Perhaps more concerning was that incidents continued to be prominent in the way in which some professionals, particularly police officers explained their practice. As part of this study semi-structured interviews were conducted with 27 professionals working in the civil protection order system (police officers, police prosecutors, lawyers, women's support workers, and magistrates). While many of the professionals articulated a well-developed understanding of IPV when asked generally about how they defined IPV – for example, referring to context, power, control and gender – this understanding tended to dissipate, particularly for police officers, when asked more practice-based questions about scenarios in which both parties were alleged to have used violence against each other (dual events) (Wangmann, 2012, pp.709-710). Dual events present particular challenges for the legal system in terms of determining who is the person that requires the protection of the law – if an incident frame is taken, and not a contextual one, it runs the risk that when women use violence in the context of their victimisation this is treated as equivalent to the predominant perpetrator's use of violence. An incident framework enables delineation between one incident and another where the actors change position. This shifting approach is illustrated in this comment made by a police officer:

> [W]e had a situation where a DV incident took place over a fairly short period of time,… where the victim in one assault [the woman] went inside and the incident moved inside and then the victim became the offender … by assaulting the previous defendant. So the victim outside had moved inside and became the defendant. …. You've got two assaults in that time frame, we got telephone interim orders for both parties and we ended up charging both … for the two separate assaults (Wangmann, 2012, pp.710-711).

Hunter (2008) also found a resort to incidents in her study of civil protection orders in Victoria. Hunter found that magistrates 'encouraged by the terms of the legislation…tended to see violence in terms of isolated, decontextualized "incidents" rather than as a pattern of

coercive behaviour' (2008, p.111). As a result, lawyers representing victims 'noted that magistrates were looking for a recent incident, the most current acts or threats, in order to grant an order, rather than wanting to hear about the history of violence in the relationship' (2008, p.111).

While many single incidents detailed in an application will be sufficient to support the making of a civil protection order, the absence of information about other acts and behaviours perpetrated over time means that the patterned and cumulative environment of IPV is not conveyed. This 'connective framework' may be particularly critical where the incident that led to the application was of a more minor nature (Wangmann, 2012, p.707), where applications have been made by both parties, or where the legislation requires a likelihood of repetition in order to grant an order (Hunter, 2008, p.111). In addition, the content of the application and the order (if made) may have flow-on effects for other legal proceedings such as family law, where the adequacy of those narratives may play an important role in the weight given to those orders, and any assessment about whether the violence and abuse has relevance to the making of parenting and financial orders following separation. As is the case with criminal offences, the 'spotlight' on single incidents allows the defendant in a protection order proceeding to raise 'counter stories…that suggest that the behaviour was uncharacteristic' (Wangmann, 2012, p.707) or explicable:

> This may be a particular problem if the incident took place at separation. For example, there are well-worn stories about the devastation experienced on the failure of the relationship, or the pain of still being in love with the woman, which are often deployed to conceal stories of control. The documentation of multiple incidents can prevent such stories of thwarted romance from taking a dominant role in the interpretation of events. (Wangmann, 2012, p.707. References omitted)

As a result it appears that a legal process that was designed to be more responsive to the harm of IPV has tended to reproduce its incident-based constraints. This reveals a great deal about the practice of law in this intersecting criminal/ civil space around the harm of IPV and is suggestive of greater and more profound challenges about how to move away from the dominance of incidents than can be addressed by simply creating a new offence (Wangmann, 2012, p.719).

B. Problems with practice and implementation remain

The most recent Australian inquiries into domestic and family violence have generally avoided the attraction of simply creating new criminal offences (although notably a dedicated strangulation offence was created in Queensland) and instead sought to target practice. For example, in deciding against recommending a dedicated domestic violence the Special Taskforce on Domestic and Family Violence in Queensland noted that:

> …the difficulties with prosecuting domestic and family violence offences relate more to problems with evidence gathering, witness cooperation, police practice and court processes. It is these elements which have undermined the effective use of existing Criminal Code provisions. The Taskforce was particularly concerned that simply creating a dedicated offence of domestic and family violence would not alleviate these barriers. Enacting a new offence specifically for domestic and family violence that faced the same evidentiary and process issues, would still not achieve the goal of protecting victims or increasing accountability of perpetrators. (2015, pp.14-15)

Similarly the Victorian Royal Commission into Family Violence noted that '[w]hatever laws we have will only be as effective as those who enforce, prosecute and apply them. Improving

these practices, through education, training and embedding best practice and family violence specialisation in the courts, is likely to be more effective than simply creating new offences…' (RCFV, 2016b, p.189). The RCFV further noted that '[s]imply changing the laws by carving out a specific response for family violence is not likely to address those underlying deficiencies' (RCFV, 2016b, p.228).

While it is too early to make evaluative assessments of the coercive control offence introduced in England and Wales in December 2015 (the Irish and Scottish offences commenced operation in 2019), some of the early information points to the continuation of the same concerns about practice that have been longstanding in efforts to get the criminal law to respond better to IPV. For example, there appears to be 'patchy' implementation across England and Wales with some police forces laying very few charges since the offence was introduced (McClenaghan and Boutard, 2017; Walklate et al., 2018; p.118), and there has been a lack of dedicated training for police with only 8 of the 43 police forces having been provided with training about the new offence two years after its introduction (Travis, 2017). Johnson and Barlow (2018) also uncovered critical gaps in practice – with low levels of charging, even lower levels of decisions to prosecute, 'missed opportunities for using' the new offence, and that calls to police about coercive control were 'given a lower priority' than other domestic abuse-related crimes by 'call handlers'. In this context, Walklate and colleagues have asked whether 'general frontline police officers can, and should be expected to understand the complexities of coercive control as a form of abuse' (2018, p.121). The centrality of this question is confirmed in a recent report by Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services (2017) on the 'police response to domestic abuse' which found that an 'understanding of victim/perpetrator dynamics (techniques of coercive and controlling behaviours)' remained the top competency identified as 'requiring improvement among frontline officers and specialist officers/investigators' by 'domestic violence practitioners' (p.28).

Similar problems have been seen in Tasmania, Australia, where two potentially innovative criminal offences came into force in 2005; 'emotional and psychological abuse' and 'economic abuse'. There have been few prosecutions of these offences. Karryne Barwick and colleagues (Chapter 7) detail that by the end of 2017, some 12 years after the offences commenced operation, only 73 charges have been finalised; involving 34 guilty pleas, 6 charges proven by the court, 2 dismissals, and 31 withdrawals. These Tasmanian offences are perhaps the most troubling given how long they have been available, and hence are perhaps indicative of more deep-seated problems with the use of the criminal law.

Whilst training about the new offence is obviously critical, the need for training and education of key professionals working in the legal system is a more far-reaching one. The extent of repetition of recommendations that call for further education and training of professionals working within the criminal justice system, and the legal system more broadly, points to greater challenges with the adequacy of responses to IPV than can be satisfied through the implementation of a single offence and training about that offence. For example, recommendations about the need for further education of police, lawyers and judicial officers were made in some of the earliest Australian inquiries (eg see NSW Task Force on Domestic Violence, 1981, pp.75–77, 79–80, 83–85; Law Reform Commission (ACT), 1986, rec 21) and have continued through to the most recent (see, eg, RCFV, 2016a, p.57, pp.102–104; Special Taskforce on Domestic and Family Violence in Queensland, 2015, pp.36–38, 43; ALRC and NSWLRC, 2010, pp.1465, 1471, 1477, 1521). Whilst some of these recommendations are

specific, relating to particular legislative provisions and procedures, a number are directed at a more conceptual level (eg see Special Taskforce on Domestic and Family Violence in Queensland, 2015, rec 138, p.43). The repetition of recommendations that are directed at this conceptual level suggests that an education package targeted at the new offence may miss the opportunity of influencing more substantive change in responses to IPV (including in relation to the implementation of any dedicated offence). It is here where I suggest Stark's work (2007) is potentially more transformative. While Stark does propose the creation of a criminal offence of coercive control (2007, p.365), this is only part of his strategising to change the way in which we conceive of and respond to IPV. Stark notes that while many professionals have already adopted a definition that recognises coercive control, practice remains focused on violence; 'documenting individual acts without identifying their political context or consequence, once again depicting the bars without grasping that they are part of a cage' (2007, p.366). While creating a new offence may assist in moving the legal system in a more responsive direction, unless an understanding of coercive control is extended across all areas and levels – for example, understanding how victims may respond to the violence and abuse they experience, how safety is considered at all levels – then any positive change might be more circumscribed than is hoped for. James Ptacek's work (1999, p.174) on social entrapment is also important here as he draws attention to the role of institutions in maintaining, facilitating and replicating social entrapment.

C. Particular challenges for the new offences

In addition to general issues related to practice and implementation in this area, there are particular implementation concerns associated with the offences in England/Wales, Scotland and Ireland. Tolmie has argued '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' (Tolmie, 2018a, p.50). It is this challenge of implementation that needs to be addressed in any consideration of whether to amend the law – it is both a challenge of whether the law achieves what it set out to achieve, and also whether it may have unintended consequences.

How these offences are interpreted within the court system when they are prosecuted will be critical. For instance, given the relative absence of prosecutions in Tasmania there are few reported decisions that reveal anything about how these offences are understood (see Douglas, 2015, pp.457-458; McMahon and McGorrery, 2016, pp.11-13). As yet there are no reported decisions from England and Wales about the interpretation of this new offence, however some questions about potential difficulties have been raised by scholars following the passage of the legislation. A key concern will be how the terms 'coerce' and 'control' will be understood by the courts – these terms are not defined in the legislation, however, there is statutory guidance (Home Office, 2015). Particular concern has focused on the gendered nature of coercive control and that some behaviours may be misconstrued as normal, or as 'signs of affection…because the behaviours engaged in through a desire to control may merge with acceptable and desirable expressions of love and concern' (Bishop and Bettinson, 2018, p.9. See also Tolmie, 2018a, pp.55-56). Not only may it be difficult to identify coercive control given that it deliberately utilises gendered norms of accepted behaviour, many instances of coercive control may also play out in a more 'covert' manner which results in the woman containing herself in order to manage the perpetrator's violent behaviour. This may mean that 'less and less physical violence and other punishing behaviour is needed to ensure

compliance' on the part of the victim (Bettinson and Bishop, 2015, p.184). The difficulty in differentiation may create problems of both under and over policing – on the one hand a great deal of controlling behaviour may not be identified as such by the police or judicial officers because it is difficult to differentiate what is 'normal', or within an 'acceptable' range of relationship behaviour, at the same time there is the possibility that the new offences may capture behaviours that the offence was not designed to address (see arguments raised in submissions to Justice Committee, Comataidh a' Cheartais (Scotland) (2017) [46], [47]-[58]. See also Burman, 2018, p.45).

This type of difficulty of being able to identify coercive control from gendered behaviours that might be 'normalised and reinforced at a societal level' (Bishop and Bettinson, 2018, p.9) can be seen in a recent decision in another legal domain that also addresses IPV; family law. In the Australian decision of *Ackerman & Ackerman* [2013] FMCAfam 109, which concerned parenting arrangements and property division following the breakdown of the relationship, the mother alleged that the father was controlling: a 'domestic tyrant' (at [20]), that he had isolated her from family and friends, limited her work time, 'required her to meet oppressively high standards in terms of the performance of housework responsibilities' (at [20]) , was intimidating, monitored her movements, and stalked her after separation. Echoing Michael Johnson's work on typologies (2008), the father sought to characterise his behaviour as 'situational couple violence' and not 'coercive control' (at [25]). The *Family Law Act 1975* (Cth) defines family violence (the term used in that legislation) as 'violent, threatening or other behaviour by a person that coerces or controls a member of the person's family… or causes the family member to be fearful' (s 4AB). The federal magistrate determined that the mother's allegations 'fell well short of violent or threatening behaviour. They may be criticised as sexist or insensitive, but, in my view…they are not, family violence' (at [155]). The federal magistrate described the father as an 'unabashed traditionalist where marriage is concerned' (at [128]).

This case perhaps represents a particular risk of the language of coercive control in the Australian context, where the work of Michael Johnson on typologies of IPV has proved attractive in some quarters, particularly family law (see the FCA & FCCA, 2016, pp.8-9). Johnson (2008) has, over time, identified five different types of IPV based on the presence or absence of control: coercive controlling violence, violent resistance, situational couple violence, separation-instigated violence and mutual violent control. While it is important to understand and investigate the heterogeneity of violence within intimate relationships, there are also a number of risks with the articulation of typologies particularly within law (see Wangmann, 2016; Rathus, 2013; Meier, 2017). The use of the term 'coercive control' within legislation (particularly without definition) may risk it being seen as reflecting typologies rather than the broader feminist understandings of the lived experience of IPV.

IV. UNINTENDED OUTCOMES

One of the clear lessons arising from experience in the area of feminist-informed law reform is the need to consider any risks or unintended consequences that might flow from an otherwise well-intentioned change to the law. A range of possible risks associated with the new offences have been canvassed by other scholars (see Tolmie, 2018a; Walklate et al., 2018; Burman and Brooks-Hay, 2018). In this chapter I seek to draw attention to two key concerns: minimisation and unintended consequences.

A. Minimisation of some levels of control

Tolmie has drawn attention to the risk of minimisation where only the most 'overt' cases of coercive control or only those where there is also evidence of physical violence will be prosecuted (Tolmie, 2018a, p.59-60). This risk is arguably embedded in the drafting of the offence in England and Wales where the alleged behaviour needs to have had 'a serious effect' on the victim defined as causing the victim to 'fear, on at least two occasions, that violence will be used against' them or that causes the victim 'serious alarm or distress which has a substantial adverse effect on [the victim's] usual day-to-day activities' (*Serious Crime Act 2015*, s 76(4)). While this threshold was clearly directed at limiting the reach of the offence, it raises the problem with 'definitional' decisions and whether the offence as drafted fits the lived experience of IPV. If the focus on physical violence meant that IPV was portrayed as 'extraordinary' rather than as a commonplace event in the lives of many women (Schneider, 2000, pp.66-67; Mahoney, 1991, pp.2-3); the way in which the coercive control offence is currently drafted in England and Wales may facilitate a similar characterisation. That is to say that women's 'everyday' experiences (Kelly and Westmarland, 2016, p.114) may remain outside the reach of the English and Welsh offence due to this threshold. Significantly, Scotland did not adopt the same threshold approach in its offence of domestic abuse instead focusing on the alleged offender requiring that a 'reasonable person would consider that the course of behaviour [that is the subject of the charge] to be likely to cause [the victim] to suffer physical or psychological harm' (*Domestic Abuse (Scotland) Act 2018*, s (1)(2)(a). See Burman, 2018, p.44).

The requirement that the behaviour have a 'serious effect' on the victim in England/ Wales and Ireland may unduly turn the focus on the victim – How did she respond? How did she react? – rather than on the accused's behaviour. This risk is evidenced in a recent English case (Armstrong, 2018) in which the man who was accused of verballing abusing his former partner (for example telling her to 'fuck off' and calling her a 'slag' and spitting in her face) was acquitted. While the judge found that the man's behaviour was 'disgraceful', the judge was not of the view that it had had a 'serious effect' on the victim who was described as 'too "strong and capable" to be under his control' (Armstrong, 2018). This requirement of 'serious effect' raises questions about whether judicial officers are adequately equipped to make this assessment and the risk that they may draw on stereotypical notions about who is a victim, and how victims might behave and respond to the violence and abuse that they experience – one can still be 'strong and capable' yet experience coercive control that has had a serious effect on one's life.

B. The absence of a gendered understanding may risk women being identified as offenders

As noted above, these is a risk that the new offences will merely direct the legal system to consider multiple incidents and deem them to 'add up' to coercive control, rather than to consider the cumulative, interrelated way in which acts and behaviours give meaning to each other to create the context of control over time. If incidents continue to define how the offence is interpreted this may pose risks to women being identified as perpetrators of coercive control, particularly if there is a failure to articulate the gendered nature of this harm (Burman and Brooks-Hay, 2018, p.76; Walklate et al., 2018, pp.122–123).

In this context scholars have pointed to the unintended increase in women arrested for domestic violence on their own or in dual contexts following the introduction of mandatory or pro-arrest policing policies (Hirschel and Buzawa, 2002). Research that explored the reasons for this increase found that many of these women were being arrested for using violence in the context of their own victimisation (Melton and Sillito, 2012; Miller, 2001). To address this problem many jurisdictions (particularly in the USA) introduced policies to assist the police to identify who is primary or predominant aggressor in the relationship (Hirschel and Buzawa, 2012). The impact of these policies has been mixed (see Hirschel and Buzawa, 2012, p.179; Hirschel and Deveau, 2017, p.1172) which has raised questions about whether the nuance these policies require of the police is possible within a system that emphasises incidents (Hirschel and Buzawa, 2002, pp.1456-1458) – a concern that echoes the complexity that is being asked of police in the context of the new offences introduced in England/Wales, Scotland and Ireland. This has led some commentators to express concerns about women being charged under these new offences (see Tolmie 2018a; Walklate et al., 2018; Burman and Brooks-Hay, 2018).

Consideration also needs to be given to how a new offence of this kind might impact on women who have intersecting needs and experiences regarding IPV, and encounter different service responses. This has two key facets – the first concerns the extent to which the woman (whether it is because of her race, cultural background, sexuality, economic status and so on alone or in combination) is able to articulate what she has experienced as coercive or controlling in a form able to be recognised by law; and the second concerns whether some women, particularly those who may be more likely to fight back verbally and physically for a range of reasons including past poor responses from the police, , might end up being targeted by the offence. The second concern picks up the unintended consequence outlined above that some women may find themselves charged with this offence.

The risk of misidentifying female victims as the primary aggressor is particularly acute in the Aboriginal and Torres Strait Islander (ATSI) community. The ALRC recently inquired into the high incarceration rates of ATSI peoples in Australia (ALRC, 2017). That report drew attention to the 'poor police responses' encountered by ATSI women experiencing family violence, including that some police may emphasise the woman's criminality rather than her victimisation (ALRC, 2017, [11.69]). The report noted increasing concern about the criminalisation of Indigenous women through the failure of the police to identify who is the primary aggressor in a relationship, the police charging women for breaches of protection orders, and noted that ATSI women are 'more likely than their non-Indigenous counterparts to be charged and imprisoned for "acts intended to cause injury" — where in some cases resorting to violence may be seen as the only feasible means of defending themselves and their children against a violent partner' (ALRC 2017, [11.72]). A recent study in Queensland has raised further concern about the way in which the protection order system is becoming an entry point for ATSI people, particularly women, where ATSI people are over-represented as applicants and respondents, as persons charged and convicted of contravening a protection order, and in receiving a sentence of imprisonment for that contravention (Douglas and Fitzgerald, 2018).

VI. MORE THAN JUST A DISCRETE OFFENCE

In this final section I want to explore further what I consider to be the greater challenge posed by Stark's work. While the creation of a discrete offence might for some women enable

behaviours previously unrecognised to be addressed through a criminal charge, an understanding of coercive control as the defining feature of IPV across all legal domains and practice may arguably be more transformative. Tolmie (2018a) made a similar argument in relation to the need for understandings of coercive control to extend across all aspects of the criminal law:

> …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 the 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. (Tolmie, 2018a, p.63)

While it is possible that the creation of a discrete offence may perform an important educative function about the nature of coercive control that may extend across legal areas, there is a risk that the creation of this offence may be interpreted as *the site* to recognise this harm. In this way coercive control might become *the offence* rather than being the 'overriding framework' (Kelly and Westmarland, 2016, p.114) for understanding the lived experience of IPV. Untethering other criminal offences from the context of coercive control may undermine the extent to which an understanding of coercive control is seen as important to how those offences are prosecuted, presented and determined. Mary Ann Dutton and Lisa Goodman (2005) in their work on conceptualising coercive control have also drawn attention to how an understanding of coercive control can assist more broadly in the legal arena – in criminal law where women may use violence in response to her victimisation (particularly for battered women who kill, see Sheehy, 2018), and to understand the context and seriousness of what might otherwise be presented as an isolated incident:

> In the legal arena, this more refined conceptualization of coercion in relationships with IPV might assist prosecutors and defense attorneys to explain more adequately both victim and perpetrator behaviour in physical and sexual assault cases involving intimate partners. Legal professionals might be able to understand more thoroughly the pattern of abuse within which specific violent acts take place; and therefore be able to make more informed decisions about perpetrator dispositions and victim safety. (Dutton and Goodman, 2005, p.754)

I have already argued how the admission of relationship evidence, which is able to reveal the situated context of an otherwise isolated incident, can be important to the successful prosecution of a case. Attention was drawn to how an understanding of coercive control introduced through relationship evidence can be critical to countering arguments that an assault, for example, was fanciful or uncharacteristic behaviour on the part of the accused. The admission of this evidence, however, is variable and inconsistent. An understanding of coercive control can also transform other areas of practice, such as sentencing. Julie Tolmie (2018b) has detailed how the incident-based approach of the criminal law in New Zealand (as is the case in many other jurisdictions) leaves victim safety absent from consideration at sentencing. This is significant given the ongoing nature of IPV, and often the ongoing relationship, marks it as distinctive from other criminal offences. If admitted, relationship evidence can also play an important role in sentencing in countering the view of the incident as one-off and isolated. The focus on victim safety is an important one as it requires us to pay attention to something that is distinctly different for IPV compared to acts of violence perpetrated between strangers. As Tolmie (2018b, p.202, emphasis in original) points out this is not necessarily about incarceration or '*longer* sentences' but rather 'sentences that are *crafted differently*'. This is particularly important given the over incarceration of Indigenous peoples (Tolmie, 2018b, p.202. See also discussion above). Understanding victim safety will

be particularly critical in the prosecution of any dedicated offence, given what various IPV death review processes have documented in terms of the presence of control in their case examinations (eg see NSW DVDRT, 2017, p.2).

Discussions about the recognition of coercive control in criminal law responses must also be considered in the context of developments and responses in other legal domains. IPV (like other harms) is not addressed by a single area of law alone – indeed, many women find themselves navigating responses to the harms that they experience across family law, child protection, civil protection orders, crimes compensation, and the criminal law (including as defendants). Understandings of coercive control are also critical to practice in these multiple domains. This is particularly important given how few victims of IPV turn to the criminal law for assistance (Cox, 2016, p.105). Increasing attention has been paid to the way in which legal responses are fragmented, and the way in which the same woman with the same harm is positioned differently across these domains (Hester, 2011; Stubbs and Wangmann, 2015). In Australia this fragmentation is not only doctrinal, but is also facilitated by the federal structure in which legal responsibilities are divided between the federal government, the states and territories. The focus on criminal law and whether it should criminalise coercive control, tends to ignore the fact that coercive control is already recognised in some areas of Australian law. Many of the Australian states and territories have articulated broad definitions of IPV within their civil protection order legislation which recognises a wide range of violent and abusive behaviours that might ground the making of such an order, and since 2012 the Australian *Family Law Act 1975* (Cth) has also defined 'family violence' as acts and behaviours that coerce or control a person or cause them to be fearful. These developments are important as they remind us that legal responses to IPV are not singular, and that the criminal law represents only part of the response to IPV.

These positive developments in other legal domains also remind us that despite legislative recognition, implementation continues to require attention (see discussion of civil protection orders above). In the context of family law in Australia a recent evaluation of the 2012 changes to the *Family Law Act 1975* (Cth) which included the new expansive definition of family violence (amongst other amendments) again draws attention to the limits of legislative change. Rae Kaspiew and colleagues (2015) found that while post-reform cases included more allegations about a wider range of acts and behaviours that might comprise family violence, and that this had resulted in some positive shifts away from orders of shared parental responsibility, it had, however, had a 'negligible' impact on orders about care time in the cases that were fully litigated (p.66). While it is important to acknowledge that family law decisions represent a complex interplay of a wide range of competing factors (alcohol and other drugs, mental health issues and parenting capacity) in addition to, or in combination with, family violence the apparent lack of traction in limiting care time raises questions about the extent to which the broader understanding of family violence is being put into action – that is to say, if the court finds that there is family violence, then what? It also draws attention to other issues such as the evidentiary hurdle to establish family violence in family law cases if the court is to take it into account. Similar questions were raised in British Columbia, Canada following the introduction in that province of a more comprehensive definition of family violence under the *Family Law Act* (Boyd and Lindy, 2016). In their study of case law following the introduction of this new definition Susan Boyd and Ruben Lindy found that:

> Our review of the case law…reveals that a number of problematic assumptions about family violence remain. Even if family violence is established under the broad definition …,many decisions tend towards an assumption that shared parental responsibility, and even parenting time, is an

> appropriate arrangement or goal. The consequences of being abused or being exposed to abuse appear to be too often underestimated. (Boyd and Lindy, 2016, p.136)

This may seem unconnected to questions about whether and how the criminal law should recognise coercive control – however, what this family law research reveals is issues around the depth of understanding that is generated from legislative change, and the need for an understanding of coercive control to permeate practice, procedure and outcomes across multiple legal domains. That is to say if we understand that IPV is more than physical violence, that it is about a patterned repeated use of intimidation, violence and control then what does it mean for how we practice law(s) that seeks to respond to this harm.

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VII. CONCLUSION

Efforts to get the criminal law to better respond to the harm of IPV are to be welcomed – and there is much that is significant in these recent moves to design a criminal offence that seeks to better capture the lived experience of IPV. The new offences introduced in England/Wales, Ireland and Scotland do represent positive steps, however there are also a number of cautionary lessons that can be learnt from the experience with feminist-informed efforts designed to move the law in a more responsive direction in regard to IPV. This chapter has emphasised the need to keep a clear focus on the more ingrained long-standing problems with the practice of law in response to IPV; by leaving these factors unaddressed the new offences run the possibility of failing to live up to their promise. While it is too early to make evaluative assessments of the offence of 'controlling or coercive behaviour' introduced in England and Wales in December 2015 (and the offences in Ireland and Scotland only commenced operation in 2019) – some of the early information points to the continuation of the same concerns about the practice of law that have been longstanding in efforts to get the criminal law to respond better to the harm(s) of IPV. If these new offences are to be effective in better reflecting the harm of IPV, efforts also need to ensure that an understanding of coercive control extends beyond the new offence. While it might be argued that training of police and other legal professionals around the new offences will be useful (and they will), an understanding of coercive control needs to extend to the way in which all offences that are perpetrated in intimate relationships are responded to, as well as how the harm of IPV is responded to by other areas of law that are also of critical importance to women.

Walklate and colleagues in their critical commentary on the creation of offences to capture coercive control ask 'whether more law is the answer?' (2018; see also Padfield, 2016, p.151) – certainly it appears that there are enough cautionary tales to suggest that simply legislating a new offence will not achieve a great deal if it is done in the absence of changing the practice of law in addressing IPV. While Stark does seek to 'criminalise coercive control' (Stark, 2007, p.23) how this might be achieved is also multi-pronged – it should not be merely seen in terms of whether there is a 'law on the books' but rather how all the laws that respond to IPV understand and recognise coercive control in implementation and practice.

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