Comment

Not Ready, Not Right: Key Objections to Criminalising Coercive Control in New South Wales

Libby Newton*

Abstract

In recent years, the New South Wales ('NSW') government has taken substantial steps toward legislating a criminal offence of coercive control. In November 2022, these steps culminated in the passage through Parliament of a Bill featuring a proposed offence of 'abusive behaviour towards current or former intimate partners'. This comment explores the main objections to criminalising coercive control by examining the NSW legislation and the vigorous public policy debate surrounding its introduction, along with leading scholarship and evidence from within and outside Australia. These objections tend to be based in one of two concerns: (i) that the criminal justice system is not ready for a discrete offence of coercive control and (ii) that the criminal law cannot provide an answer to the problem of domestic and family violence. An examination of these two framings reveals that criminalisation is presently seen as a high-risk, short-sighted response to an inherently complex social problem. This position appears to be taken irrespective of any overall belief in the utility or appropriateness of criminal justice–based solutions to domestic and family violence. Implications for the 2022 NSW reforms are duly considered.

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* BA (Syd) LLB (Hons) candidate (Syd). Gadigal land. Email: libnewton@gmail.com. ORCID iD: https://orcid.org/0009-0003-4602-3320.
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I Introduction

Global responses to domestic and family violence ('DFV') have undergone marked evolution in recent decades.[1] One ongoing development in many English-speaking countries is the take-up by legal systems and discourses of coercive control as a conceptual lens through which to view and understand DFV, particularly intimate partner violence. Developed in the work of American feminists Ann Jones[2] and Susan Schechter,[3] among others, and popularised by Evan Stark,[4] coercive control denotes a course of conduct the objective of which is to subordinate a family member (ordinarily a female intimate partner) by depriving them of their independence and autonomy. Stark describes coercive control as a 'gender specific … liberty crime'[5] whereby men seek to shore up their privilege and dominance in the face of the hard-won gains of women's liberation movements, including women's expanded freedoms, agency and formal equality with men.[6] Stark's conception of DFV as a pattern of behaviours comprising relationship-specific permutations of physical and/or non-physical control tactics[7] has been highly influential in the criminal law and policy space. His work has been credited with providing the foundations for offences introduced in England and Wales, the Republic of Ireland, Scotland and Northern Ireland.[8]

The key utility of the concept and its attractiveness for anti-violence advocates lies in its reframing of DFV to better reflect the lived experience of victim-survivors. In emphasising the patterned, individualised and often covert nature of DFV, coercive control compels a shift in community and institutional understandings of DFV. Crucially, definitions such as Stark's are anchored in an appreciation that in the vast majority of cases the most severe DFV-related injuries are not to the body but to personhood, and are continuously and routinely — rather than merely episodically — inflicted.[9]

Towards the end of 2022, NSW took the decisive step of criminalising coercive control. In October 2022, the NSW government introduced a Bill including a proposed offence of 'abusive behaviour towards current or former intimate

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1 For a comprehensive account of this evolution, see Eve S Buzawa and Carl G Buzawa (eds), *Global Responses to Domestic Violence* (Springer, 2017). See also Mandy Burton, *Domestic Abuse, Victims and the Law* (Routledge, 2022).

2 See, eg, Ann Jones, *Women Who Kill* (Beacon Press, 1980); Ann Jones, *Next Time, She'll Be Dead: Battering and How to Stop It* (Beacon Press, 1994).

3 See, eg, Susan Schechter, *Women and Male Violence: The Visions and Struggles of the Battered Women's Movement* (South End Press, 1982).

4 Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, 2009).

5 Ibid 16.

6 Ibid 171.

7 Ibid 206.

8 Marilyn McMahon and Paul McGorrery (eds), *Criminalising Coercive Control: Family Violence and the Law* (Springer, 2020) x.

9 This is consistently reinforced by victim-survivors' accounts: see ibid ix; Leigh Goodmark, *A Troubled Marriage: Domestic Violence and the Legal System* (New York University Press, 2011) 30, 37.

partners'.[10] The Bill passed both Houses, and received the Governor's assent on 23 November 2022,[11] with a commencement date between 1 February 2024 and 1 July 2024.[12] This comment explores the main objections to criminalising coercive control by examining the *Crimes Legislation Amendment (Coercive Control) Act 2022* (NSW) ('*Coercive Control Act*') and the public policy debate surrounding its introduction, along with leading scholarship and evidence from within and outside Australia. These objections tend to reflect one of two overarching concerns: (i) that the criminal justice system is not ready for a discrete offence of coercive control and (ii) that the criminal law cannot provide an answer to the problem of DFV. An examination of these two framings reveals that criminalisation is widely regarded as a high-risk, myopic response to an inherently complex social problem. Importantly, this assessment appears to resonate among stakeholders and experts irrespective of any overall belief in the utility or appropriateness of criminal justice–based solutions to DFV.

II Background

A *Criminalising Coercive Control: The Debate*

There are various potential avenues for translating the concept of coercive control into criminal law — for instance, as an adjunct to existing offences, a partial or complete defence to homicide, or a matter for expert witness evidence to support invocation of the defence of self-defence in cases where an abused woman kills her abuser.[13] Criminalisation via offence creation, however, has attracted the most attention in law reform circles and has emerged as the intervention of choice in many anglophone jurisdictions.[14]

Proponents of a standalone coercive control offence feel that much can be gained from harnessing the symbolic power, educative function and condemnatory force of the criminal law in relation to DFV.[15] Criminalisation is seen as an opportunity to sharpen the criminal justice system's crude understanding of DFV, validate victim-survivors' experiences,[16] communicate the 'moral gravity' and

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10 Crimes Legislation Amendment (Coercive Control) Bill 2022 (NSW) sch 1.

11 'Crimes Legislation Amendment (Coercive Control) Bill 2022', *Parliament of New South Wales* (Web Page) <https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=4024>.

12 Attorney-General (NSW), 'Taskforce to Implement State's Coercive Control Laws Begins Ahead of Schedule' (Media Release, 30 November 2022) <https://www.nsw.gov.au/media-releases/coercive-control-laws>.

13 Charlotte Barlow, Kelly Johnson, Sandra Walklate and Les Humphreys, 'Putting Coercive Control into Practice: Problems and Possibilities' (2020) 60(1) *British Journal of Criminology* 160, 160–1.

14 Sandra Walklate and Kate Fitz-Gibbon, 'Why Criminalise Coercive Control? The Complicity of the Criminal Law in Punishing Women through Furthering the Power of the State' (2021) 10(4) *International Journal for Crime, Justice and Social Democracy* 1, 3–4; Charlotte Barlow and Sandra Walklate, *Coercive Control* (Routledge, 2022) 88.

15 Julia Tolmie, 'Coercive Control: To Criminalize or Not to Criminalize?' (2018) 18(1) *Criminology and Criminal Justice* 50, 51–53; Julia Quilter, 'Evaluating Criminalisation as a Strategy in Relation to Non-Physical Family Violence' in Marilyn McMahon and Paul McGorrery (eds), *Criminalising Coercive Control: Family Violence and the Law* (Springer, 2020) 111, 126–7.

16 Tolmie (n 15) 51–53.

distinctness of the wrong[17] and correct a dangerous legal lacuna.[18] Because existing offence categories such as assault ignore the underlying architecture of DFV, law enforcement and judicial officers are purportedly unable to adequately protect victim-survivors and sanction perpetrators.[19] In this connection, Tolmie refers to the expectation that a coercive control offence, in making less-overt harms cognisable, will ensure 'fair labelling' in charging and conviction and proportionality in the sentencing of DFV offenders.[20] Furthermore, it is said that an offence that captures the context-specific nature of DFV could facilitate a departure from the criminal law's customary focus on incidents of physical violence, in turn enabling and encouraging police and the courts to intervene before lower level, non-physical abuse escalates into life-threatening violence and/or notwithstanding the absence of physical abuse (the 'intervention point argument').[21]

The argument that criminalising coercive control means installing a life-saving early intervention point has been regularly invoked in the policy debate in NSW.[22] Government action in recent years has occurred in tandem with increased public awareness of the lethality of coercive control. Research conducted by the NSW Domestic Violence Death Review Team ('DVDRT') in the period 2010–21, for instance, confirms the status of coercive control as a major predictor of intimate partner homicide. The DVDRT's four most recent reports to Parliament found that more than 95% of intimate partner homicides in NSW are preceded by coercive and controlling behaviour on the part of the perpetrator.[23] Growing awareness of the link between coercive control and intimate partner homicide, along with the high-profile murders of Dr Preethi Reddy and Hannah Clarke by their partners in 2019 and 2020 respectively,[24] has kept the DFV death toll front of mind for the Australian public. This may account for the dominance of the death prevention rationale in the government's defence of the NSW legislation and its coverage by mainstream media. The intervention point argument is discussed further in Part IV(B)(1) below.

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17 Quilter (n 15) 127.

18 Marilyn McMahon and Paul McGorrery, 'Criminalising Coercive Control: An Introduction' in Marilyn McMahon and Paul McGorrery (eds), *Criminalising Coercive Control: Family Violence and the Law* (Springer, 2020) 3, 5–6.

19 Tolmie (n 15) 51–2.

20 Ibid 52–3.

21 Ibid.

22 See, eg, Attorney-General (NSW), 'NSW Government Delivers on Coercive Control Law' (Media Release, 11 October 2022) 1 <https://dcj.nsw.gov.au/news-and-media/media-releases-archive/2022/nsw-government-delivers-on-coercive-control-law.html>; Amy Dale, 'Family Violence: Criminalising Coercion' (2020) 70 *LSJ: Law Society Journal* 28, 30; Joint Select Committee on Coercive Control, Parliament of NSW, *Coercive Control in Domestic Relationships* (Report No 1/57, June 2021) iv.

23 Domestic Violence Death Review Team, *Report 2019–2021* (2022) 27–31, *Report 2017–2019* (2020) 154, *Report 2015–2017* (2017) 121, *Report 2013–2015* (2015) ix.

24 Kelly Hughes, 'Hannah Clarke's Domestic Violence Murder Highlighted Coercive Control — But Has Anything Changed?', *ABC News* (online, 10 August 2020) <https://www.abc.net.au/news/2020-08-10/anti-domestic-violence-laws-to-criminalise-coercive-control/12377952>; Kelly Fuller, 'New South Wales MP Names Proposed Coercive Control Bill for Murder Victim Preethi Reddy', *ABC News* (online, 25 September 2020) <https://www.abc.net.au/news/2020-09-25/proposed-coercive-control-bill-named-for-victim-preethi-reddy/12698074>.

B *Legal Responses to DFV in NSW and Australia*

Closely linked to the intervention point argument is another key claim made by those in favour of the legislation: that a discrete offence of coercive control will perform an important gap-filling function.[25] To test this claim, it is necessary to consider the existing legal framework and reform context in NSW.

The criminal law has figured in responses to DFV in NSW and Australia, but its role has been small compared to developments in other legal domains. Statutory civil protection order regimes, for instance, have been the prevailing legal response to DFV in Australia since the 1980s.[26] In 1983, NSW became the first Australian state to institute civil protection orders.[27] These orders, known in NSW as apprehended domestic violence orders ('ADVOs'),[28] impose constraints on a DFV perpetrator's conduct, typically limiting or prohibiting contact with the victim.[29] They can be applied for by a victim or by police on a victim's behalf.[30] In NSW, a court may make an ADVO if satisfied that the applicant reasonably fears the commission of a prescribed 'domestic violence offence'[31] or stalking or intimidatory behaviour by the respondent.[32] These ADVOs are hybrid civil–criminal mechanisms where breach of the order triggers criminal sanctions.[33]

Within Australia's federal compact, the states and territories have primary responsibility for making criminal law.[34] Until recently, no specific DFV offence had been codified in NSW law or the law of any other state (although certain types of non-physical abuse have been criminalised in Tasmania since 2004).[35] Domestic and family violence is instead dealt with via more general offences such as assault, property damage and sexual assault, as well as offences tailored to particular DFV behaviours such as stalking and intimidation, and breach of protection orders.[36] The existence of these offences has led to suggestions that at least some aspects of coercive control are already criminalised in NSW.[37] This point is addressed in Part IV(B)(1) below.

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25 See, eg, Amy Dale, 'Law Society Joins Calls to Criminalise Coercive Control' (2021) 75(1) *LSJ: Law Society Journal* 14.

26 Julie Stubbs and Jane Wangmann, 'Australian Perspectives on Domestic Violence' in Eve S Buzawa and Carl G Buzawa (eds), *Global Responses to Domestic Violence* (Springer, 2017) 167, 174.

27 Ibid.

28 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) pt 4 ('*CDPV Act*').

29 Ibid pt 8.

30 See, eg, ibid s 48.

31 Ibid s 16(1)(a). A 'domestic violence offence' is an existing criminal offence that is either a personal violence offence or intended to coerce or control, or intimidate or induce fear in, the applicant: s 11(1).

32 Ibid s 16(1)(b).

33 Ibid s 14. See generally Jane Wangmann, 'Incidents v Context: How Does the NSW Protection Order System Understand Intimate Partner Violence?' (2012) 34(4) *Sydney Law Review* 695.

34 Quilter (n 15) 122.

35 Kerryne Barwick, Paul McGorrery and Marilyn McMahon, 'Ahead of Their Time? The Offences of Economic and Emotional Abuse in Tasmania, Australia' in Marilyn McMahon and Paul McGorrery (eds), *Criminalising Coercive Control: Family Violence and the Law* (Springer, 2020) 135.

36 Stubbs and Wangmann (n 26) 178.

37 See, eg, Heather Douglas, 'Do We Need a Specific Domestic Violence Offence?' (2015) 39(2) *Melbourne University Law Review* 434.

III The Coercive Control Offence

New South Wales is the only Australian state that has legislated a standalone offence of coercive control, although parallel processes of offence creation are either under consideration or under way in all other states and territories.[38] In this, the Australian states are following in the footsteps of England and Wales, the Republic of Ireland, Scotland and Northern Ireland, all of which have introduced discrete offences of coercive control, beginning with England and Wales in 2015.[39]

The *Coercive Control Act* amends the *Crimes Act 1900* (NSW) ('*Crimes Act*'), inserting into pt 3 a new offence of 'abusive behaviour towards current or former intimate partners' (the 'coercive control offence').[40] Abusive behaviour is defined broadly in s 54F and makes explicit reference to 'coercion or control' of the current or former intimate partner.[41] The section contains a non-exhaustive list of actual or threatened behaviours capable of constituting abusive behaviour.[42] These include behaviour that (i) causes harm to a person other than the person to whom the behaviour is directed (including a child);[43] (ii) is economically or financially abusive;[44] (iii) shames, degrades or humiliates;[45] (iv) harasses or monitors a person or their activities (including via technological means);[46] (v) causes damage to or destruction of property;[47] (vi) isolates the person;[48] (vii) prevents the person from engaging in cultural or spiritual practices or expressing their cultural identity;[49] (viii) causes death or injury to an animal;[50] or (ix) deprives a person of liberty, including by unreasonably controlling or regulating the person's day-to-day activities.[51]

The offence consists of five elements, all of which must be proven beyond reasonable doubt.[52] The prosecution must establish (i) a course of conduct (defined as behaviour engaged in repeatedly and/or continuously);[53] (ii) consisting of abusive

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38 The Queensland government announced its own proposed coercive control laws two days after the NSW Bill was introduced into Parliament: Attorney-General (Qld), 'Legislation to Strengthen Response to Coercive Control Introduced into Parliament' (Media Release, 14 October 2022) 1 <https://statements.qld.gov.au/statements/96337>.

39 *Serious Crime Act 2015* (UK) s 76; *Domestic Violence Act 2018* (Irl) s 39; *Domestic Abuse (Scotland) Act 2018* (UK) s 1; *Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021* (NI) ch 1.

40 *Crimes Act 1900* (NSW) s 54D (as inserted by *Crimes Legislation Amendment (Coercive Control) Act 2022* (NSW) sch 1 item 1).

41 *Crimes Act 1900* (NSW) s 54F(1)(b).

42 Ibid s 54F(2).

43 Ibid s 54F(2)(a), (b).

44 Ibid s 54F(2)(c).

45 Ibid s 54F(2)(d).

46 Ibid s 54F(2)(e).

47 Ibid s 54F(2)(f).

48 Ibid s 54F(2)(g).

49 Ibid s 54F(2)(g)(ii), (iii).

50 Ibid s 54F(2)(h).

51 Ibid s 54F(2)(i).

52 Ibid s 54H(2)(a).

53 Ibid s 54G(1).

behaviour (which may include any combination of abusive behaviours);[54] (iii) directed against a former or current intimate partner;[55] (iv) with intent to coerce or control;[56] (v) in circumstances where a reasonable person would consider the course of conduct likely to cause fear of violence[57] or restraint of liberty in terms of 'a serious adverse impact on the person's capacity to engage in some or all of their ordinary daily activities'.[58] The offence carries a maximum penalty of seven years' imprisonment.[59] A defence is established if the course of conduct in question was 'reasonable in all the circumstances'.[60]

IV Objections

A *Two Camps*

In NSW, responses to the new offence have been mixed. Journalism, media reporting, public consultation processes and other physical and online spaces playing host to law reform debates and commentary have provided the vehicle for formation of a countermovement, with a number of legal practitioners, academics, advocates, peak organisations and victim-survivors using these avenues to register their dissent.[61] Within this countermovement, I identify a loose bifurcation between those who accept the premise and/or rationale of criminalisation but question whether the NSW criminal justice system is 'ready' for a discrete offence of coercive control, and those who reject criminalisation as a solution to the problem of DFV, insisting that the offence cannot and will not do 'right' by victim-survivors and the community.

The 'not ready' camp is wary of any policy approach that leans on legislation as a panacea when it comes to DFV. They acknowledge that the law tends to be a blunt instrument for carving out responses to gendered violence,[62] but are not willing to discount criminal justice–based measures altogether. To the extent that members of this camp contemplate penal sanctions (including imprisonment) as part of the solution, there is some alignment with carceral feminism and the mainstream anti-

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54 Ibid s 54D(2)(a).

55 Ibid s 54D(1)(b).

56 Ibid s 54D(1)(c).

57 Ibid s 54D(1)(d)(i).

58 Ibid s 54D(1)(d)(ii).

59 Ibid s 54D.

60 Ibid s 54E.

61 See Paige Cockburn, 'NSW Government Rushes to Pass Coercive Control Bill Despite Opposition from Domestic Violence Advocates', *ABC News* (online, 12 October 2022) <https://www.abc.net.au/news/2022-10-12/nsw-coersive-control-bill-parliament-domestic-violence/101527312>; Christine Robinson, 'Why Aboriginal Women Fear NSW's New Coercive Control Laws Could Do More Harm than Good', *The Guardian (Australia)* (online, 25 October 2022) <https://www.theguardian.com/society/2022/oct/25/why-aboriginal-women-fear-nsws-new-coercive-control-laws-could-do-more-harm-than-good>.

62 See, eg, Barlow and Walklate (n 14) 86; Sandra Walklate and Kate Fitz-Gibbon, 'The Criminalisation of Coercive Control: The Power of Law?' (2019) 8(4) *International Journal for Crime, Justice and Social Democracy* 94, 99, 102.

violence movement.[63] In respect of the NSW reforms, they highlight the importance of systemic change in criminal justice practice and procedure as a precursor or adjunct to the introduction of any new DFV offence.[64] This approach is discussed in more detail in Part IV(B) below.

Members of the 'not right' camp envision a pared-back role for criminal legal frameworks in DFV policy. They favour alternative approaches designed to correct gender- and race-based power imbalances and expand victim-survivors' agency, targeting the economic, sociocultural, political and other conditions that render individuals and communities vulnerable to DFV.[65] Importantly, the 'not right' camp resists inclusion in the white, middle-class battered women's movement,[66] and underscores how differences among women subjected to DFV necessitate more innovative justice strategies in lieu of the criminal law's brute equalising force.[67] Paradigms and perspectives drawn on include anti-carceral feminism, postcolonial criminology, and critical race theory. A central contention of this camp is that criminalisation does not work but rather produces tangible harms, particularly for marginalised women. This perspective is discussed further in Part IV(C) below.

B *Not Ready*

1 *The Implementation Gap*

One argument that has dominated responses to the NSW Bill is that a discrete offence of coercive control is premature and/or reflects a misdiagnosis of the problem, ignoring serious deficiencies in the *implementation* (rather than the content) of existing law and policy.[68] This argument refutes the 'legislative gap' paradigm as it applies to coercive control, instead underscoring the role of extra-legal factors — professional cultures, practitioner attitudes, training and perceptions — that underpin criminal justice processes and shape legal outcomes.[69]

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63 See Leigh Goodmark, *Decriminalizing Domestic Violence: A Balanced Policy Approach to Intimate Partner Violence* (University of California Press, 2018); Rachel Killean, '"A Leap Forward"? Critiquing the Criminalization of Domestic Abuse in Northern Ireland' (2020) 71(4) *Northern Ireland Legal Quarterly* 595.

64 See Jane Wangmann, Submission to Standing Committee on Social Issues, Parliament of NSW, *Crimes Legislation Amendment (Coercive Control) Bill 2022* (31 August 2022).

65 See Goodmark, *Decriminalizing Domestic Violence* (n 63); Heather Nancarrow, *Unintended Consequences of Domestic Violence Law: Gendered Aspirations and Racialised Realities* (Palgrave Macmillan, 2019).

66 Ellen Reeves and Silke Meyer, 'Marginalized Women, Domestic and Family Violence Reforms and Their Unintended Consequences' in E Erez and P Ibarra (eds), *The Oxford Research Encyclopedia of International Criminology* (online at 22 January 2021) 6, 15.

67 Nancarrow (n 65) 215; Goodmark, *Decriminalizing Domestic Violence* (n 63) 10–11.

68 Wangmann, Submission (n 64) 5.

69 See, eg, Quilter (n 15) 126; Jane Wangmann, 'Coercive Control as the Context for Intimate Partner Violence: The Challenge for the Legal System' in Marilyn McMahon and Paul McGorrery (eds), *Criminalising Coercive Control: Family Violence and the Law* (Springer, 2020) 219, 221; Killean (n 63) 602.

A singular focus on criminalisation tends to presume and unduly emphasise the existence of a legislative gap.[70] Scholars have critiqued the logic of the legislative gap framing for its preoccupation with the law's coverage and implicit assumption that so long as statute makes provision for a particular subject matter, that subject matter is sufficiently dealt with by the law.[71] In NSW, it is unlikely that any statutory 'gap' can account for the criminal justice system's failure to come to grips with DFV, given the extent to which existing laws are amenable to contextual approaches to policing, prosecuting and adjudicating DFV matters.[72] This is supported by the findings of the Australian and NSW Law Reform Commissions. In their joint review of national family violence laws, the Commissions identified the need for improvements in the enforcement of existing offences as a key factor militating against the creation of new DFV-related offences.[73]

Importantly, existing laws in NSW *do* criminalise ongoing and non-physical forms of DFV. Because of the way they are formulated, 'course of conduct' offences — such as stalking or intimidation in s 13 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ('*CDPV Act*') — should, in theory, prompt criminal justice personnel to take an expansive rather than snapshot view of victim–perpetrator relationships, including any history of abuse therein. In determining whether the offence of stalking or intimidation is made out, for instance, the court is permitted to consider 'any pattern of violence in the relationship'.[74] The stalking or intimidation offence, moreover, captures a broad range of abusive behaviours, both on its face and in practice. Intimidation is expressed to include, inter alia, (i) harassment or molestation;[75] (ii) unwanted approaches (including via technology) that lead a person to fear for their safety;[76] or (iii) conduct causing reasonable apprehension of injury,[77] violence to any person,[78] damage to property[79] or harm to an animal[80] — all of which would likely satisfy the conduct element of the new coercive control offence.

The behaviours listed in s 13 of the *CDPV Act* and in the new s 54F(2) of the *Crimes Act* are substantially similar, and there are reasons to suspect that this duplication will have more than merely textual or theoretical significance. A recent Bureau of Crime Statistics and Research ('BOCSAR') paper on DFV-related stalking and intimidation offences in NSW, for instance, confirms that police do in practice rely on s 13 to target forms of abuse at which the coercive control offence

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70 Quilter (n 15) 124.

71 Ibid.

72 Douglas, 'Do We Need a Specific Domestic Violence Offence?' (n 37).

73 Australian Law Reform Commission ('ALRC') and New South Wales Law Reform Commission ('NSWLRC'), *Family Violence — A National Legal Response* (ALRC Report No 114 and NSWLRC Report No 128, October 2010) 587.

74 *CDPV Act* (n 28) ss 7(2), 8(2), although the courts have tended to interpret this narrowly, limiting the utility of this permissive provision: see *DPP (NSW) v Lucas* [2014] NSWSC 1441, [27].

75 *CDPV Act* (n 28) s 7(1)(a).

76 Ibid s 7(1)(b).

77 Ibid s 7(1)(c)(i).

78 Ibid s 7(1)(c)(ii).

79 Ibid s 7(1)(c)(iii).

80 Ibid s 7(1)(c)(iv).

is directed — namely, threatening and intimidatory behaviour and verbal abuse.[81] Applying the legislative gap rhetoric then, there is much to be said for the counterargument that offences on the books in NSW already 'cover' coercive and controlling behaviour, at least in part. Real questions arise as to how the s 54D offence will interact with the s 13 offence, and the potential for their imbrication to generate confusion among criminal justice practitioners.[82]

Of course, formal criminalisation does not automatically equate to substantive criminalisation.[83] Treating DFV as a legislative gap to be filled is misconceived because of the role played by acts of discretion at various points in the criminal justice process.[84] Victim or witness reporting, police and prosecutorial decision-making, and acts of judicial interpretation and reasoning are all discretionary matters which mediate legal structures and legal outcomes. Importantly, a new offence framed in terms of repeated or continuous acts and including specific reference to non-physical abuse can only achieve so much while criminal justice practice and procedure remain shackled to the violent incident model of crime. In the absence of training and education initiatives capable of engendering cultural change within the key professions and institutions tasked with responding to DFV (including the police force), it is likely that practice will remain so shackled.[85]

The utility of existing 'course of conduct' offences, for instance, has been undermined by the dominance of incident-based models of policing. Evidence from other jurisdictions indicates that instead of sensitising law enforcement officials to the routinised, everyday nature of intimate partner violence, stalking and intimidation offences tend to be administered in an 'incident additive' manner whereby 'individual incidents are examined and proven to determine whether they add up to a course of conduct'.[86] This additive approach has characterised police implementation of the coercive control offence in England and Wales (discussed in Part IV(B)(2) below). This suggests that rather than embedding contextualised understandings of DFV, legislated offences intended to capture ongoing and non-physical abuse are only used where there are identifiable incidents of violence; and because physical violence is more readily evidenced and identifiable by police, the result is a reversion to the violent incident focus.[87]

There is a real risk that the NSW coercive control offence will face the same practical problems. Further, offences of this kind are uniquely difficult to implement because of the highly nuanced factual analysis that successful implementation

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81 Stephanie Ramsey, Min-Taec Kim and Jackie Fitzgerald, 'Trends in Domestic Violence–Related Stalking and Intimidation Offences in the Criminal Justice System: 2012 to 2021' (BOCSAR, Bureau Brief No 159, June 2022) 6.

82 Wangmann, Submission (n 64) 12.

83 Quilter (n 15) 126.

84 Ibid.

85 Wangmann, Submission (n 64) 4–6.

86 Tolmie (n 15) 59; Vanessa Bettinson and Charlotte Bishop, 'Is the Creation of a Discrete Offence of Coercive Control Necessary to Combat Domestic Violence?' (2015) 66(2) *Northern Ireland Legal Quarterly* 179, 189.

87 Barlow et al (n 13) 169.

requires.[88] Criminal justice actors, police especially, are neither accustomed nor equipped to carry out the necessary inquiries.

To illustrate, the coercive control offence definition includes a catalogue of behaviours,[89] many of which, at face value, may cohere with regular family dynamics and/or an agreed division of household responsibilities. In most cases, the intention, meaning and effect of a particular course of conduct (control of the family's finances by one partner, for instance) plus its interrelation with other dynamics in the relationship, will determine whether it is capable of falling within the intended meaning of 'abusive behaviour' and thus constituting a crime. As Walklate, Fitz-Gibbon and McCulloch have observed, when coercive control is displaced from clinical frameworks, it can be an extremely slippery concept[90] — perhaps too slippery for the criminal legal system and its actors to operationalise. The question arises whether police, who are primed to lay charges on the basis of formulaic offences,[91] are the appropriate persons to conduct these assessments and trigger the intervention of the state in individuals' private lives. In practice, delays in reporting and unwilling witnesses and victims are additional obstacles to developing a full picture of what has occurred in any case and thus detecting, evidencing and prosecuting coercive and controlling behaviour.[92]

2 *The (In)effectiveness of Criminalisation*

Evidence as to the success of criminal justice interventions targeting coercive control is limited and inconclusive.[93] There are, moreover, signs that coercive control offences introduced in other jurisdictions are not working as intended. Although most of these offences are in their infancy, it is nonetheless concerning that early assessments of their operation consistently demonstrate under-utilisation or utilisation only in conjunction with offences characterised by more obvious physical forms of violence. The latter trend is especially significant insofar as it suggests that a discrete offence of coercive control in NSW will lack any independent utility.

The experience of Tasmania in relation to its offences of economic abuse and emotional abuse[94] is instructive. There has been a dearth of charges and prosecutions on the basis of these offences: none in the first three years of their operation[95] and only 73 prosecutions in total over 12 years.[96] Against this, 3,174 charges were laid for breach of a family violence order in the space of a single year.[97] While uptake is

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88 Tolmie (n 15) 54.

89 See *Crimes Legislation Amendment (Coercive Control) Act 2022* (NSW) s 54F.

90 Sandra Walklate, Kate Fitz-Gibbon and Jude McCulloch, 'Is More Law the Answer? Seeking Justice for Victims of Intimate Partner Violence through the Reform of Legal Categories' (2018) 18(1) *Criminology and Criminal Justice* 115, 115.

91 Douglas, 'Do We Need a Specific Domestic Violence Offence?' (n 37) 440.

92 Ibid.

93 Australia's National Research Organisation for Women's Safety ('ANROWS'), *Defining and Responding to Coercive Control: Policy Brief* (ANROWS Insights 01/2021, 2021).

94 *Family Violence Act 2004* (Tas) ss 8, 9.

95 Barwick, McGorrery and McMahon (n 35) 137.

96 Ibid.

97 Ibid 149.

not to be conflated with efficacy, *lack* of uptake of the offences in the absence of a marked reduction in DFV rates points to missed opportunities for their use.[98] In accounting for the scarcity of charges and prosecutions, commentators have referred to drafting and formulation issues as well as ongoing challenges in the implementation of the offences,[99] reinforcing once more the significance of the implementation gap.

In England and Wales, the offence of controlling or coercive behaviour in an intimate or family relationship[100] has encountered similar problems. Despite considerable early uptake, use of the offence has waned with few charges laid and fewer proceedings brought.[101] Barlow et al's empirical analysis of police practice in one English district since the introduction of the offence reveals several problematic trends.[102] The authors found that investigative efforts remained focused on evidencing violent incidents such as assault or property damage to the exclusion of patterns of abusive behaviour, even where repeated coercive and controlling behaviours were present or reported.[103] Coercive control rarely triggered use of police powers in the absence of an accompanying incident-based offence characterised by physical violence.[104] Significantly, only 3.1% of cases involving coercive control unaccompanied by evidence of physical violence resulted in coercive control charges being laid, compared to 20.7% of cases where physical violence was also present.[105] This is symptomatic of the continued normalisation and minimisation of 'lower' levels of abuse, their implicit classification as benign, and the prevailing attitude that abuse is only a problem where it is visible, physical and violent.[106] Such trends raise questions about the capacity of a standalone offence to provide an intervention point where one does not already exist in law, given that charges of coercive control, where laid, are simply being tacked on to other charges referrable to violent incidents.

3 *Attendant Risks and Harms*

Many commentators anticipate that, in addition to having limited or no utility, the NSW legislation in its present form will be attended by adverse consequences for victim-survivors. In particular, there are fears that the new offence will contribute to the problems of misidentification, systems abuse and re-traumatisation of victim-survivors. Upon attending a scene where one or both parties appear to have used violence, in circumstances where it is not easy to ascertain whether the violence was used for an offensive or a defensive purpose, there is a risk that police will mistake a victim of DFV for a perpetrator. This risk is elevated by poor police practice, such

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98 Walklate and Fitz-Gibbon (n 14) 3; Wangmann, 'Coercive Control as the Context for Intimate Partner Violence' (n 69) 230.

99 See Barwick, McGorrery and McMahon (n 35).

100 *Serious Crime Act 2015* (UK) s 76.

101 Barlow et al (n 13) 163–4.

102 Ibid 172.

103 Ibid 170.

104 Ibid 169, 171.

105 Ibid 171.

106 Tolmie (n 15) 60.

as failing to take statements from both parties separately, and acting on the basis of moment-in-time impressions. It is also elevated by manufactured retellings of the action by the primary aggressor, who may present as calmer and therefore the more 'rational' and credible witness of the two.[107]

Linked to victim misidentification is the opportunity for what Douglas calls 'systems abuse', where the perpetrator uses the legal system and its processes to maintain or further the victim's subordination.[108] The NSW offence may be particularly susceptible to being wielded in this manner. As observed by one stakeholder group, the legislation could support attempts to characterise non-coercive and controlling behaviours — such as a victimised mother's decision to cease contact or visitation of her children with their father due to safety concerns[109] — as abusive behaviour for the purpose of the offence.[110] The legislation as it stands does not guard against the deployment of disingenuous arguments that weaponise children of the relationship and demonise (or seek to criminalise) protective mothers.[111]

Victim re-traumatisation is another foreseeable harm. Where coercive control is alleged in the course of legal proceedings, it is highly likely that the complainant will be required to testify. This is due to the inherent difficulty of evidencing coercive and controlling behaviour, a difficulty underwritten by persistent myths and misconceptions about 'willing victims' and 'masochistic women', as well as the legal system's preoccupation with bodily injury as a definitive marker of DFV.[112] Because of these evidentiary barriers, there is a greater need for victim involvement in the presentation of the prosecution's case. This will mean exposing victims to the adversarial process — including defence tactics designed to discredit the victim as a witness.[113] This in turn may lead to the victim's re-traumatisation through continued denial of her reality, and the legal process acting as a 'secondary abuser'.[114]

C *Not Right*

1 *Racialised Policing of DFV*

The implementation problem and associated systemic issues in the administration of criminal justice have led some to argue that criminalisation is fundamentally the

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107 Madeleine Ulbrick and Marianne Jago, '"Officer She's Psychotic and I Need Protection": Police Misidentification of the "Primary Aggressor" in Family Violence Incidents in Victoria' (Policy Paper No 1, July 2018, Women's Legal Service Victoria).

108 Heather Douglas, 'Legal Systems Abuse and Coercive Control' (2018) 18(1) *Criminology and Criminal Justice* 84.

109 See Barlow and Walklate (n 14) 25.

110 Women's Legal Service NSW, Submission to Standing Committee on Social Issues, Parliament of NSW, *Crimes Legislation Amendment (Coercive Control) Bill 2022* (31 August 2022) 46.

111 Ibid.

112 See Bettinson and Bishop (n 86).

113 Tolmie (n 15) 55.

114 Douglas, 'Legal Systems Abuse and Coercive Control' (n 108) 94.

wrong mechanism to address DFV.[115] This dovetails with concerns about how marginalised groups, including First Nations peoples, are often the worst affected by deficiencies in criminal justice practice and procedure. Situational barriers to justice combined with structural racism and sexism mean that First Nations women are both excluded from DFV solutions based in criminal justice interventions and *actively harmed* by those purported solutions. In particular, First Nations women who experience DFV are adversely impacted by ingrained beliefs not only about what DFV looks like (violent incidents), but also about what a victim of DFV looks like and where Indigenous women 'fit' in terms of the victim–offender binary.[116] These are issues which a new offence cannot rectify, and may even exacerbate.

Cunneen describes police relations with Indigenous peoples as a 'contiguous zone' in which the evils of racism, colonialism and violence converge.[117] First Nations victim-survivors' experiences of DFV policing demonstrate the dysfunctionality and dangerousness of this zone. In particular, documented over- and under-policing of DFV involving First Nations women — the twin products of a tendency to view First Nations women as criminals first and never as 'deserving' victims[118] — points to problems with reliance on DFV solutions that rest on the expansion of police powers.

Buxton-Namisnyk delivers a clear picture of these problems. In her study of homicide cases involving the death of First Nations women at the hands of male partners across six Australian jurisdictions between 2006 and 2016, she found that contact with police was uniformly harmful for these women. Policing failures and police inaction frequently contributed to fatal outcomes:

> [I]n almost a fifth of cases … there was evidence that First Nations women had asked officers to take action on their behalf, usually to apply for a [domestic violence order] or to progress charges against their partner, but police failed to act. For example, in one case from the [Northern Territory], a First Nations woman attended the police station after an assault, and while police entered her details into the system, they did not take her statement. She left the station after a long wait in the public waiting area in view of passing community members. Police failed to follow up with her, their records describing that officers were dispatched to an 'urgent' job. She was killed later that night.[119]

Buxton-Namisnyk's findings demonstrate that police action is similarly responsible for poor outcomes for First Nations victims of DFV. Too often, police responses

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115 See Goodmark, *Decriminalizing Domestic Violence* (n 63).

116 See Lisa Young Larance, Margaret Kertesz, Cathy Humphreys, Leigh Goodmark and Heather Douglas, 'Beyond the Victim–Offender Binary: Legal and Anti-Violence Intervention Considerations with Women Who Have Used Force in the US and Australia' (2022) 37(3) *Affilia: Feminist Inquiry in Social Work* 466.

117 Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (Allen and Unwin, 2001), cited in Emma Buxton-Namisnyk, 'Domestic Violence Policing of First Nations Women in Australia: "Settler" Frameworks, Consequential Harms and the Promise of Meaningful Self-Determination' (2021) 62(6) *British Journal of Criminology* 1323, 1325.

118 Emma Buxton-Namisnyk, 'Domestic Violence Policing of First Nations Women in Australia: "Settler" Frameworks, Consequential Harms and the Promise of Meaningful Self-Determination' (2021) 62(6) *British Journal of Criminology* 1323, 1332.

119 Ibid.

have the effect of undermining victim agency and diminishing confidence in the legal system for First Nations women.[120] Across the cases analysed, implementation of DFV law and policy by law enforcement officials tended to be paternalistic and inattentive to context.[121] In several cases, for example, police secured civil protection orders against the express wishes of victims, including one case in NSW where the victim and respondent remained in a relationship and were co-habiting at the relevant time.[122]

Furthermore, there is evidence that DFV policing contributes to the criminalisation of First Nations women.[123] Indigenous women are convicted of DFV offences at rates far higher than non-Indigenous women.[124] In nearly one-third of the intimate partner homicides analysed by Buxton-Namisnyk, the victim had previously been identified by police as a DFV perpetrator.[125] In 22% of cases, police attending a DFV call-out pursued criminal charges against the victim for unrelated minor offences[126] — a clear example of police practice driven by racist perceptions of women of colour as criminals rather than victims in need of protection. These figures suggest a pattern of false mutualisation,[127] driven by failures to recognise the self-defensive or retaliatory nature of violence used by First Nations women against their abusive partners,[128] as well as the influence of gendered and racialised stereotypes such as that of the 'angry black woman'.[129] The racism and sexism that pervade policing responses to DFV raise questions about the capacity of a new DFV offence — the implementation of which will fall squarely on the shoulders of law enforcement authorities — to deliver on its promise of better responding to and protecting DFV victim-survivors.

2 *The Intervention Point Argument*

The claim that the new offence will provide a point of intervention facilitating the prevention of DFV-related deaths (mentioned in Part II) is also highly dubious, not least because police already have the necessary powers and capacity to intervene to protect victims of DFV but frequently do not (especially where the victim is a First Nations woman).[130] Moreover, many women who experience DFV are reluctant to engage with police in the first place.[131] Under-reporting of DFV by Aboriginal and

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120 Ibid 1334.
121 Ibid 1333–4.
122 Ibid 1334.
123 Nancarrow (n 65) 21.
124 Ibid 11.
125 Buxton-Namisnyk (n 118) 1335.
126 Ibid.
127 See Elizabeth A Sheehy, 'Criminalising Private Torture as Feminist Strategy' in Kate Fitz-Gibbon, Sandra Walklate, Jude McCulloch, JaneMaree Maher (eds), *Intimate Partner Violence, Risk and Security: Securing Women's Lives in a Global World* (Routledge, 2018) 251, 266.
128 Referred to in the literature as 'violent resistance': Buxton-Namisnyk (n 118) 1335.
129 Ibid; Larance et al (n 116) 471.
130 Buxton-Namisnyk (n 118) 1340.
131 See Goodmark, *Decriminalizing Domestic Violence* (n 63).

Torres Strait Islander[132] women is a particular issue,[133] though hardly inexplicable. Under-reporting stems from a matrix of factors: fears of discriminatory police responses, of being ostracised by one's community, and of perpetrator retaliation;[134] fears about ramifications for the perpetrator (including the possibility of incarceration, and the very real dangers to which being in prison exposes Aboriginal men and women) and for oneself (if the victim has a criminal record or is otherwise known to police);[135] lack of culturally appropriate services; and awareness of the 'direct pathway' from police contact to child protection involvement.[136] Importantly, many women do not wish, and (due to financial dependency)[137] cannot afford, for the perpetrator to be removed from their lives. They just want the violence to end.[138]

For First Nations and other marginalised women, these factors operate to discourage engagement with a system ostensibly designed to assist and protect them, in circumstances where viable alternative avenues (such as community- and Elder-led programs) are either chronically underdeveloped or simply do not exist.[139] Because First Nations women have long experienced the law itself as a coercive and controlling force, intent from the very beginning on 'break[ing] up' Aboriginal families,[140] violence at the hands of an intimate partner may be seen as the lesser of two evils, more tolerable than intervention by the state. For these reasons, in these contexts in particular, the intervention point argument labours under a lack of realism.

3 *Governing through Crime*

Anti-carceral feminists have denounced the criminalisation agenda adopted by mainstream anti-violence movements, offering a counter-discourse to the criminalisation thesis in its application to gendered violence.[141] They point to established policy learnings, two of which have particular resonance in the debate on criminalising coercive control: one, that the deterrent value of criminalisation is, with few exceptions, minimal;[142] the other, that criminalisation disproportionately affects marginalised groups.[143] While there are some benefits of penal responses for

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132 The terms 'Aboriginal and Torres Strait Islander', 'Indigenous' and 'First Nations' are used throughout this comment to refer to the First Nations peoples of Australia. I pay my respects to the traditional owners of Australia's lands and waters.

133 Reeves and Meyer (n 66) 7.

134 Ibid 8.

135 Ibid 10.

136 Buxton-Namisnyk (n 118) 1335.

137 Reeves and Meyer (n 66) 14.

138 Ibid 8.

139 ANROWS (n 93) 9.

140 Reeves and Meyer (n 66) 14.

141 See Goodmark, *Decriminalizing Domestic Violence* (n 63); Nancarrow (n 65) 225; Chelsea Watego, Alissa Macoun, David Singh and Elizabeth Strakosch, 'Carceral Feminism and Coercive Control: When Indigenous Women Aren't Seen as Ideal Victims, Witnesses or Women', *The Conversation* (online, 25 May 2021) <https://theconversation.com/carceral-feminism-and-coercive-control-when-indigenous-women-arent-seen-as-ideal-victims-witnesses-or-women-161091>.

142 Goodmark, *Decriminalizing Domestic Violence* (n 63) 12, 24; Buxton-Namisnyk (n 118) 1334.

143 Goodmark, *Decriminalizing Domestic Violence* (n 63) 17, 19, 21; Watego et al (n 141).

some victim-survivors of DFV (such as incapacitation of the abuser and associated peace of mind for the victim),[144] the truth remains that treating coercive control like any other crime does not, and cannot, solve the problem on its own since it does not lead to a reduction in the impugned behaviour. Nor does it cure the socials ills that create the conditions necessary for the impugned behaviour to flourish.[145] Rather, criminalisation tends to exacerbate those very ills, through ripple effects that travel far beyond the lives of the immediate victim and perpetrator.[146]

The findings of Buxton-Namisnyk are again illustrative. Her research shows that attaching the threat of arrest, prosecution, conviction and punishment to a certain behaviour does not necessarily deter perpetrators or prevent recidivism. She notes that

> for almost three-quarters of all of the First Nations women who were killed by their partner … the woman's partner had previously been convicted of domestic violence offences. Prior convictions accordingly did not stop the victim's partner from using violence, including fatal violence.[147]

The clear failure of specific deterrence in this context calls into question the effectiveness of DFV offences and the rationale of criminalisation as a whole.

Criminalisation also aggravates the conditions within intimate relationships and society that contribute to DFV. Goodmark has written extensively on this. She underlines the fact that individuals with criminal histories are likely to encounter social stigma, prolonged unemployment, and financial hardship.[148] Moreover, the 'warehousing' in prison of men who would otherwise be serving as the primary income earners in their families, engaging in unpaid domestic work such as childcare, and supporting the local economy through their spending leads to dislocation and instability in both families and communities.[149] One of Goodmark's core arguments is that offence creation or 'governing through crime'[150] is no stand-in for, and indeed distracts and detracts from,[151] targeted policymaking designed to address social problems which frequently coalesce with DFV, including poverty, homelessness and mental illness.[152]

In this vein, it has been suggested that addressing DFV within the Australian settler-colonial context will necessarily involve a parallel decolonising process, whereby power is vested (and funds invested) in First Nations justice structures.[153] Such an approach is preferable to legislating new DFV offences in light of the implementation gap, but also and especially because the concept of coercive control formulated in statute is unlikely to capture DFV as it is experienced within and

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144 Goodmark, *Decriminalizing Domestic Violence* (n 63) 15–16.
145 Ibid 17.
146 Ibid.
147 Buxton-Namisnyk (n 118) 1334.
148 Goodmark, *Decriminalizing Domestic Violence* (n 63) 26–7.
149 Ibid 26–8.
150 Ibid 153–4.
151 As Goodmark observes, funding is often a 'zero-sum game': *Decriminalizing Domestic Violence* (n 63) 22.
152 Ibid 18.
153 Reeves and Meyer (n 66) 20.

understood by Indigenous communities.[154] The manner in which the coercive control offence is packaged in the *Coercive Control Act*, for instance, reflects 'white' conceptions of DFV which do not map neatly onto the reality of family violence as it is experienced by many Indigenous peoples.[155] The limitation of the proposed offence to intimate partners is particularly problematic insofar as it fails to pick up forms of violence perpetrated by other family members (including within kin relationships under customary law) which may be more prevalent in Indigenous communities. Financial elder abuse is a key example.[156]

4 *Dangers of Criminalisation: Hyper-Incarceration and Misidentification*

Several commentators have drawn attention to the unintended (though 'not unanticipated')[157] consequences likely to attend the NSW reforms, with particular emphasis given to the ways the coercive control offence will disadvantage already vulnerable groups.[158] Among the concerns of First Nations–led organisations is the potential net-widening effect of the offence for First Nations peoples: the possibility that it will act as an additional entry-point into the criminal justice system and contribute to the hyper-incarceration of Indigenous Australians.[159] Recent BOCSAR figures reveal that changes in the implementation of DFV offences have a pronounced effect on the First Nations population. The overall increase in recorded incidents of domestic violence–related stalking and intimidation in NSW observed over the 10 years to 2021, for instance, occurred in tandem with a doubling of the number of Indigenous people receiving custodial penalties for these offences.[160] In 2021, legal proceedings against First Nations people for stalking or intimidation offences were brought at a rate seven times that of the general population.[161] The overrepresentation of Aboriginal people in proceedings for the s 13 offence justifies concerns about the disproportionate impact that a novel coercive control offence will have upon First Nations people.

As mentioned in Part IV(B)(3) above, the potential for police to mistake a victim of DFV for a perpetrator is a risk for victim-survivors generally, due to poor police practice and situational ambiguity. However, the risk of misidentification has unique dimensions for two groups of DFV victims. One group is culturally and

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154 See Wirringa Baiya Aboriginal Women's Legal Centre ('AWLC'), Submission to Standing Committee on Social Issues, Parliament of NSW, *Crimes Legislation Amendment (Coercive Control) Bill 2022* (31 August 2022) 10–11.

155 See Harry Blagg, Victoria Hovane, Tamara Tulich, Donella Raye, Suzie May and Thomas Worrigal, 'Law, Culture and Decolonisation: The Perspectives of Aboriginal Elders on Family Violence in Australia' (2022) 31(4) *Social and Legal Studies* 535.

156 See ibid; Wirringa Baiya AWLC (n 154) 10.

157 Emma Buxton-Namisnyk, Althea Gibson and Peta MacGillivray, 'Unintended but Not Unanticipated: Coercive Control Laws Will Disadvantage First Nations Women', *The Conversation* (online, 26 August 2022) <https://theconversation.com/unintended-but-not-unanticipated-coercive-control-laws-will-disadvantage-first-nations-women-188285>.

158 Ibid.

159 Ibid; Watego et al (n 141).

160 Ramsey, Kim and Fitzgerald (n 81) 16.

161 Ibid 9.

linguistically diverse women — who are vulnerable to having their version of events undermined in the absence of an interpreter, especially where their abuser is more fluent in English and thus in a better position to communicate his account.[162] The other is Aboriginal and Torres Strait Islander women, due to gendered and racialised stereotypes of the kind discussed above. Research shows that First Nations women are sanctioned for DFV at rates much higher than non-Indigenous women, and that police regularly take action against First Nations victim-survivors instead of perpetrators.[163] Women who retaliate or defend themselves, or who are distressed and in no fit state to answer police questions are often deemed unwilling or uncooperative and dismissed[164] or, worse, mistakenly identified as the perpetrator and sanctioned in kind.[165] The devastating bind is that women of colour are more likely to resort to self-help and 'fight back' against their abusers precisely because they are unable to access the protection and resources that are available to white, middle-class women, so embedded are constructions of 'ideal victimhood' as well as structural racism.[166] The failure of the criminal justice system to protect marginalised women in turn leads to their criminalisation.

All of this has clear implications for the introduction of any new DFV offence in NSW. As Christine Robinson of Wirringa Baiya Aboriginal Women's Legal Centre recently stated:

> [If an] Aboriginal woman is uneasy or unable to persuade a police officer that she is the primary victim of physical violence [under the current law] what hope, or incentive is there to persuade a police officer that she has experienced ongoing psychological and/or economic abuse [under the new law]?[167]

V Conclusion

In November 2022, the NSW Parliament legislated a standalone offence of coercive control. The *Coercive Control Act* has been lauded as an essential and long overdue piece of reform, designed to extend the criminal law's reach beyond physical abuse between intimate partners to patterns of abuse which often precede fatal acts of violence and which function to deprive victims of their personal autonomy. This comment has canvassed the key objections to the criminalisation of coercive control, with reference to the NSW and broader Australian (and overseas) contexts. A close analysis of these objections reveals their resonance across paradigmatic divides, including on both sides of the criminalisation thesis. Opposition stems from concerns about systemic issues in criminal justice practice and procedure, the lack of a firm evidence base favouring criminalisation of DFV, and the potential harms of criminalisation for victim-survivors. The *Coercive Control Act* provides for the establishment of a Coercive Control Implementation and Evaluation Taskforce to

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162 Reeves and Meyer (n 66) 11.
163 Buxton-Namisnyk (n 118) 1335–6.
164 Reeves and Meyer (n 66) 9.
165 Ibid 11.
166 Ibid 7, 9, 15.
167 Robinson (n 61).

oversee implementation of the new offence.[168] Because of the real dangers associated with introducing an offence that has little hope of operating as envisioned and which may come at a significant cost to its intended beneficiaries, the taskforce has substantial work to do between now and the commencement of the offence's operation in 2024.

[168] *Crimes Act 1900* (NSW) s 54I.