

**ATTACHMENT HD 9**

This is the attachment marked "**HD 9**" referred to in the witness statement of Heather Douglas dated 20 July 2015.

## DO WE NEED A SPECIFIC DOMESTIC VIOLENCE OFFENCE?

Heather Douglas\*

### ABSTRACT

This article considers whether a specific domestic violence offence is needed in Australian criminal law that can recognise the ongoing, coercive and controlling nature of domestic violence. The recent introduction into England and Wales law of a ‘coercive and controlling’ behaviour offence that is designed to apply to offences committed in the context of domestic violence provides a good opportunity to extend the discussion in Australia. After briefly overviewing the difficulties and concerns associated with prosecuting domestic violence as a criminal offence, this article reflects on recent law reform processes and outcomes in England and Wales. The article then considers the approach to the criminalisation of domestic violence in the USA before turning to examine criminal law offences in Australia. The article concludes by proposing the introduction of a new offence.

### INTRODUCTION

This article considers whether a specific domestic violence offence is needed in Australian criminal law that can recognise the ongoing, coercive and controlling nature of domestic violence.<sup>1</sup> This question of whether the ‘on-going’ or ‘course of conduct’ nature of domestic violence should be better captured in criminal offences continues to be discussed by scholars and law reform commissions around the world.<sup>2</sup> In recent years a number of Australian domestic violence related statutes and reports have endorsed a definition of domestic violence that defines domestic violence as coercive and controlling behaviour.<sup>3</sup> Australia’s National Plan to Reduce Violence Against Women and Their Children defines domestic violence as:

...acts of violence that occur between people who have, or have had, an intimate relationship. While there is no single definition, the central element of domestic violence is an ongoing pattern of behaviour aimed at controlling a partner through fear, for example by using behaviour which is violent and threatening. In most cases, the violent

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\*BA, LLB, LLM, PhD Professor of Law, University of Queensland. A version of this paper was originally presented at the Criminal Law Research Workshop in Melbourne, March 2015. Thanks to the participants of the workshop, especially Stella Tarrant and Julia Tolmie, for their comments. Thanks also to Zoe Ratus AM and Andreas Schloenhardt for comments on a later draft. Finally thanks to Kate Thomas for research assistance. Research for this article was supported by the Australian Research Council’s Future Fellowship program, project number FT140100796.

<sup>1</sup> For a consideration of domestic violence and coercive control see Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, 2007) Chapter 7.

<sup>2</sup> See, eg, Russell P Dobash and Rebecca Emerson Dobash, ‘Abuser Programmes and Violence against Women’ in Wilma Smeenk and Marijke Marlsch (eds), *Family Violence and Police Response: Learning from Research Policy and Practice in European Countries* (Ashgate, 2005), 191; Australian Law Reform Commission and New South Wales Law Reform Commission (ALRC/NSWLRC), *Family Violence—A National Legal Response*, Final Report No 114 (2010), [13.7] (*‘ALRC/NSWLRC Report’*), 565; Deborah Tuerkeheimer, ‘Renewing the Call to Criminalize Domestic Violence: An Assessment Three years Later’ (2007) 75 *The George Washington Law Review* 613.

<sup>3</sup> s 5 *Family Violence Protection Act 2008* (Vic); s 8 *Domestic and Family Violence Protection Act 2012* (Qld). See also s 4AB(1) *Family Law Act 1975* (Cth). In *ALRC/NSWLRC Report*, above n 2, [5.167] the ALRC recommended that this definition should be applied throughout Australia.

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behaviour is part of a range of tactics to exercise power and control over women and their children...Domestic violence includes physical, sexual, emotional and psychological abuse.<sup>4</sup>

It is timely then to consider whether an offence should be introduced so that the criminal law can adequately reflect this definition. Further, the recent introduction of a 'coercive and controlling' behaviour offence into England and Wales<sup>5</sup> provides a good opportunity to extend the discussion in Australia. After briefly overviewing the difficulties and concerns associated with prosecuting domestic violence as a criminal offence, this article reflects on recent law reform processes and outcomes in England and Wales. The article then considers the approach to the criminalisation of domestic violence in the United States of America before turning to examine criminal law offences in Australia that are specifically designed as a response to domestic violence or may be particularly appropriate in this context. The article then considers whether a specific domestic violence offence is needed in Australia and proposes a new offence.

## BACKGROUND

A number of difficulties and concerns about the prosecution of criminal offences in the domestic violence context have been identified by researchers<sup>6</sup> and by successive law reform commission reports. For example in its 2006 review of domestic violence the Victorian Law Reform Commission (VLRC) identified four key inter-linked issues in relation to using the criminal law as a response to domestic violence. These were police and prosecution failure to enforce the existing criminal law; problems with proving criminal offences; the victim's attitude to prosecution<sup>7</sup> and the fact that not all domestic violence fits (neatly) into existing criminal law offences.<sup>8</sup> In 2010 the Australian and New South Wales Law Reform Commissions Report on Family Violence (ALRC/NSWLRC Report) emphasised evidentiary concerns observing that it may be difficult to prove domestic violence offences because victims may not be able to accurately recall dates and times of an incident; victim's evidence may be uncorroborated; victim's disclosures to others may be inadmissible on hearsay grounds and there may be no evidence of injury sustained.<sup>9</sup> The ALRC/NSWLRC Report also observed

<sup>4</sup> Council of Australian Governments (COAG), *The National Plan to Reduce Violence Against Women and Their Children 2010-2022*, (2011) 2.

<sup>5</sup> s 76 *Serious Crime Act 2015* (UK) c 9.

<sup>6</sup> See Dobash and Dobash above n 2, 100.

<sup>7</sup> Many victims may be reluctant to engage with criminal prosecution because they desire to continue the relationship with the offender or because it is perceived to be traumatic; see also Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (2015), 301 ('*Not Now, Not Ever Report*'). Victims may also be reluctant to support prosecution as they believe nothing is to be gained, they fear retaliation or fear the 'breadwinner' will be lost from the family; see David Hirschel and Ira Hutchison, 'The Relative Effects of Offense, Offender, and Victim Variables on the Decision to Prosecute Domestic Violence' (2001) 7 (1) *Violence Against Women* 46, 56.

<sup>8</sup> Victorian Law Reform Commission, *Review of Family Violence Laws* (2006), [3.25] ('*Review of Family Violence Laws*').

<sup>9</sup> ALRC/NSWLRC, above note 2, [13.7]. See also *Not Now, Not Ever Report*, above n 7, 301.

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that the 'predominantly incident-focussed'<sup>10</sup> nature of the majority of criminal offences fails to take into account the continuing nature and patterns of domestic violence and the power and control inherent in such behaviour.<sup>11</sup>

These problems associated with prosecuting domestic violence offences have been known for some time. The perceived limitations of the criminal law were one reason why civil protection orders were introduced throughout Australia and other parts of the world during the 1980s.<sup>12</sup> Civil protection orders are a much more accessible legal response for victims than the criminal justice process. A person who is experiencing domestic violence can obtain a civil protection order without assistance from police or prosecution services, the burden of proving the need for a protection order is much lower, the victim generally controls the process, civil protection orders can cover a wide range of behaviours outside the boundaries of traditional criminal law categories and breach offences exist as an incentive for the perpetrator to abide by the conditions of the protection order. While civil protection orders were originally expected to operate alongside criminal justice responses, protection orders have become the most common response to domestic violence throughout Australia, the United States of America and the United Kingdom.<sup>13</sup> This focus on protection orders has led to claims that domestic violence has, in a practical sense, been decriminalised.<sup>14</sup> Previous research has found that the police response to domestic violence is focused on the civil order scheme: to assist or encourage application for a protection order if none is in place, and in circumstances where a protection order is in place to charge a breach of that order.<sup>15</sup> The summary offence of breach of a domestic violence order, available under civil domestic violence protection order legislation throughout Australia,<sup>16</sup> appears to be the most common criminal offence charged in the domestic violence context, often even where more serious substantive offences may be applicable.<sup>17</sup> However a focus on obtaining a protection order (or prosecuting breach) instead of prosecuting a substantive offence may give very little indication of the behaviour underlying the

<sup>10</sup> See also Jennifer Youngs, 'Domestic Violence and the Criminal Law: Reconceptualising Reform' (2015) 79(1) *The Journal of Criminal Law* 55, 62.

<sup>11</sup> *ALRC/NSWLRC Report*, above n 2, [13.6].

<sup>12</sup> Carol Jordan et al, 'The Denial of Emergency Protection: Factors Associated with Court Decision Making' (2008) 23 *Violence and Victims* 603.

<sup>13</sup> Sally Goldfarb, 'Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse without Ending the Relationship?' (2008) 29(4) *Cardozo Law Review* 1487.

<sup>14</sup> Heather Douglas and Lee Godden, 'The Decriminalisation of Domestic Violence: Examining the Interaction between the Criminal Law and Domestic Violence' (2003) 27 *Criminal Law Journal* 32.

<sup>15</sup> Heather Douglas, 'The Criminal Law's Response to Domestic Violence: What's Going On?' (2008) 30 (3) *Sydney Law Review* 439.

<sup>16</sup> s 14(1) *Crimes (Domestic and Personal Violence) Act 2007* (NSW); s 177 *Domestic and Family Violence Protection Act 2012* (Qld); s 31 *Intervention Orders (Prevention of Abuse) Act 2009* (SA); s 35 *Family Violence Act 2004* (Tas); s 123 *Family Violence Protection Act 2008* (Vic); s 61 *Restraining Orders Act 1997* (WA); s 90 *Domestic Violence and Protection Orders Act 2008* (ACT); s 120 *Domestic and Family Violence Act 2007* (NT).

<sup>17</sup> Douglas, *The Criminal Law's Response to Domestic Violence*, above n 15.

breach;<sup>18</sup> it may lead to inappropriate or very low level penalties being applied;<sup>19</sup> and a breach offence can only be charged where there is a protection order already in place. Part of the reason for the apparent focus on protection orders and charging breach of those orders is no doubt attributable, at least in part, to police enforcement practices and victim preferences,<sup>20</sup> however there may be cases where a specific domestic violence offence may be a useful and appropriate alternative or additional response. Recently law reform in England and Wales has introduced a new domestic violence offence; this is discussed in the next section of this article.

## REFORM IN THE ENGLAND AND WALES

Since 2013 the definition of domestic violence in England and Wales government departments encompasses coercive and controlling behaviour.<sup>21</sup> Similar to Australia, England and Wales has a range of single incident-focussed assault-type offences that could be applied in many domestic violence cases.<sup>22</sup> In terms of 'course of conduct' offences, England and Wales already has stalking and harassment offences.<sup>23</sup> These could potentially be applied in cases where the domestic violence is non-physical and coercive and controlling, however this form of domestic violence is not explicitly recognised in these offences.<sup>24</sup> Furthermore current court of appeal decisions may be a barrier to their application in this context.<sup>25</sup> *R v Curtis*, for example, involved a number of incidents of harassment perpetrated over a long period of time. The Court of Appeal found that the trial judge should have stopped the case at the close of the prosecution:

...we cannot conclude that, in this volatile relationship, the six incidents over a nine month period amounted to a course of conduct amounting to harassment within the meaning of the statute. The spontaneous outbursts of ill-temper and bad behaviour, with aggression on both sides, which are the hallmarks of the present case, interspersed as those outbursts were with considerable periods of affectionate life, cannot be described as such a course of conduct.<sup>26</sup>

<sup>18</sup> This may be described as an issue 'fair labelling'. See James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71 (2) *Modern Law Review* 217 and Glanville Williams, 'Convictions and Fair Labelling' (1983) 42 (1) *Cambridge Law Journal* 85.

<sup>19</sup> Sentencing Advisory Council, *Sentencing Practices for Breach of Family Violence Intervention Orders: Final Report* (2009), 44; Heather Douglas, 'Not a Crime Like any Other: Sentencing Breaches of Domestic Violence Protection Orders' (2007) 31 *Criminal Law Journal* 220, 221; see also *Review of Family Violence Laws*, above n 8, [10.72].

<sup>20</sup> See, eg, Crime and Misconduct Commission, *Policing Domestic Violence in Queensland: Meeting the Challenges* (2005) 74-75 ('*Policing Domestic Violence in QLD*').

<sup>21</sup> Home Office and Jeremy Browne, 'Extended Definition of Domestic Violence Takes Effect' (Announcement, 31 March 2013) <<https://www.gov.uk/government/news/extended-definition-of-domestic-violence-takes-effect>> ; Home Office, Lynne Featherstone and Mike Penning, *Ending Violence Against Women and Girls in the UK* (26 March 2013) Gov.UK <<https://www.gov.uk/government/policies/ending-violence-against-women-and-girls-in-the-uk>>.

<sup>22</sup> s 3 *Criminal Justice Act 2003* (UK), c 44; ss 18, 20 and 47 *Offences Against the Person Act 1861* (UK) 24 and 25 Vict, c 100.

<sup>23</sup> For an overview see The Crown Prosecution Service, *Stalking and Harassment* <[http://www.cps.gov.uk/legal/s\\_to\\_u/stalking\\_and\\_harassment/](http://www.cps.gov.uk/legal/s_to_u/stalking_and_harassment/)>. See also Judith Gowland, 'Protection from Harassment Act 1997: the "New" Stalking Offences' (2013) 77(5) *The Journal of Criminal Law* 387.

<sup>24</sup> ss 2 and 2A *Protection from Harassment Act 1997* (UK).

<sup>25</sup> This was pointed to by the Home Office, 'Strengthening the Law on Domestic Abuse: A Consultation' (Consultation Paper, Home Office, August 2014), 11, referring to *R v Curtis* [2010] 1 Cr. App. R.31 and *R v Widdows* [2011] EWCA Crim 1500.

<sup>26</sup> *R v Curtis* [2010] 1 Cr. App. R. 31, [32].

It has been acknowledged that many relationships that include domestic violence include periods of violence interspersed with periods of non-violence and that periods of non-violence may also be part of a controlling pattern.<sup>27</sup> Thus a period of affection may not necessarily signal a break in a course of conduct. In any event some commentators in the have suggested that the law in England and Wales is ambiguous about whether coercive and controlling behaviours are encapsulated in existing stalking and harassment offences.<sup>28</sup>

In its consultation paper around reform of offences to the person legislation, the Law Commission questioned whether aggravated or specialised forms of assault offences should be created where the victim is a family member.<sup>29</sup> It posited several arguments in favour of creating a new offence. Arguments in favour of the development of such an offence include fair labelling<sup>30</sup> which it suggested may contribute to efforts to rehabilitate the offender and protect the victim. It pointed out that such reforms would ensure that domestic violence appears on the criminal record of the accused and alert social services and future sentencing judges to the offender's domestic violence history. It also pointed out that offence specificity could have an educative function, emphasising the particular context and seriousness of domestic violence assaults, and may assist in increasing prosecution rates of domestic assaults. The Law Commission suggested that domestic violence involves 'wrongs peculiar to it' and the prosecution of domestic violence offences may help correct the power imbalance between the sexes.<sup>31</sup> In the alternative the Law Commission also identified several reasons against the introduction of a domestic violence offence including that separating out domestic violence from other forms of violence may suggest that domestic violence is somehow not 'real' violence; it observed it is wrong in the same way other assaults are wrong.<sup>32</sup> It suggested that domestic violence should not be confused with gender based violence, observing that violence can occur 'whatever the genders involved' and there can be gender-based violence that has nothing to do with domestic violence.<sup>33</sup> The Law Commission also identified a separate question of whether a broader offence of domestic violence was needed that covered a more comprehensive range of

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<sup>27</sup> Stark, above n 1, 245-247.

<sup>28</sup> Home Office, above n 25, 11.

<sup>29</sup> Law Commission (UK), *Reform of Offences Against the Person: A Scoping Consultation Paper*, Consultation Paper No 217 (2014), [5.146] ('*Reform of Offences Against the Person Paper*').

<sup>30</sup> Chalmers and Leverick, above n 18.

<sup>31</sup> *Reform of Offences Against the Person Paper*, above n 29, [5.148].

<sup>32</sup> *Ibid* [5.149]. See also generally Michelle Dempsey, *Prosecuting Domestic Violence: A Philosophical Analysis* (Oxford University Press, 2009).

<sup>33</sup> *Reform of Offences Against the Person Paper*, above n 29, [5.150].

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behaviour such as coercive control or keeping a person short of money.<sup>34</sup> It is this second type of offence that was recently introduced into England and Wales.

In June 2014 there was some discussion in the House of Lords about the Serious Crime HL Bill (2014-2015) which included a collection of new offences focussed on computer fraud and child protection. In debating its contents Lord Paddick (LD) asked why:

...the Government have not taken the opportunity in this Bill to address what many women's groups believe to be a legislative gap in domestic violence law to deal with psychological abuse and coercive control. Indeed, psychological abuse and coercive control, not individual incidents of physical violence, are the essence of domestic violence.<sup>35</sup>

In response to these concerns the Home Office carried out a consultation about the criminal law's response to domestic violence. Its consultation was specifically focussed on 'whether we should create a specific offence that captures patterns of coercive and controlling behaviour in intimate relationships...'.<sup>36</sup> In its consultation paper, the Home Office recognised that a new offence may be seen as duplicating existing legislation (ie harassment and stalking). It observed: 'there is no need for greater clarity around violent behaviours, which are effectively criminalised through existing offences. However non-violent behaviours are criminalised through legislation that is not explicitly applicable to intimate relationships.'<sup>37</sup> In response to its consultation the Home Office received 757 submissions, and 85 per cent were in favour of 'strengthening' the law on domestic violence.<sup>38</sup> One submission commented:

Current legislation is not sufficient; it largely reinforces an approach based on single physical incidents, rather than capturing the patterns of power and coercive control within an ongoing relationship ... These failings mean that the police do not have all the tools that they need and that Criminal Justice System cannot effectively intervene, nor translate and consequently penalise the crime before the abuse has escalated. For many this is too late.<sup>39</sup>

In January 2015 a member of the House of Lords announced that amendments in committee to the *Serious Crime Bill* would 'provide an additional charging option where there is a pattern of non-violent controlling conduct, the cumulative impact of which can be no less traumatic for the

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<sup>34</sup> Ibid [5.152].

<sup>35</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 16 June 2014, 670 (Brian Paddick).

<sup>36</sup> Home Office, above n 25, 5.

<sup>37</sup> Home Office, above n 25, 11.

<sup>38</sup> Home Office, 'Strengthening the Law on Domestic Abuse: Summary of Responses' (Home Office, December 2014) 5.

<sup>39</sup> Ibid 6.

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victim.<sup>40</sup> Subsequently an amendment to the Serious Crime Bill was moved on the 20 January 2015 with the Solicitor General stating:

We must bring domestic abuse out into the open if we are to end it. The first step is to call it what it is: a crime of the worst kind ... We must create a new offence that makes it crystal clear that a pattern of coercion is as serious within a relationship as it is outside one. In many ways it is worse, because it plays on the trust and affection of the victim. That is why we need a new offence... The new offence seeks to address repeated or continuous behaviour in relationships where incidents viewed in isolation might appear unexceptional but have a significant cumulative impact on the victim's everyday life, causing them fear, alarm or distress.<sup>41</sup>

### **Section 76 Controlling or coercive behaviour in an intimate or family relationship**

Enacted in March 2015, section 76 of the *Serious Crime Act (UK) 2015*, titled *Controlling or coercive behaviour in an intimate or family relationship*, is a complex provision. Key aspects are considered below. Sub section 1 sets out the offence as follows:

- (1) A person (A) commits an offence if—
- (a) A repeatedly or continuously engages in behaviour towards another person (B) that is controlling or coercive,
  - (b) at the time of the behaviour, A and B are personally connected,
  - (c) the behaviour has a serious effect on B, and
  - (d) A knows or ought to know that the behaviour will have a serious effect on B.

The remainder of the subsections in the provision define various aspects of subsection 1. For example 'personally connected' includes circumstances where A and B are in, or have been in, an intimate personal relationship or where they are 'members of the same family' (ss 2). The definition of 'same family' is focussed on intimate partner type relationships but is defined very broadly in subsection 6. It includes situations where A and B are married or are in a civil partnership (or have been), have agreed to marry, are parents of the same child, have had parental responsibility for the same child or who are relatives.

'Serious effect' means that A's behaviour causes B to fear, on at least two occasions, that violence will be used against B or that it causes B serious alarm or distress such that it has an adverse effect on B's usual day-to-day activities (ss 4). No doubt there will be further discussion about what constitutes serious alarm or distress and how 'adverse effect' on day to day activities is to be determined. In a recent explanatory note on this aspect of the provision the need for a 'substantial

<sup>40</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 5 Jan 2015, 63 (Theresa May).

<sup>41</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 20 January 2015, 172 (Robert Buckland, Solicitor General).



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adverse effect' on daily activities was suggested.<sup>42</sup> Subsection 5 identifies an objective test of knowledge and explains that 'A "ought to know" that which a reasonable person in possession of the same information would know.'

In relation to the requirement of 'repeatedly or continuously' engaging in the relevant behaviour and the objective test as to knowledge the Solicitor General commented:

We recognise the importance of ensuring that the new offence does not impact on non-abusive relationships that might be more volatile than others. As such, the repeated or continuous nature of the behaviour and the ability of a reasonable person, whether part of or external to the relationship, to appreciate that their behaviour will have a serious effect on the victim, are key elements of the new offence.<sup>43</sup>

The myths and confusions surrounding 'ordinary' people's understanding of the effects of domestic violence have been identified by many.<sup>44</sup> For example a provision in Victoria's criminal law statute allows for experts to give evidence about how individuals may be affected by domestic violence, reflecting the view that ordinary people may not understand its impacts.<sup>45</sup> While an objective test assumes that expertise will not be needed to make an assessment about whether certain behaviour will have serious effects, it may still be difficult for prosecution officers to prove to magistrates and juries.

Subsection 8 provides for a reverse onus defence where A can show that s/he 'believed' s/he was acting in the 'best interests' of B and that the behaviour was reasonable. The defence will be satisfied if A (the defendant) can adduce 'sufficient evidence' of facts relevant to the defence and 'the contrary is not proved beyond reasonable doubt' (ss 9). Examples presented in the House of Commons included circumstances where a person needs to restrict the movements of a partner 'perhaps with a mental health issue, for their own safety.'<sup>46</sup> In a later explanatory note it was further clarified that the defendant would be protected where the action was 'actually reasonable and justified in a particular case, since it was rooted in a desire to protect the best interests, personal safety or medical needs of the apparent victim.'<sup>47</sup> Emphasising that the burden is placed on the alleged perpetrator to adduce sufficient evidence the Solicitor General commented that the test 'is

<sup>42</sup> Explanatory Notes, Serious Crime HL Bill (2014-2015) 96.

<sup>43</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 20 January 2015, 172 (Robert Buckland, Solicitor General).

<sup>44</sup> See, eg, Julie Stubbs and Julia Tolmie, 'Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on the Battered Woman Syndrome' (1999) 23 *Melbourne University Law Review* 709.

<sup>45</sup> See s 322J *Crimes Act 1958* (Vic).

<sup>46</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 20 January 2015, 172 (Robert Buckland, Solicitor General).

<sup>47</sup> Explanatory Notes, Serious Crime HL Bill (2014-2015) 96.

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not an easy test to meet' and it 'cannot be used as a get out of jail free card'.<sup>48</sup> There was some debate about the defence, with one member of the House of Commons concerned about the assessment of 'best interests', suggesting that this might require the evidence of a professional. This member also questioned the use of the word 'reasonable' suggesting 'justified' may be more appropriate.<sup>49</sup> However the Solicitor General defended the wording and explained that the burden was 'evidential not legal' and that the word reasonable created an objective test.<sup>50</sup> However the provision does appear to be a reverse onus provision, requiring the accused to present evidence and to prove that she or he believed the behaviour was in the best interests of the victim and that the behaviour was reasonable. Such reverse onus provisions are increasingly common in relation to domestic violence matters<sup>51</sup> however they have been criticised as they contribute to the steady erosion of the presumption of innocence and may be particularly difficult for vulnerable offenders to satisfy, for example unrepresented people (and if introduced in Australia, Indigenous people<sup>52</sup>). The vulnerability of unrepresented defendants will be exacerbated if they are required to call expert evidence of 'best interests.'

Subsection 11 states that the person may be convicted on indictment (maximum penalty 5 years or a fine or both) or on summary conviction (maximum penalty 12 months or a fine or both). This approach is common in England and Wales and usually a magistrate will make a decision about whether the case is too serious or complex to be heard in the magistrate's court. Given that the new provision is a course of conduct offence it is likely that some offences will be based on actions that took place over months or years, thus it is sensible that there appears to be no time limit on prosecution.

In other debate about the provision the Solicitor General pointed out that there was deliberately no reference to domestic violence or domestic abuse in the provision. He suggested the focus was on the specific behaviour which is coercive and controlling. He commented: 'we do not want duplication or confusion; we want an extra element that closes a loophole.'<sup>53</sup> Speaking in favour of the new provision and to its communicative function Mr Llwyd observed: 'tougher domestic violence laws are obviously needed to combat the lack of awareness and possible lack of confidence in our

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<sup>48</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 20 January 2015, 172 (Robert Buckland, Solicitor General).

<sup>49</sup> *Ibid* 185 (Norman Baker).

<sup>50</sup> *Ibid* 189 (Robert Buckland, Solicitor General).

<sup>51</sup> See, eg, s 9F (presumption against bail) *Bail Act 1992* (ACT) and s304 *Criminal Code Act 1899* (Qld) ('*Criminal Code* (QLD)') (defendant must prove provocation).

<sup>52</sup> David Pheeney, "'Do You Reckon I'm Gunna Get Bail?": The Impact and Consequences of New South Wales Bail Laws on Aboriginal Juveniles' (2012) 7(30) *Indigenous Law Bulletin* 3.

<sup>53</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 20 January 2015, 188 (Robert Buckland, Solicitor General).

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justice system to punish the behaviour and protect the victims.<sup>54</sup> These comments point to both the generality of the new provision but at the same time the aspiration of the legislators to respond specifically to domestic violence. However, given the ‘personally connected’ requirement of the offence, a person successfully prosecuted under this provision will be identifiable as either a family member or a former or current intimate partner of the victim, for example in their criminal record.

The *Serious Crime Act 2015* (UK) received Royal Assent on 3 March 2015. The Explanatory Notes on House of Commons amendments identify that the estimated annual cost to the police from ‘additional investigations would be £2.2 million and to other criminal justice agencies arising from additional proceedings would be £11.6 million.’<sup>55</sup> Further it is speculated that the amendments may reduce the prevalence of domestic violence by 0.1 per cent leading to some of the costs of the reform being recuperated.<sup>56</sup>

#### DEBATES IN THE UNITED STATES OF AMERICA (USA)

Some in the USA argue that domestic violence remains prevalent, at least in part, because the substantive definition of domestic violence, and therefore its appropriate criminalisation, has not been properly addressed.<sup>57</sup> Mulligan points out that although many criminal statutes in the USA have introduced crimes of domestic violence, their definitions are based on traditional criminal law concepts<sup>58</sup> and ‘the essential *actus reus* for domestic violence crimes is an act intended to cause or that causes physical pain or injury.’<sup>59</sup> The domestic violence crimes developed in the USA are essentially traditional crimes such as assault that are ‘aggravated’ when they are committed on a spouse, former spouse or family member. Mulligan points out that, in effect, the essence of domestic violence remains ‘uncriminalised’ because non-physical methods of power and control are still not criminalised.<sup>60</sup> In the USA Burke and Tuerkheimer are strong advocates for the introduction of a domestic violence offence that captures the power and control aspects of domestic violence.<sup>61</sup> Burke emphasises the disjuncture between social scientists who almost universally describe

<sup>54</sup> Ibid 176 (Elfyn Llwyd).

<sup>55</sup> Explanatory Notes, Serious Crime HL Bill (2014-2015) 96.

<sup>56</sup> Ibid.

<sup>57</sup> Steve Mulligan, ‘Redefining Domestic Violence: Using the Power and Control Paradigm for Domestic Violence Legislation’ (2009) 29 (1) *Children’s Legal Rights Journal* 33, 34.

<sup>58</sup> See, eg, *Alabama Code 2013*, 13A Ala Code, §13A-6-130; *Georgia Code 2010*, 16 Ga Code Ann, §16-5-23.1; *Mississippi Code 2010*, 97 Miss Code Ann, ch 3: ‘Crimes’; *Ohio Code 2013*, Ohio Rev Code Ann §2919.25 (LexisNexis, 2013); *Tennessee Code 2010*, 39 Tenn Code Ann, ch 13: ‘Criminal Offenses’. All of these statutes contain domestic violence offences which are essentially assault and battery crimes committed against a spouse or former spouse.

<sup>59</sup> Mulligan, above n 57, 34.

<sup>60</sup> See also Leigh Goodmark, *A Proper Marriage: Domestic Violence and the Legal System* (New York University Press, 2012), 31.

<sup>61</sup> See Alafair Burke, ‘Domestic Violence as a Crime of Pattern and Intent’ (2007) 75 (3) *George Washington Law Review* 552, 555; Tuerkeheimer above n 2.

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domestic violence as an ongoing pattern of behaviour motivated by the perpetrator's desire for power and control over the victim while, in contrast, she observes current crimes focus on discrete acts without considering the actor's motivation for power and control.<sup>62</sup> Tuerkheimer has been particularly outspoken on this issue.<sup>63</sup> She observes that the 'treatment of domestic violence as a crime developed alongside deliberate efforts to dismantle a public-private divide that placed the latter off limits.'<sup>64</sup> She argues that the violent exercise of power and control should be criminalised, urging that 'battering be defined as a course of conduct, allowing seemingly disconnected events to become woven together by the thread of control.'<sup>65</sup>

There are strong similarities between the criminal offences recommended by Burke and Tuerkheimer in that they both propose a course of conduct offence which involves the exercise of power and control in some way. However, Burke's proposed offence includes a subjective test of intent: [He or she] 'attempts to gain power or control' over the victim 'through a pattern of domestic violence.'<sup>66</sup> In contrast Tuerkheimer recommends an objective test: 'He or she knows or reasonably should know that such conduct is likely to result in substantial power or control over the family or household member.'<sup>67</sup> As Tuerkheimer points out her suggested formulation requires that the prosecution prove intended acts but it does not need to prove that the defendant intended to exercise power and control over the victim.<sup>68</sup>

At the same time that there has been discussion about the introduction of new domestic violence focussed offences, there has also been significant discussion about the risks and dangers associated with increasing the focus on criminalisation. While dealing with domestic violence as a crime may seem perfectly logical in many cases, the re-emphasis on domestic violence as a criminal matter in the USA, (which Goodmark argues dovetails with the broader push in western democracies to 'get tough on crime')<sup>69</sup> has led to significant criticism. In part these criticisms relate to various procedural reforms designed to assist in criminalising domestic violence generally including, for example,

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<sup>62</sup> Burke, above n 61, 555.

<sup>63</sup> See, eg, Deborah Tuerkeheimer, 'Confrontation and the Re-Privatisation of Domestic Violence' (2014) 113 *Michigan Law Review First Impressions* 32; Tuerkeheimer, 'Renewing the Call', above n 2; Deborah Tuerkeheimer, 'Recognizing and Remediating the Harm to Bettering: A Call to Criminalize Domestic Violence' (2004) 94 (4) *Journal of Criminal Law and Criminology* 959.

<sup>64</sup> Tuerkeheimer, 'Confrontation and the Re-Privatisation of Domestic Violence', above n 63, 39; Cheryl Hanna, 'No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions' (1996) 109 *Harvard Law Review* 1849, 1869; Mulligan, above n 57, 33.

<sup>65</sup> Tuerkeheimer, 'Renewing the Call', above n 2, 614.

<sup>66</sup> Burke, above n 61, 601.

<sup>67</sup> Tuerkheimer, 'Recognizing and Remediating the Harm', above n 63, 1020-1021.

<sup>68</sup> Tuerkheimer, 'Renewing the Call', above n 2, 620.

<sup>69</sup> Goodmark, above n 60, 2.

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mandatory arrest, prosecution and sentencing,<sup>70</sup> which, in effect, exclude the victim from the decision-making processes. Ritchie has criticised the USA focus on criminalising domestic violence and questioned whether anyone benefits from it and in particular 'who loses most when we rely too much on the criminal legal system.'<sup>71</sup> Ritchie points to a number of problems that have been identified including dual arrest; 'police fatigue' leading to less effective responses for those women who do seek a criminal response; and that the criminal justice system's requirement for victims to be involved can be both 'undesirable and dangerous'.<sup>72</sup> Ritchie argues that:

...a circuitous pattern of disempowerment results whereby 1) women are hurt by [intimate partner violence], 2) they aren't helped when they attempt to get relief from the criminal legal system, 3) so they are hurt more, 4) then they avoid turning to the system that has not helped them, and 5) since they don't engage with what has become the expected trajectory to safety they are understood to be non-victims.<sup>73</sup>

The existence of mandatory approaches to arrest and charge in many jurisdictions in the USA is likely to have a significant impact on how criminal law operates and is experienced by both police and survivors of domestic violence.

#### **CURRENT AUSTRALIAN APPROACHES**

To date Australian jurisdictions have not gone down the path of introducing a criminal offence focussed on coercive and controlling behaviour. There has been debate, however, about the introduction and application of 'course of conduct' type offences in the domestic violence sphere. For example in its review in 2010 the ALRC/NSWLRC Report observed that there is academic support for a 'course of conduct- based offence'<sup>74</sup> in the context of domestic violence, although there was lack of agreement about how it might be drafted. In 2000 the *Queensland Taskforce on Women and the Criminal Code* (the 2000 Queensland Taskforce) identified that at the core of domestic violence offending is the notion of 'course of conduct' rather than a single incident and it observed that such offences are not unfamiliar in criminal law.<sup>75</sup> The 2000 Queensland Taskforce suggested that there

<sup>70</sup> For example *Mississippi Code 2010*, 97 Miss Code Ann, ch 3: 'Crimes' states that a person convicted of a third offense of simple domestic violence (essentially assault of a spouse or former spouse) within 5 years of the last assault must serve a minimum term of at least 5 years imprisonment.

<sup>71</sup> Beth Ritchie, 'Who Benefits and Who Loses in the Criminalization of IPV: Considering the Logic of Punishment and Impact of Legal Intervention as a Tertiary Prevention Strategy' (Paper prepared for the National Science Foundation/National Institute of Justice Workshop: A Workshop on Developing Effective Primary, Secondary and Tertiary Interventions, Arlington, Virginia, May 14-16 2014). See also Linda Mills, *Insult to Injury: Rethinking Our Response to Intimate Abuse* (Princeton University Press, 2003) 6 who argues 'at worst criminal justice increases violence against women, at best it has no effect'.

<sup>72</sup> Ritchie, above n 71, 13.

<sup>73</sup> *Ibid* 14.

<sup>74</sup> *ALRC/NSWLRC Report*, above n 2 [13.16].

<sup>75</sup> The Taskforce identified two examples: maintaining a sexual relationship with a child (s229B *Criminal Code* (Qld)) and trafficking drugs (s 5 *Drugs Misuse Act 1986* (Qld)): Queensland Taskforce on Women and the Criminal Code, *Report of the Taskforce on Women and the Criminal Code* (2000) 112 ('*Report of the 2000 Qld Taskforce*'). See also David Ross, 'Continuing Offences' (2005) 10(1) *Deakin Law Review* 283 who adds consorting, stalking and supplying to this list.

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may be a number of benefits in introducing a specific offence for domestic violence. Its suggested benefits included that the 'real nature of the offence is not camouflaged'; there is better identification of domestic violence offences in institutional records; and clearer information may enhance community recognition.<sup>76</sup> The more recent 2015 Queensland taskforce report into domestic violence titled 'Not Now, Not Ever' also suggested that a specific criminal offence may be able to capture, through definition, patterns of coercive and controlling behaviour.<sup>77</sup>

Throughout Australian jurisdictions there are a number overlapping assault-type offences available which can be 'aggravated' where particular harm is caused or where a particular class of people are assaulted.<sup>78</sup> Generally these aggravating features have not been specifically directed at domestic violence and they are suitable for the prosecution of one-off or single-incident type offending. Similar to the United Kingdom, over time other offences have been introduced to various Australian statutes to address perceived limitations in the criminal law's response to domestic violence.<sup>79</sup> For example, throughout the 1990s, various offences of stalking<sup>80</sup> were introduced throughout Australia, in part to address concerns related to the prosecution of domestic violence related offending. Queensland introduced a criminal offence of torture in 1997 and Tasmania introduced offences of economic and emotional abuse in 2003.<sup>81</sup> Some jurisdictions have focussed on developing various aggravating factors emphasising the domestic relationship and these apply to existing assault type offences. These different approaches are discussed below.

### Stalking

Queensland was the first state to pass stalking law in Australia in 1993.<sup>82</sup> Consultations undertaken in relation to a general review of the *Queensland Criminal Code* suggested that the criminal law did not provide adequate protection for a person who was followed, placed under surveillance, contacted or sent offensive items in circumstances where the victim felt 'harassed, intimidated or threatened.'<sup>83</sup> Stalking was associated with the risk of violence, and the new Queensland stalking

<sup>76</sup> *Report of the 2000 Qld Taskforce*, above n 75, 112.

<sup>77</sup> *Not Now, Not Ever Report*, above n 7.

<sup>78</sup> Model Criminal Code Officers Committee, *Model Criminal Code Chapter 5: Non Fatal Offences Against the Person*, (September 1998), 1.

<sup>79</sup> Note the need for an offence of strangulation appropriate to domestic violence contexts has been discussed elsewhere: Heather Douglas and Robin Fitzgerald, 'Strangulation, Domestic Violence and the Legal Response' (2014) 36 (2) *The Sydney Law Review* 231. Note also *Not Now, Not Ever Report*, above n 7, 305 where the introduction of an offence of strangulation focussed on domestic violence was recommended.

<sup>80</sup> For an overview, see The National Council to Reduce Violence against Women and their Children, *Domestic Violence Laws in Australia* (2009) 171–80.

<sup>81</sup> See, eg, *Criminal Code* (Qld) s 320A, which was actually introduced as a response to child abuse; *Family Violence Act 2004* (Tas) ss 8 and 9. These provisions are discussed further below.

<sup>82</sup> See chapter 33A *Criminal Code* (QLD).

<sup>83</sup> Explanatory Notes, Criminal Law Amendment Bill 1993 (Qld).

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laws aimed in part to protect people from future violence,<sup>84</sup> an aspiration similar to that underlying domestic violence protection orders. Subsequently all Australian jurisdictions have introduced stalking offences;<sup>85</sup> in some cases these laws were introduced in response to cases involving domestic violence.<sup>86</sup> Stalking is a 'course of conduct' offence and focuses on activities that are 'protracted' or occur on more than one occasion. Relevant activities might include, but are not limited to, following, contacting, watching or intimidating a person in a way that a reasonable person would experience fear or apprehension or where the behaviour causes detriment to the person being stalked. Stalking offences vary between states but the offence may encapsulate some forms of coercive and controlling behaviour. Although the stalking offence is not specifically targeted at domestic violence cases, in Australia it is most commonly associated with domestic violence<sup>87</sup> and has been successfully prosecuted in this context.<sup>88</sup>

In their study of family violence and post-separation conflict Parkinson, Cashmore and Single interviewed 181 parents who had been involved in parenting disputes after separation.<sup>89</sup> They observed that the word stalking seemed to have passed into common usage and the term was used 'extensively' by their participants.<sup>90</sup> The researchers noted that while sometimes the use of the word was consistent with the criminal law definitions, often it meant something quite different including conduct that unduly interfered with a parent's post-separation freedom from having to deal with the other parent.<sup>91</sup> The common use of this language may have implications for prosecution as complaints may not be taken seriously by police if stalking terminology is routinely used by complainants.

### **Torture - Queensland**

In its 2000 review of the Criminal Code the Queensland Taskforce considered the crime of torture which has a maximum penalty of 14 years imprisonment: s320A *Queensland Criminal Code*. In this provision, torture is defined as 'the intentional infliction of severe pain or suffering on a person by

<sup>84</sup> Explanatory Notes, Criminal Law Amendment Bill 1993 (Qld) 2.

<sup>85</sup> See Sally Kift, 'Stalking in Queensland: From the Nineties to YK2' (1999) 11(1) *Bond Law Review* 144. Note provisions in other states: s13 *Crimes (Domestic & Personal Violence) Act* 2007 (NSW); s19AA *Criminal Law Consolidation Act 1935* (SA); s192 *Criminal Code Act 1924* (Tas); s21A *Crimes Act 1958* (Vic); s338D *Criminal Code Act Compilation Act 1913* (WA); s35 *Crimes Act 1900* (ACT); s189 *Criminal Code Act 1983* (NT).

<sup>86</sup> See, eg, Explanatory Notes, Crimes (Domestic and Personal Violence) Bill 2007 (NSW) and David Brown et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 6<sup>th</sup> ed, 2015) 655.

<sup>87</sup> See AW Burgess et al, 'Stalking Behaviours within Domestic Violence' (1997) 12 *Journal of Family Violence* 389.

<sup>88</sup> *R v Keong* [2007] QCA 163 (25 May 2007); *Casey v R* [2014] VSCA 257 (21 October 2014); *Devany v R* [2012] NSWCCA 285 (21 December 2012).

<sup>89</sup> Patrick Parkinson, Jusy Cashmore and Judi Single, 'Post-Separation Conflict and the Use of Family Violence Orders' (2011) 33(1) *Sydney Law Review* 1.

<sup>90</sup> *Ibid* 21.

<sup>91</sup> *Ibid* 22.

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an act or series of acts done on 1 or more than 1 occasion' and sets out that pain and suffering may be permanent or temporary and may be physical, mental, psychological or emotional. The Queensland Taskforce observed that the crime of torture was introduced primarily as a response to child abuse, but that it may be appropriate in domestic violence cases.<sup>92</sup> The offence requires the defendant to carry out an act or acts, which may be interpreted broadly to include, not just incidences of physical violence, but may also extend to acts of exclusion and degradation. Similarly, the pain and suffering element of the offence may be psychological or emotional. Torture is an indictable offence which has a maximum penalty of 14 years imprisonment and must be dealt with in the District Court, as a result it tends to be charged in serious cases alongside other offences.<sup>93</sup> The Queensland Taskforce recommended that domestic violence could be added to the Queensland Criminal Code as an example in the torture provision to encourage prosecution of domestic violence under this provision.<sup>94</sup> A second option put forward by the Queensland Taskforce was that a similar (but separate) offence to torture should be introduced with a focus on domestic violence. Some submissions to the Queensland Taskforce were in favour of this option suggesting that 'it would improve the public perception that domestic violence is a criminal offence' and that 'domestic violence needs to be named as violence in a personal intimate relationship and as different from other forms of assault.'<sup>95</sup> The Aboriginal Legal Service agreed with the suggestion of introducing a new crime of domestic violence focussed torture but stressed that it was important such an offence could be dealt with in the magistrate's court.<sup>96</sup> These recommendations were not followed and the Queensland taskforce did not draft a new model offence.

Despite the lack of reform, since 2000 there have been a number of prosecutions for torture in a domestic violence setting.<sup>97</sup> For example HAC relentlessly tortured his wife over a period of approximately six months and incidents included forcing her to swallow chillies; to lick up her own vomit; burning her with a hot poker; making her sleep on the veranda 'like a dog'; disallowing her use of the shower and toilet; forcing her to use an outside hose to wash; and spitting and urinating on her.<sup>98</sup> In this case torture was charged alongside a number of other offences, including assault causing bodily harm. While some of the incidents of torture identified in this case could perhaps

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<sup>92</sup> *Report of the 2000 Qld Taskforce*, above n 75, 116; the provision was introduced in response to the case of *R v Griffin* [1998] 1 Qd R 659.

<sup>93</sup> See, eg, *R v Ottley* [2009] QCA 211 (24 July 2009); *R v Peirson* [2006] QCA 251 (14 July 2006); *R v West* [2007] QCA 347 (19 October 2007); *R v HAC* [2006] QCA 291 (11 August 2006).

<sup>94</sup> *Report of the 2000 Qld Taskforce*, above n 75, 116.

<sup>95</sup> *Ibid* 115.

<sup>96</sup> *Ibid*.

<sup>97</sup> Above n 93.

<sup>98</sup> *R v HAC* [2006] QCA 291 (11 August 2006) [17]-[35].



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have been charged under other provisions such as assault and threat,<sup>99</sup> the torture offence better captures the ongoing nature of the abuse and the emotional impact of the degradation the victim experienced. In *R v HAC* Justice Jerrard said that:

...where more than one act in a series is relied on as causing the intentionally inflicted severe pain or suffering that constitutes torture, the jury must be satisfied that the necessary level of pain or suffering was intentionally inflicted, and caused, by an act or acts, which the jury are unanimously satisfied did happen.<sup>100</sup>

Other cases have similarly emphasised that it is not enough for the prosecution to prove that the victim experienced severe pain or suffering as a result of the acts, it also must prove that the accused intended to inflict severe pain and suffering when doing the relevant acts. Intention has been defined as 'determining mentally upon some result.'<sup>101</sup> The requirement to prove a subjective intent may be difficult in many cases.

### **Offences of economic and emotional abuse - Tasmania**

In 2003 the Tasmanian Attorney General, Judy Jackson, supported the introduction of a domestic violence framework called *Safe at Home*, which was 'pro-arrest and pro-prosecution'.<sup>102</sup> The new policy approach aimed to increase the criminalisation of domestic violence and enhance the criminal justice system response.<sup>103</sup> It was suggested that a new offence should be introduced that reflects a course of conduct. It was recommended:

That a crime be created under the new legislation where patterns of psychological and emotional abuse, such as intimidation and bullying behaviour, which if taken as individual incidents, would not reach a level of seriousness sufficient to be a crime but however, over time create or maintain a climate of fear which affects the family.<sup>104</sup>

The *Safe at Home* framework included the introduction of a new *Family Violence Act*. Within that Act two new offences of economic abuse and emotional abuse or intimidation were included. It is notable that these offences are included in the same legislation that regulates domestic violence protection orders rather than within the Tasmanian Criminal Code. It is arguable that placing these offences within what is generally known as civil protection order legislation may be perceived to

<sup>99</sup> ss 246 (assaults unlawful), 335 (common assault), 339 (assault occasioning bodily harm) and 359 (threats) *Criminal Code* (QLD).

<sup>100</sup> *R v HAC* [2006] QCA 291 (11 August 2006) [47].

<sup>101</sup> *R v Ping* [2006] 2 Qd R 69.

<sup>102</sup> Department of Justice and Industrial Relations (Tas), *Safe at Home: A Criminal Justice Framework for Responding to Family Violence in Tasmania* (2003) 25; see also Appendix 5.1.

<sup>103</sup> *Ibid* 4.

<sup>104</sup> *Ibid* 24.

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minimise or differentiate domestic violence as something less serious compared to other criminal offences. These two offences are set out below:

*8. Economic abuse, Family Violence Act 2004 (Tas)*

A person must not, with intent to unreasonably control or intimidate his or her spouse or partner or cause his or her spouse or partner mental harm, apprehension or fear, pursue a course of conduct made up of one or more of the following actions:

(a) coercing his or her spouse or partner to relinquish control over assets or income;

(b) disposing of property owned –

(i) jointly by the person and his or her spouse or partner; or

(ii) by his or her spouse or partner; or

(iii) by an affected child –

without the consent of the spouse or partner or affected child;

(c) preventing his or her spouse or partner from participating in decisions over household expenditure or the disposition of joint property;

(d) preventing his or her spouse or partner from accessing joint financial assets for the purposes of meeting normal household expenses;

(e) withholding, or threatening to withhold, the financial support reasonably necessary for the maintenance of his or her spouse or partner or an affected child.

Penalty: Fine not exceeding 40 penalty units or imprisonment for a term not exceeding 2 years.

*9. Emotional abuse or intimidation, Family Violence Act 2004 (Tas)*

(1) A person must not pursue a course of conduct that he or she knows, or ought to know, is likely to have the effect of unreasonably controlling or intimidating, or causing mental harm, apprehension or fear in, his or her spouse or partner.

Penalty: Fine not exceeding 40 penalty units or imprisonment for a term not exceeding 2 years.

(2) In this section –

a course of conduct includes limiting the freedom of movement of a person's spouse or partner by means of threats or intimidation.

In introducing the new *Family Violence Act* Mr Parkinson, Deputy Leader of the Government in Council, commented on the need for section 8 and 9, explaining:

The bill creates new offences ... to underline that family violence does not always take an overtly physical form or that it can involve a range of behaviours aimed at isolating the victim and undermining their capacity to take independent action...Economic abuse and emotional abuse, even though they may be seen sometimes as trivial in isolation, often are only part of a systematic course of abuse over time, and that is criminal conduct.<sup>105</sup>

Some commentators have suggested that the offences may be difficult to enforce and difficult to prove given that they require the prosecution to prove that the person has *intent* to inflict economic abuse or that the person *knows or ought to know* that that their course of conduct will have certain effects.<sup>106</sup> The offences in sections 8 and 9 are both summary offences and therefore a complaint must be made within 6 months from the time the matter arose. This time limit is likely to be a barrier to prosecution. Given that both these offences are 'course of conduct offences' which may

<sup>105</sup> Tasmania, *Parliamentary Debates*, Legislative Council, 25 November 2004, 6.07pm; and 26 November 2004, 11.36am (Doug Parkinson).

<sup>106</sup> *Ibid.* Also, Karen Wilcox, 'Island Innovation, Mainland Inspiration: Comments on the Tasmanian Family Violence Act' (2006) 32(4) *Alternative Law Journal* 213, 214.

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take place over a period of time exceeding six months, some have suggested that legislative reform is needed so that the six month limitation does not apply in relation to these offences.<sup>107</sup>

It is not clear how often these new offences have been charged and successfully prosecuted, and there are almost no reported cases. *Howe v R*<sup>108</sup> is an exception. In this case the defendant initially pleaded guilty to, among other offences, an offence of emotional abuse or intimidation pursuant to section 9 *Family Violence Act 2004* (Tas). The prosecution alleged Howe had made a telephone call to his ex-partner threatening to take her child away if she did not spend the night with him and telling her that if she continued with a family court application ‘things would get vicious’. When these comments were made there was a domestic violence protection order in place which required that the defendant did not contact his ex-partner. Subsequently the defendant sought to withdraw his plea on the basis that a single telephone call could not amount to a course of conduct. While the magistrate accepted that a ‘course of conduct’ would usually be interpreted as ‘protracted’ or engaged in on more than one occasion, the magistrate appeared to accept there may be a wider definition within the provision. He referred to the language of section 9 and observed that it ‘defines “a course of conduct” to include “limiting the freedom of movement of a person, spouse or partner by means of threats or intimidation”’.<sup>109</sup> However the magistrate did not ultimately decide on this point allowing the defendant to withdraw his plea on the basis that the prosecution had not demonstrated that the defendant ‘knew or ought to have known’ that his conduct would threaten or intimidate.<sup>110</sup> This case demonstrates the difficulty in proving the required intention and thus the difficulty involved in prosecuting these offences.

The most recent review of the *Safe at Home* framework did not report on prosecutions of domestic violence offences or on sections 8 and 9 specifically.<sup>111</sup> In considering these provisions the ALRC/NSWLRC Report observed that these offences may be unnecessary given that they may be satisfactorily provided for in offences such as fraud.<sup>112</sup>

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<sup>107</sup> Department of Justice (Tas), *Review of the Integrated Response to Family Violence* (June 2009) 66 (*‘Review of the Integrated Response Report’*).

<sup>108</sup> *Howe v S* [2013] TASM33.

<sup>109</sup> *Ibid* [22].

<sup>110</sup> *Ibid* [23].

<sup>111</sup> However this review did find that in over one third of police call outs to domestic violence situations there was a dual arrest of both the male and female partner and that in 25 per cent of cases women had been identified as the offender: *Review of the Integrated Response Report*, above n 106, 62.

<sup>112</sup> *ALRC/NSWLRC Report*, above n 2, [13.108].

### An aggravating circumstance in sentencing

Judges must balance a range of factors when making sentencing decisions including the aims of the sentence.<sup>113</sup> These aims have been referred to as ‘guideposts’ that sometimes ‘point in different directions’.<sup>114</sup> In sentencing cases involving domestic violence, judges throughout Australia have increasingly recognised the wide-ranging destructive effects and the community abhorrence of domestic violence and have tended to focus on deterrence and denunciation as the key aims of sentencing. For example in a recent Queensland case *McMurdo P* stated:

The dreadful effects of prolonged episodes of domestic violence are notorious...Deterrence, both personal and general, is an important factor in sentencing in domestic violence cases. So too is denunciation. The community through the courts seeks sentences which show the public disapprobation of such conduct. The effects of domestic violence go beyond the trauma suffered by victims, survivors and their children to their extended families, and friends. Domestic violence also detrimentally affects the wider community, causing lost economic productivity and added financial strain to community funded social security and health systems.<sup>115</sup>

While currently domestic violence is not specifically identified as an aggravating feature of offending, in Australian jurisdictions there appears to be a growing jurisprudence around sentencing aims with respect to domestic violence related offending. Furthermore, in those cases where a protection order is already in place and the criminal offending breaches the order, the breach may be both charged as an offence on its own<sup>116</sup> and also determined to be an aggravating feature of any substantive offence.<sup>117</sup> Australian sentencing legislation does not generally refer specifically to ‘course of conduct’ as a factor to be considered in sentencing.<sup>118</sup> An exception is the Australian Capital Territory where, if the offence forms part of a course of conduct, this must be considered by the court in sentencing the offender.<sup>119</sup> The provision does not clarify whether ‘course of conduct’ would be considered an aggravation of the offence and there are no publicly available reported

<sup>113</sup> *Veen v R (No. 2)* (1988) 164 CLR 465, 476.

<sup>114</sup> *Ibid.*

<sup>115</sup> *R v Major; ex parte AG (Qld)* [2011] QCA 210, [53] (*McMurdo P*), see also *R v Banens* (Unreported, Supreme Court of South Australia, King CJ, Legoe and Von Doussa JJ, 18 November 1987), 7-8. See also *Heilig v Cabiness* [2011] FMCAfam 97 (2 March 2011) [30]-[73] – it cites: *R v Greene* [2001] NSWCCA 258 (29 June 2001) [16]; *R v Glen* (Unreported, NSW Criminal Court of Appeal, Grove, Simpson JJ and Loveday AJ, 19 December 1994) 9 (Simpson J); *In R v Dunn* (2004) 144 A Crim R 180, [47] (Adams J ; Ipp JA and Sully J agreeing); *R v Devine* (Unreported, Supreme Court of Tasmania, Underwood CJ, 5 July 1993); *R v Robinson* [2007] NSWSC 460 (11 May 2007) [74], [108], [111]; *R v Edigarov* (2001) 125 A Crim R 551, [41] (Wood CJ; Studdert and Bell JJ agreeing); *R v Rowe* (1996) 89 A Crim R 467, 472–3; *R v Berry* (2000) 32 MVR 405, [32]; *Gallegos v R* [1999] WASCA 191 (6 October 1999) [28]. See also *R v B G* (Unreported, Supreme Court of the Australian Capital Territory, Refshauge J, 1 December 2010); *Roberts v Smorhun* [2013] ACTSC 218 (1 November 2013) [83], [103].

<sup>116</sup> See provisions noted above n 16. See also *ALRC/NSWLRC Report*, above n 2, [12.126].

<sup>117</sup> *R v Parisi* (2003) 86 SASR 183, 188. See also *R v Nedza* [2013] SASCF 142 (18 December 2013) [45]-[47] (Gray J), [97] (Nicholson J); *R v Haji-Noor* [2007] NTCCA 7 (18 May 2007) [118]; *Brown v R* [2014] NSWCCA 215 (13 October 2014) [42]; *R v Robinson* [2007] NSWSC 460 (11 May 2007) [76], [107]; *R v Anderson* (Unreported, Supreme Court of Victoria, Byrne J, 17 December 1997) 8.

<sup>118</sup> *ALRC/NSWLRC Report*, above n 2, [13.25]-[13.34].

<sup>119</sup> See s 33(1)(c) *Crimes (Sentencing Act) 2005* (ACT).

cases where the sentencing approach to domestic violence related criminal offending has explicitly considered this provision. In South Australia there is a provision that requires the prosecutor to furnish the court with particulars of injury or loss resulting from 'a course of conduct consisting of a series of criminal acts of the same or a similar character of which the offence for which sentence is to be imposed forms part'.<sup>120</sup> Neither the ACT provision nor the South Australian provision are specifically directed towards domestic violence offending, and they may operate as a limiting factor on sentence to ensure that a defendant does not experience double jeopardy in sentencing by being sentenced twice for the same acts.<sup>121</sup> In South Australia and Western Australia offences committed in the context of certain relationships is an aggravating factor, while in the Northern Territory an assault is aggravated in cases where the person assaulted is a female and the offender is a male. These approaches are discussed below.

- Relationship as an aggravating circumstance

In both South Australia and Western Australia criminal statutes identify that when various offences are committed by a person against their current or former domestic partner the relationship constitutes an aggravation of the offence. Pursuant to section 5AA(g) of the *Criminal Law Consolidation Act (1935) SA* an offence is aggravated if the offender committed the offence knowing that the victim was a spouse or domestic partner, or former spouse or domestic partner, of the offender. Several offences in the *Criminal Law Consolidation Act (1935) SA* (Stalking (s 19AA); unlawful threats (s 19); assault (s 20) and causing harm or serious harm (ss 23 and 24)) may be committed in circumstances of aggravation and can attract a higher penalty. The definitions of spouse and domestic partner in the legislation are fairly clearly outlined, nevertheless relationship status has been challenged. For example O'Loughlin was charged with rape and assault of the victim; he entered a plea of guilty to the charge of assault and proceeded to trial on the rape charge. He was ultimately found not guilty of rape.<sup>122</sup> Sentencing was adjourned and O'Loughlin subsequently sought to withdraw his plea of guilty to assault, challenging the particulars including that the victim was not a 'family member'.<sup>123</sup> Judge Barrett concluded the victim was a family member:

Those passages of evidence lead me to conclude that the applicant regarded himself as being in a de facto relationship with Ms Taylor and that he had been in that relationship for about 10 months despite occasional separations. In common parlance I think they would be said to have lived in a de facto relationship. They lived together, they went out together. When he

<sup>120</sup> See s 7(1)(b)(ii) *Criminal Law (Sentencing) Act 1988* (SA).

<sup>121</sup> See generally *Pearce v R* [1998] 194 CLR 610.

<sup>122</sup> *R v O'Loughlin* [2008] SADC 76.

<sup>123</sup> *Ibid.* Note that he was charged under the previous s 39(1) *Criminal Law Consolidation Act 1935* (SA) which reflected a specific offence of assault a family member. This provision was repealed in 2007 and replaced with s 20 *Criminal Law Consolidation Act 1935* (SA) assault with aggravation which references s 5AA (g) of the *Criminal Law Consolidation Act 1935* (SA).

left, the applicant saw himself as leaving a relationship, not just an occasional sexual relationship but a domestic, de facto relationship.<sup>124</sup>

In some cases the courts have emphasised the requirement under s 5AA that the prosecution is required to prove that the accused had knowledge of the aggravating circumstance;<sup>125</sup> that is, the prosecution must prove that the victim was a spouse or partner or former spouse or partner of the offender and that the offender knew this was the case. This may not always be simple, as the above case demonstrates. In deciding on *Wilkinson's* appeal against sentence for a range of serious assaults perpetrated against his defacto partner, Gray J considered section 5AA and observed that '[p]arliament has recognised that crimes involving violence and assault may be aggravated by a domestic situation' and that personal and general deterrence called for particular attention in cases involving domestic violence.<sup>126</sup>

Similar to South Australia, in Western Australia section 221 of the *Criminal Code* sets out that there is aggravation of an offence where 'the offender is in a family and domestic relationship with the victim.' This is relevant to a number of *Criminal Code* offences including assault (s313); assault causing bodily harm (s317) and stalking (s338)<sup>127</sup> which if committed in circumstances of aggravation may attract a higher penalty. Section 63B of the *Restraining Orders Act 1997* (WA) also includes a sentencing provision that requires courts to take into account the fact that an offender is in a family or domestic relationship with the victim and the fact that the offender's conduct in committing the offence constituted a breach of a restraining order in 'determining the seriousness of the offence'. This provision applies to a specific group of offences different to those in the aggravation category.<sup>128</sup> When section 221 of the *Criminal Code* was introduced in 2004 the explanatory memorandum stated: 'these amendments afford greater protection to victims of family and domestic violence and reflect the increased recognition of the harm that exposure to violence can cause children. These changes also reinforce the sanction effect of a restraining order.'<sup>129</sup> Pointing to failure by judges to consider section 63B of the *Restraining Orders Act 1997* (WA) in sentencing<sup>130</sup> the LRCWA Report recommended that this section be relocated to the *Sentencing Act 1995* (WA) so

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<sup>124</sup> *Ibid* [59].

<sup>125</sup> *R v Clarke* [2008] SASC 100, [93].

<sup>126</sup> *R v Wilkinson* [2008] SASC 172, [29].

<sup>127</sup> Also, grievous bodily harm (s294); wounding (s301); indecent assault (s323): *Criminal Code Act Compilation Act 1913* (WA) ('*Criminal Code* (WA)').

<sup>128</sup> Unlawful homicide or murder (s 277); Attempt to unlawfully kill (s 283); Kidnapping (s 332); Deprivation of liberty (s 333); Threat to gain with intent (s 338A); threats (s 338C); stalking (s 338E) of *Criminal Code* (WA).

<sup>129</sup> Explanatory Memorandum, Acts Amendment (Domestic Violence) Bill 2004 (WA).

<sup>130</sup> Law Reform Commission of Western Australia (LRCWA), *Enhancing Laws Concerning Family and Domestic Violence*, Report No 104 (2014) 130 ('*Enhancing Laws Report*').

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that 'judicial officers, prosecutors and lawyers may appreciate its existence'.<sup>131</sup> The LRCWA Report also identified a gap in that some offences that may be committed in a family relationship context do not currently attract a higher penalty either via aggravation or via section 63B of the *Restraining Orders Act 1997* (WA) and recommended various changes to the Western Australian Criminal Code and 63B of the *Restraining Orders Act 1997* (WA) so that there was greater coverage.

- Gender as an aggravating circumstance

Pursuant to the Northern Territory *Criminal Code Act 1983* common assault attracts a maximum penalty of one year imprisonment.<sup>132</sup> If the person assaulted is a female and the offender is a male the maximum penalty is increased to five years imprisonment.<sup>133</sup> Other aggravating factors included in this provision include that the victim suffers harm, that the victim is under the age of 16 or that the victim is disabled or infirm such that they are not able to retaliate.<sup>134</sup> In several judgments the courts have bundled together 'women, children and the weak' to send a message that they will be protected against personal violence 'insofar as it is in the court's power to do so'.<sup>135</sup> While a number of domestic violence cases in the Northern Territory are prosecuted as aggravated assault because they are cases where a male has assaulted a female, the focus of the aggravation has been the gender of the victim not the type of relationship between the offender and victim.<sup>136</sup>

It is notable that the New Zealand *Crimes Act 1961* includes an offence titled 'Assault on a child, or by a male on a female'; this offence attracts a maximum period of imprisonment of two years.<sup>137</sup> In New Zealand statistics on prosecutions of 'male assault female' under section 194 have been collected by the Ministry of Justice, and while these prosecutions are not specifically 'tagged' as domestic violence offences the Ministry of Justice reports that 'a substantial proportion of offences relate to family violence'.<sup>138</sup> It is also notable that 21 per cent of these charges were withdrawn in 2005 before being finalised.<sup>139</sup> As mentioned earlier, the victim's attitude to prosecution may be a

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<sup>131</sup> Law Reform Commission of Western Australia, *Enhancing Laws Concerning Family and Domestic Violence*, Discussion Paper No 104 (2013) 108 (*Enhancing Laws Discussion Paper*).

<sup>132</sup> s 188(1) *Criminal Code Act 1983* (NT) (*Criminal Code* (NT)).

<sup>133</sup> s 188(2)(b) *Criminal Code* (NT).

<sup>134</sup> ss188 (2)(a), (c), (d) *Criminal Code* (NT). Note there are a number of other possible aggravations included in this provision.

<sup>135</sup> See *Patrick v Baum* [2003] NTSC 59 (30 May 2003), [10]. See also *R v Daniel* [1998] 1 Qd R 499, 532 (Fitzgerald P); *R v Riley* [2006] NTCCA 10 (7 June 2006) [17]; *R v GJ* [2005] NTCCA 20 (22 December 2005) [27].

<sup>136</sup> See, eg, *R v Haji-Noor* [2007] NTCCA 7 (18 May 2007), even though in many cases the assault is committed in a domestic violence context, *Horrigan v Rowbotham & Ors* [2005] NTSC 60 (4 October 2005) [50].

<sup>137</sup> See s 194 *Crimes Act 1961* (NZ).

<sup>138</sup> Robyn Dixon et al, 'Family Safety Teams Pilot Evaluation: Stage One Baseline Study and Formative Evaluation' (Research Report, Ministry of Justice (NZ), 31 August 2006), Appendix 7.5 'Prosecution Outcomes – National (1996-2005).

<sup>139</sup> *Ibid.*

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barrier to prosecution of domestic violence offences generally, and this may in part explain the high proportion of withdrawal of charges.<sup>140</sup>

The 2000 Queensland Taskforce put forward a reform option that an offence of male assault female should be introduced into the *Queensland Criminal Code* as a serious assault<sup>141</sup> or that a gender aspect could be introduced as an aggravation to the various assault type provisions in the *Queensland Criminal Code*.<sup>142</sup> These suggestions were not supported by submissions to the 2000 Queensland Taskforce which variously were concerned about the stereotyping of women as victims and that marginalised communities such as Indigenous people would face higher rates of arrest. Further, in its submission to the 2000 Queensland Taskforce, the Aboriginal Legal Service pointed out that when people assaulted each other there was not necessarily a gendered aspect to their selection of victim.<sup>143</sup> It is argued that this form of aggravation by gender may be outdated<sup>144</sup> and does not reflect the domestic violence context of the offence.

### Ongoing Australian reform

The Law Reform Commission of Western Australia's (LRCWA) recent discussion paper<sup>145</sup> and report,<sup>146</sup> and the recent 2015 Queensland Report 'Not Now, Not Ever',<sup>147</sup> considered whether a preferred alternative to defining aggravation of a criminal offence by reference to the relationship context would be to identify domestic violence as an aggravating feature. Submissions to the LRCWA's enquiry into domestic and family violence identified that requiring proof of domestic violence was sometimes difficult, especially in cases where there are no previous reports,<sup>148</sup> and it ultimately did not recommend this change. In contrast the Queensland 'Not Now, Not Ever' report determined that making domestic and family violence a 'floating' aggravating factor for all criminal offences would be a 'less intrusive measure'.<sup>149</sup> It recommended that a higher penalty should be applied to offences committed in the context of domestic and family violence to ensure that the seriousness of domestic violence was acknowledged and the perpetrator was held to account.<sup>150</sup> In January 2015 Premier Daniel Andrews announced a Royal Commission into family violence in

<sup>140</sup> *Policing Domestic Violence in QLD*, above n 20, 48-50.

<sup>141</sup> That is in a similar way to those 'aggravations' listed in s 340 *Criminal Code* (Qld).

<sup>142</sup> *Report of the 2000 Qld Taskforce*, above n 75, 113.

<sup>143</sup> *Ibid.*

<sup>144</sup> See generally Steven Shatz and Naomi Shatz, 'Chivalry Is Not Dead: Murder, Gender, and the Death Penalty' (2012) 27 *Berkeley Journal of Gender, Law and Justice* 64.

<sup>145</sup> *Enhancing Laws Discussion Paper*, above n 131.

<sup>146</sup> *Enhancing Laws Report*, above n 130.

<sup>147</sup> *Not Now, Not Ever Report*, above n 7.

<sup>148</sup> *Enhancing Laws Discussion Paper*, above n 131, 105. Although see also the consideration of whether the defendant's defacto partner was a 'family member': *R v O'Loughlin* [2008] SADC 76.

<sup>149</sup> *Not Now, Not Ever Report*, above n 7, 304.

<sup>150</sup> *Not Now, Not Ever Report*, above n 7, 304-305.



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Victoria; its terms of reference include finding effective ways to ‘make perpetrators accountable’ and the Premier has stated that nothing is off limits for the Royal Commission.<sup>151</sup> Criminal justice reforms are likely to be considered in that enquiry.

## A NEW OFFENCE

Both the ALRC/NSWLRC Report<sup>152</sup> and the recent Queensland report on domestic violence, *Not Now, Not Ever*,<sup>153</sup> discussed the possibility of introducing a specific domestic violence but ultimately found that there was a lack of consensus about how such an offence would be formulated. No suggested formulations of a possible new offence were put forward by either of these enquiries. Two of the central arguments in favour of the development of a specific domestic violence offence are that current provisions do not reflect the on-going and coercive and controlling nature of domestic violence and that such an offence could assist in educating the public about the serious nature of domestic violence. In some Australian jurisdictions the effect of this gap in the law may be one of the contributing factors to the low rate of prosecution of criminal offences associated with domestic violence, and the ensuing lack of accountability placed on perpetrators.

Concerns about the limitations of current Australian approaches have been addressed earlier. It is suggested that there are significant concerns about the application of the provision of ‘Coercing and controlling behaviour’ recently introduced in England and Wales.<sup>154</sup> On the one hand it may be difficult to prove the offence, and on the other hand it may capture some behaviours that might be able to be understood as coercive and controlling behaviour but that occurs in non-abusive relationships. Furthermore, determining what constitutes coercive and controlling behaviour is likely to be an issue of much debate in cases prosecuted under the new provision.

Furthermore, the language of ‘coercive and controlling’ behaviour may have particular significance in the Australian context. Despite a long history of feminist research that has identified and explored the coercive and controlling behaviours underlying domestic violence,<sup>155</sup> in Australia Kelly and

<sup>151</sup> Daniel Andrews (Premier of Victoria), ‘Nothing Off Limits in Family Violence Royal Commission’ (Media Release, 19 January 2015) <<http://www.premier.vic.gov.au/nothing-off-limits-in-family-violence-royal-commission>>.

<sup>152</sup> ALRC/NSWLRC Report, above n 2, [13.88].

<sup>153</sup> *Not Now, Not Ever Report*, above n 7, 300.

<sup>154</sup> s 76 *Serious Crime Act 2015* (UK) c 9.

<sup>155</sup> See generally The Duluth Model, *Home of the Duluth Model* (2011) <<http://www.theduluthmodel.org/>>; Margaret Johnson, ‘Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law’ (2009) 42 *University of California Davis Law Review* 1107.

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Johnson's work on developing a typology of violence has been very influential.<sup>156</sup> In their typology, coercive and controlling violence is merely one of a variety of forms of violence that may occur between intimates; their typology also includes violent resistance, situational couple violence and separation instigated violence.<sup>157</sup> Rathus has argued that if the language of 'coercive and controlling' behaviours was to be interpreted in line with the typologies of violence literature, one of the effects may be to exclude some very valid experiences of domestic violence from criminalisation.<sup>158</sup>

The Queensland crime of torture<sup>159</sup> was discussed earlier and is defined as 'the intentional infliction of severe pain or suffering on a person by an act or series of acts done on 1 or more than 1 occasion'. The provision also states that pain and suffering may be permanent or temporary and may be physical, mental, psychological or emotional. This offence can be charged where the accused engages in a course of conduct involving a series of coercive and controlling actions intended to cause, and causing, severe pain and suffering to the victim. The form of injury is notably broad and does not require physical injury. 'Acts' in the provision may encompass acts that are not criminalised elsewhere, such as those mentioned in the case of *R v HAC* discussed earlier (ie exclusion from using household amenities, pressured to eat chillies etc.).<sup>160</sup> Clearly the offence is applicable and useful in domestic violence contexts.<sup>161</sup> Other jurisdictions might consider introducing the offence to their criminal statutes.

There are, however, some possible limitations in applying the offence of Torture in the context of many cases domestic violence. One is that the pain and suffering must be 'severe' and another is that the pain and suffering must be 'intentionally' inflicted. Therefore, Torture may exclude less severe forms of domestic violence, and the subjective mens rea of intent may be difficult to prove. The language of 'torture' in the provision may also discourage police and prosecutors from applying the provision as it may be understood to be directed at more public or political forms of torture. Currently matters charged under section 320A QCC cannot be heard summarily, in part because of its high penalty. An answer to some of these concerns may be to develop a new offence of

<sup>156</sup> Joan B Kelly and Michael P Johnson, 'Differentiation among Types of Intimate Partner Violence: Research Update and Implications for Interventions' (2008) 46 *Family Court Review* 476. See Zoe Rathus, 'Shifting Language and Meanings between Social Science and the Law: Defining Family Violence' (2013) 36(2) *University of New South Wales Law Journal* 359, and also Jane Wangmann, 'Different Types of Intimate Partner Violence - An Exploration of the Literature' (Issues Paper No 22, Australian Domestic and Family Violence Clearinghouse, 2011).

<sup>157</sup> Kelly and Johnson, above n 156, 477, 481, 485, 487,

<sup>158</sup> Rathus, above n 156, 389; although Rathus makes this argument in the context of family law cases.

<sup>159</sup> s 320A *Criminal Code* (Qld).

<sup>160</sup> *R v HAC* [2006] QCA 291.

<sup>161</sup> As noted earlier the offence has been applied in this context: *R v Ottley* [2009] QCA 211; *R v Peirson* [2006] QCA 251; *R v West* [2007] QCA 347; *R v HAC* [2006] QCA 291.

'Cruelty'.<sup>162</sup> While the focus of the discussion below is on the Queensland context, it is suggested that the proposed offence could be adapted to other Australian jurisdictions. The offence of Cruelty could be drafted in the following way:

320B Cruelty<sup>163</sup>

(1) A person who commits cruelty to another person commits a crime.

Maximum penalty 5 years.

(2) if the person commits cruelty to a person in a relevant relationship the offender is liable to imprisonment for 7 years

(3) In this section

*cruelty* means the infliction of pain or suffering on a person by an act or series of acts done on 1 or more than 1 occasion.

*pain or suffering* includes physical, mental, psychological or emotional pain or suffering, whether temporary or permanent.<sup>164</sup>

*relevant relationship* means a relevant relationship under the *Domestic and Family Violence Act 2012*(Qld) section 13.<sup>165</sup>

Similar to the crime of Torture, the proposed crime of Cruelty encompasses a series of acts which individually may not be defined as a criminal offence<sup>166</sup> but as a series of actions may be understood as Cruelty (for example regularly placing the victim's food next to the dog's bowl, locking the bathroom so that the victim must use an outdoor hose to wash, dropping the victim at far away locations so that she must walk a long way home; closing the victim's bedroom door so that her room is without access to air-conditioning or regularly moving a wheelchair out of reach<sup>167</sup>). Furthermore, unlike the Torture offence, the pain and suffering need not be 'severe'. Any pain and suffering is sufficient, and presumably the types of acts and the level of pain and suffering would be relevant to sentencing outcomes.

<sup>162</sup> It is notable that offences of cruelty are not unfamiliar within criminal statutes, see, eg, s364 *Criminal Code* (Qld); s 62 *Criminal Law Consolidation Act 1935* (SA), 'Child pornography material'; s 204A(1) *Criminal Code Act Compilation Act 1913* (WA), 'Offensive material'; s 125A *Criminal Code Act 1983* (NT), 'Child abuse material'. Note: Sections in other acts referring to cruelty only do so re defining what constitutes offensive/child abuse material. However cruelty is often used to refer to cruelty towards animals, see eg s242 *Criminal Code* (Qld); s 530 *Crimes Act 1900* (NSW); s 13 *Prevention of Cruelty to Animals Act 1985* (SA); s 8 *Animal Welfare Act 1993* (Tas); s 9 *Prevention of Cruelty to Animals Act 1986* (Vic); s 4 *Prevention of Cruelty to Animals Act 1920* (WA); s 7 *Animal Welfare Act 1992* (ACT); s 9 *Animal Welfare Act* (NT).

<sup>163</sup> The suggestion here is that this provision be placed in the *Criminal Code* (Qld) directly following the crime of torture in s 320A. It may also be appropriate to rename s 320A as a crime of 'Serious Cruelty' and change 'severe' to 'serious' as this would be more consistent with other language used in the *Criminal Code* (Qld).

<sup>164</sup> This part reflects the language of s 320A Torture but removes the word 'severe'.

<sup>165</sup> This definition could be adjusted in other jurisdictions to reflect the domestic violence legislation in other jurisdictions.

<sup>166</sup> As Youngs, above n 10, 64 points out, the assertion that aspects of domestic violence are not captured in existing criminal offences is important in rebutting claims of over-criminalisation.

<sup>167</sup> These examples have all been provided by women interviewed as part of the author's current Future Fellowship project: 'Using Law and Leaving Violence'.

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Missing from this proposed offence is any reference to omissions, insults or demeaning comments. In order to successfully prosecute Cruelty an act or acts<sup>168</sup> must be proven. While evidence of omissions, insults or demeaning comments may assist in disproving a claim of automatism or accident,<sup>169</sup> it is suggested that these matters are best dealt with by the protection order system rather than the criminal law.<sup>170</sup>

It is proposed that the crime of Cruelty would be heard summarily unless the defendant elected a jury trial.<sup>171</sup> This decision would ultimately be subject to the magistrate's decision as to whether he or she should abstain from jurisdiction given the seriousness of the charge or the accused's criminal history.<sup>172</sup> This is one of the features that distinguish the crime of Torture from the proposed crime of Cruelty; it means that the offence could be applied to lower level offending and if heard in the Magistrates Court in Queensland the maximum penalty would be 3 years imprisonment.<sup>173</sup> Other distinguishing features include that there is no requirement for the offender to 'intend' to cause severe pain and suffering. In the Queensland context this would mean that cruelty would be read as a crime of general intent (similar to assault<sup>174</sup>), so that, while the prosecution will need to satisfy the court that the accused intended to carry out the acts alleged,<sup>175</sup> it will not need to prove that the accused intended pain and suffering to result from the acts. However, similar to the crime of assault occasioning bodily harm,<sup>176</sup> the prosecution will need to prove a connection between the acts carried out and the pain and suffering experienced by the victim.<sup>177</sup>

The two-tiered nature of the offence clearly indicates that cruelty in circumstances of domestic violence should be taken particularly seriously. The 'aggravated' form of the proposed offence links the definition of relevant relationships to the *Domestic and Family Violence Protection Act 2012* (Qld) which defines relevant relationships to include intimate personal relationships both current and past, family relationships and informal care relationships.<sup>178</sup> The words 'coercive and controlling'

<sup>168</sup> 'Act' has been defined as some physical action apart from its consequences' see *R v Taiters* (1997) 1 QdR 333.

<sup>169</sup> See s 132B *Evidence Act 1977* (Qld).

<sup>170</sup> Thanks to Zoe Rathus for making this point.

<sup>171</sup> See s 552B *Criminal Code* (Qld).

<sup>172</sup> In Queensland see s 552D *Criminal Code* (Qld).

<sup>173</sup> In Queensland see s 552H *Criminal Code* (Qld)

<sup>174</sup> In Queensland see s 245 *Criminal Code* (Qld)

<sup>175</sup> This means that automatism (s 23(1) (a) *Criminal Code* (Qld)), accident (s 23(1)(b) *Criminal Code* (Qld)) and insanity (s 27 *Criminal Code* (Qld)) would be applicable.

<sup>176</sup> See s 339 *Criminal Code* (Qld).

<sup>177</sup> Essentially this means that causation would need to be satisfied: see *Royall v R* (1991) 172 CLR 378.

<sup>178</sup> See ss 13-20 *Domestic and Family Violence Protection Act 2012* (Qld). Note that this approach is consistent with recent reports that have recommended that the context of domestic violence should not be seen as a mitigating factor: *ALRC/NSWLRC Report*, above n 2, Recommendation 13–3; and that it should be seen as an aggravating feature: see *Not Now, Not Ever Report*, above n 7, 304. In other jurisdictions this definition could be similarly tied to domestic violence legislation.

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are not included in the proposed language of the provision. However behaviours that are coercive and controlling behaviours, where they cause pain and suffering, will be captured under the provision as will other forms of domestic violence identified in the typology literature discussed earlier.

In common law jurisdictions it may be appropriate to include a statement of mens rea in the proposed provision. For example the following words might be employed:

*cruelty* means the infliction of pain or suffering on a person by an act or series of acts done on 1 or more than 1 occasion in circumstances where the offender knew or ought reasonably to have known that pain or suffering would be likely to be a consequence of the act or series of acts.

Of importance is that the test of mens rea suggested here is an objective one which makes the offence easier to prove.

## Conclusion

There are two important caveats to the preceding discussion. The first is that the criminal justice process is just one aspect of an integrated response to domestic violence. While justice responses are important, so too are service responses such as housing and counselling, and efforts to promote positive attitudes that discourage domestic violence.<sup>179</sup> Robinson and Tregidga observe:

...the challenge is to create and maintain coordinated efforts that effectively result in desirable and predictable outcomes for victims, such as greater access to civil and criminal court remedies that increase protection, more effective control of the abuser by the criminal justice system, and increased access to community resources that provide prompt and appropriate support for the victim, both in the present and as she plans for the future.<sup>180</sup>

The second caveat is that, especially for some groups, there may be particular risks involved in placing greater emphasis on the criminal response. For example in the Australian context it has been shown that criminal law responses can escalate violence and that some groups, for example Indigenous people, may experience particularly adverse impacts from a criminal justice focussed response.<sup>181</sup> As some of the previous discussion has noted, it is not always easy for police to identify

<sup>179</sup> *Not Now, Not Ever Report*, above n 7, 8.

<sup>180</sup> Amanda Robinson and Jasmin Tregidga, 'The Perceptions of High Risk Victims of Domestic Violence to a Coordinated Response in Cardiff, Wales' (2007) 13 (11) *Violence Against Women* 1130, 1132.

<sup>181</sup> *ALRC/NSWLRC Report*, above n 2, [13.4]; also Heather Nancarrow and Heather Douglas, 'Perils of Using Law: A Critique of Protection Orders to Respond to Intimate Partner Violence' in Holly Johnson, Bonnie S. Fisher, Véronique Jaquier (eds), *Critical Issues on Violence Against Women: International Perspectives and Promising Strategies* (Routledge, 2014) 77.

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victims and perpetrators in domestic violence cases,<sup>182</sup> and dual arrest and the criminalisation of women who are overwhelmingly the victims of domestic violence is a continuing concern.

While other criminal justice issues including policing, prosecution decision-making and evidential issues are all important aspects of the criminal justice approach they are beyond the scope of this article. Furthermore, while this article proposes the introduction of a crime of Cruelty into Australian criminal law statutes, this does not preclude the development of more appropriate sentencing approaches and provisions.<sup>183</sup> Ultimately this article concludes that a new offence of Cruelty that is directed at, but not limited to, cases of domestic violence may be helpful in progressing the criminal justice response to domestic violence.

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<sup>182</sup> Note, eg, work on cross-orders, where it was found to be reasonably common for police to apply for protection orders on behalf of both parties: Jane Wangmann, 'Incidents v Context: How Does the NSW Protection Order System Understand Intimate Partner Violence?' (2012) 34 (4) *Sydney Law Review* 695; Heather Douglas and Robin Fitzgerald, 'Legal Processes and Gendered Violence: Cross-applications for Domestic Violence Protection Orders' (2013) 36 (1) *University of New South Wales Law Journal* 56.

<sup>183</sup> See generally Douglas, 'Not a Crime Like Any Other', above n 19.