

Women's Safety and Justice Taskforce (Qld)
28 July 2021

**Submission to the Women's Safety and Justice Taskforce on the discussion paper dealing
with Coercive Control**

Thank you for this opportunity to make a submission to the Queensland Safety and Justice Taskforce on your discussion paper 'options for legislating against coercive control and the creation of a standalone domestic violence offence' (Discussion Paper 1). I apologise for this submission being made after the closing date for submissions, I hope that you will still be able to consider it in your deliberations.

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 NSW Attorney General's Department's Violence Against Women Specialist Unit, and as a researcher and academic. In my academic work I focus on a wide range of legal responses to domestic and family violence (including civil protection orders, criminal law and family law). I am interested in how the law conceives of, understands and responds to this harm and have in the past written about the limitations of the incident-focus in the context of civil protection orders. Since 2014, I have been a non-government sector expert member of the NSW Domestic Violence Death Review Team (DVDRT).

The following articles and chapters that I have written or co-authored may be of relevance to the Taskforce's work on Discussion Paper 1, and its wider terms of reference:

- ***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.

- ***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.

My submission does not specifically address the questions that are raised in the Taskforce's discussion paper on options for legislating against coercive control and the creation of a standalone domestic violence offence. Instead I am forwarding to the Taskforce the submission that I made to the NSW Joint Select Committee Inquiry into Coercive Control, while there are a couple of sections that are specific to the NSW process and NSW criminal laws, the approach I adopted in my NSW submission was to 'focus on some of the tensions and challenges for effective law reform in response to a gendered harm such as domestic and family violence'. I am of the view that the more general nature of my submission, and the larger overarching issues that I raise mean that it remains relevant to the deliberations of the Queensland Taskforce. One area in which there been developments since, and during, the NSW Inquiry is the greater debate and information coming from Aboriginal and Torres Strait Islander scholars and advocates working to respond to domestic and family violence. I strongly urge the Taskforce to pursue dedicated discussions with these scholars and advocates who are raising important concerns about the impact of increased use of the criminal law to respond to domestic and family violence.¹

The key argument I raised with the NSW Inquiry was 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 experience.² Experience with law

¹ For example see Chelsea Watego, 'Carceral feminism and coercive control: When Indigenous women aren't seen as ideal victims, witnesses or women', *The Conversation*, 25 May 2021 (available at <https://theconversation.com/carceral-feminism-and-coercive-control-when-indigenous-women-arent-seen-as-ideal-victims-witnesses-or-women-161091>); and Megan Davis and Emma Buxton-Namismyk, 'Coercive control law could harm the women it's meant to protect', *The Sydney Morning Herald* (2 July 2021).

² 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*,

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.³

- 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.

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

Yours faithfully

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Australia, Cat No 4906.0 (ABS, 2016). The use of gendered language does not mean that I do not recognise that men may also be victims and women perpetrators of violence in heterosexual or same-sex relationships – they can and are. I also recognise the high rates of violence perpetrated against transwomen and those who do not identify with the gender binary. These added dimensions of the experience of gender-based violence must also be considered in the work of the Taskforce.

³ 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.

Joint Select Committee on
Coercive Control
Parliament of NSW

8 February 2021

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.

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- **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 women¹ 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.

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 Remediating 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 McGorrrery (eds), *Criminalising Coercive Control: Family Violence and the Criminal Law* (Springer, 2020), 227.

services⁵ 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 orders⁹) and there are also some offences designed to address patterned forms of behaviour (for example, stalking and intimidation in NSW¹⁰).

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

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 entrapment¹³ 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.

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 of 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 of 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:

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://20ian81kynqg38bl313ch8bf-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 Commissioner 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 Queensland²³) 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 colleagues²⁶ 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 partner²⁷ 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] WASC 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 inquiries 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

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 McGorrey (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

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 Aboriginal 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 were 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

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

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

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 Vijayarasa (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 personnel 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

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,

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.

⁷³ See Paul McGorriery 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 or 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 McGorriery and McMahon, above n73, p. 5-6.

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

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