Marilyn McMahon
Paul McGorrery *Editors*

Criminalising Coercive Control

Family Violence and the Criminal Law

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Foreword

The Honourable Professor Marcia Neave AO FASSA

This interesting collection of essays examines whether the criminal law should punish a family member who systematically controls and dominates another member of their family. The contributors are experts in criminal law, criminology, family violence, sociology and feminist legal theory.

The book focuses on intimate partner violence in heterosexual relationships, where one member of the couple (more commonly the man) exercises coercive control over his female partner ('domestic violence'). However much of the discussion is also relevant to coercive control exercised in other family relationships ('family violence'), for example, violence between gay couples, and violence by adult children against elderly parents.

The expression coercive control recognises that family violence is not limited to physical assault and threats. As State intervention/protection order legislation acknowledges, it often includes psychological or emotional abuse such as demeaning the victim by constantly telling them they are stupid, incompetent and ugly, manipulating the victim so that they distrust their own sanity (sometimes called 'gaslighting') and preventing the victim seeing their own friends or family. Coercive control may take the form of economic abuse, for example stopping a partner from working outside the home, depriving them of money or forcing them to guarantee a loan or to borrow money for the perpetrator. It may include bombarding the victim with messages or threats, which keep them in a constant state of fear. Technological abuse can involve using phones, computers and other devices to keep the victim under surveillance. In one case described to the Victorian Royal Commission into Family Violence, a woman's former partner kept her under surveillance by concealing a tracking device in her child's teddy bear.

The central question canvassed by this edited collection is whether the various forms of non-physical abuse of family members should be criminalised and, if so, what forms of behaviour should be punished? So far, Tasmania is the only Australian State to create offences of economic and emotional abuse. Legislation which criminalises various forms of coercive control has also recently been enacted

in England, Scotland, Wales and Ireland. Discussion of jurisdictional differences and of the different costs and benefits of criminalisation will provide an excellent guide to policymakers.

The Victorian Royal Commission into Family Violence was told by survivors of non-physical forms of family violence that it could take longer to get over the effects of sustained emotional or financial abuse than to recover from a physical assault. Some survivors even said that they would have preferred to have been physically injured because even when they realised that non-physical abuse was a form of family violence, and reported it to family members, doctors or the police, they might not be believed. But although the Commission recognised that coercive control is a central feature of family violence, and particularly violence directed at intimate partners, it did not recommend that new offences be introduced to punish coercive control or specific aspects of such control, for example, emotional or economic abuse.

Criminalising the horrific forms of cruelty and abuse which are used by some perpetrators is immediately appealing. Introducing offences to cover these forms of domestic terrorism would acknowledge the long-lasting harm suffered by victims of coercive control. Applying criminal sanctions to non-physical abuse would condemn abusive behaviour and deter those who might be inclined to rely on it. But in my view, it would be premature to introduce such offences. There are practical difficulties in ensuring that these offences actually help victims of family violence. Some police are still reluctant to investigate physical assaults, and investigating allegations of non-physical abuse is likely to be particularly difficult. Except in extreme cases, which are likely to involve physical abuse as well, victims may be reluctant to give evidence or unable to describe accurately what happened to them. We know there are difficulties in prosecuting alleged offenders for behaviour which takes place over a significant period, rather than in one or more separate incidents. These difficulties already arise in prosecuting continuing sexual offending against children, where justice to alleged offenders requires that they understand the behaviour for which they are being prosecuted and victims often have difficulty in describing or are unable to recall examples of the prohibited behaviour. Widespread change is required to ensure that perpetrators of physical violence are effectively prosecuted and that prosecutors do not accept guilty pleas to lesser assault charges, rather than persisting with prosecutions for non-physical abuse. In my view we should be satisfied that police, prosecutors and courts have changed their practices, before we widen the criminal justice response to cover emotional or financial abuse. There is also a concern that introducing a coercive control offence might unfairly differentiate between the situation where egregious bullying and abusive behaviour occurring inside a family is criminalised, but long-standing similar behaviour in work, school or institutional settings is not.

It was for these reasons that the Victorian Royal Commission into Family Violence decided not to recommend the adoption of an offence of the kind that now exists in Scotland under the *Domestic Abuse (Scotland) Act 2018*. The concerns

about criminalisation that I have expressed may prove wrong in the future, but the value of this approach has not yet been fully demonstrated. We need more evidence on the success of introducing criminal offences of this kind in other jurisdictions.

Despite my reservations about the criminalisation of coercive control, I applaud the editors and authors for their deft and comprehensive contribution to this debate. All of us share the goal of reducing all forms of family violence including the cruelty of non-physical abuse, which injures and blights the lives of all those subjected to it. This book makes an important contribution to that goal.

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Preface

On 29 December 2015, the British Parliament did something extraordinary. It brought into law a new offence that recognised non-physical domestic abuse as criminal. Only once before (in Tasmania, Australia) had a common law jurisdiction enacted such an offence. Traditionally, the criminal law has been exclusively concerned with physical violence committed by one partner (usually a male) against another (usually a female). This narrow construction of family violence meant that the criminal law has been incapable of responding to what most family violence victims describe as the 'worst part': the emotional and psychological abuse, the economic abuse, and the deprivation of liberty, autonomy and identity.

That is no longer the case. With the offence of controlling or coercive behaviour now in operation in England and Wales and related offences enacted in Tasmania, Scotland and Ireland, criminal justice systems are recognising and responding to a much broader range of harms. Early cases in England reveal that offenders who have been convicted of the offence of controlling or coercive behaviour have: threatened to publicly share explicit photographs of their partners or ex-partners; prevented their partner from ending the relationship by threatening to, or actually, engaging in self-harm; isolated their partners by confiscating or destroying their mobile phones and deleting all male contacts on their social media; demanded that their partners eat certain foods, sleep in certain places and exercise daily; prohibited their partners from engaging in employment; conducted regular inspections of their partner's home and body for any evidence of infidelity; and a myriad of other behaviours, all of which were connected by the singular goal of exerting dominance, coercion and control over another human being.

Other jurisdictions are now considering whether to implement similar offences. As these jurisdictions decide whether, and how, to criminalise non-physical abuse, the need for careful and considered policy and lawmaking in this area is critical. It is to those matters that this edited volume is directed. The book originated from a roundtable that we hosted in Melbourne, Australia in November 2017. We invited noted academics and criminal justice practitioners from Australia, the United Kingdom and the United States to discuss key issues involved in criminalising

coercive control. Many of the people who attended and presented at the roundtable have contributed to this book.

Part I of this book outlines the harms and wrongs of non-physical abuse. Chapter 1 locates the new domestic abuse offences within contemporary developments in the criminal law and argues that they reflect the growing impact of human rights considerations as well as an increasing recognition of the serious harms caused by this abuse. In Chap. 2, Evan Stark, whose work has been credited as the inspiration for the offence in England and Wales, clarifies his definition of coercive control and outlines a 'constellation of factors' that he believes will determine the efficacy, or otherwise, of any new offence. In Chap. 3, Supriyah Singh explains economic abuse through the lens of her own qualitative research comparing the experiences of Anglo-Celtic and Indian women in Australia and concludes that this particular form of abuse must be included within any offence that purports to criminalise non-physical abuse. More generally, Danielle Tyson (Chap. 4) outlines the important role of coercive control in domestic violence (and particularly intimate partner homicide) and outlines how the recognition of coercive control could inform claims of self-defence for women who kill their abusive partners.

Part II of the book is then directed at the notion that there is a 'gap' in the current law which a new offence might fill. We, along with Kelley Burton (Chap. 5), consider whether a new offence is even necessary or whether extant stalking laws might already be capable of capturing non-physical abuse between intimate partners. We conclude that while stalking laws are technically capable of applying in those contexts, limitations in community and expert understandings of stalking restrict the effective operation of those laws. In Chap. 6, Julia Quilter applies a new processes and modalities approach to understanding criminalisation and considers the challenges that must be addressed when attempting to transpose a new criminal offence from one jurisdiction to another. She concludes that despite the inherent problems of criminalisation through 'gap-filling', the time for a new family violence offence is 'now'.

Part III of this book is an analysis of the offences that have been introduced in Tasmania, England and Wales, and Scotland. While the English and Welsh offence has received a considerable amount of attention in both the media and scholarly circles, it is perhaps less well known that the Australian State of Tasmania introduced similar offences of 'economic abuse' and 'emotional abuse and intimidation' over a decade earlier in 2005. Along with police prosecutor Kerryne Barwick, we discuss the Tasmanian offences, focusing on difficulties in their construction that likely contributed to the scarcity of prosecutions (Chap. 7). In Chap. 8, Cassandra Wiener traces how Evan Stark's sociological construct of 'coercive control' was transformed into a legal (and policy) concept in England and Wales, and identifies a number of successes and problems that occurred during that translation. And in Chap. 9, Marsha Scott outlines the new Scottish offence of domestic abuse, an offence that is acclaimed by many as 'the new gold standard'. As CEO of *Women's Aid Scotland*, Scott is in the unique position of being able to outline how

victim-survivors and their advocates contributed to the development and enactment of the Scottish offence, and how critical it is for policymakers to engage with them during the reform process.

Finally, in Part IV of this book, the authors consider ways of moving forward. In Chap. 10, Vanessa Bettinson presents a comprehensive overview of the various offences in Tasmania, England and Wales, Ireland and Scotland and a comparative analysis of those offences. She identifies considerable variations, with different approaches to, for example, who the victims may be (partners, ex-partners, other family members), maximum penalties for the offences, and whether an offender will only be liable if they actually caused the victim significant harm of some sort. In Chap. 11, Jane Wangmann argues that while a new offence could potentially be a positive development, the true value of 'coercive control' lies in it informing understandings of domestic abuse throughout justice systems. And finally, in Chap. 12, Heather Douglas offers an alternative approach, suggesting that the formulation of crimes such as 'torture' (introduced in Queensland, Australia in 1997) could be used more frequently to prosecute non-physical abuse and could be modified (with a lesser offence of 'cruelty') to address a range of domestic abuse.

As readers progress through the book they will be exposed to varying viewpoints. Our particular contributions reveal that we favour introducing a new offence that broadens the range of harms captured by the criminal law in relation to family violence. We don't identify a model offence; on this, readers will no doubt benefit from the descriptions and evaluations provided by other contributors. Our aim is to engage in further discussion and debate about the optimal form such an offence might take, its likely impact, and issues in relation to operationalisation. We think that criminalisation is warranted because the harms experienced by victims are considerable and the human rights abuse significant. To fail to criminalise relevant abuse means that it will continue to be borne by victim-survivors as a private burden.

We know that some think otherwise and are yet to be convinced that criminalising non-physical abuse is a positive step. They argue, *inter alia*, that there is a risk that such an offence could further disenfranchise those it is designed to protect, and that introducing a new offence could distract attention from other vital reforms. These are valid concerns. But they are inherent challenges to address in the process of reform, not reasons to avoid it altogether.

Melbourne, Australia

Marilyn McMahon
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Part I
The Harms and Wrongs of Non-Physical Abuse

Chapter 1
Criminalising Coercive Control: An Introduction

Marilyn McMahon and Paul McGorrery

Abstract Novel criminal offences introduced in England and Wales in 2015, and in Scotland and Ireland in 2018, criminalise non-physical abuse in the context of family relationships in distinctive ways: they criminalise conduct that causes, or is intended to cause, psychological or economic harm without necessarily requiring that a victim sustain physical injury or fear death or serious physical harm. In Tasmania (Australia) related offences had been introduced a decade earlier. These significant and distinctive extensions of the criminal law apply to certain current or past familial relationships and supplement other criminal legislation that penalises physical assault, stalking or other offending against intimate partners or other family members. The new offences were designed to protect human rights by addressing gaps in the criminal law, gaps which permitted significant harmful activities to previously go unpunished. In the context of the ongoing debate about how best to tackle the problem of family violence, these developments raise significant legal issues—theoretical and practical—in relation to how best to protect victims. This chapter presents an overview of the offences, locates them within contemporary developments in the criminal law and identifies key matters that must be taken into account when evaluating them.

Keywords Non-physical abuse · Coercive control · Domestic violence · Human rights · Criminal law

1.1 Introduction

Since the 1970s, a great deal of research, policymaking and legal reform concerning domestic violence has focused on the compelling issue of physical violence in intimate relationships. Considerable attention has been directed to protecting victims through developing more effective police responses, improving the experi-

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ences of victims in their contacts with criminal justice systems and more appropriate sentencing of offenders. Legislation in many common law countries has also introduced a range of civil orders (family intervention orders, protection orders, harassment orders or similar) that aim to protect victims from anticipated future violence.

There has also been an equally long-standing but perhaps less visible concern about non-physical aspects of domestic violence (Dobash and Dobash 1979). Feminist researchers identified that physical violence constitutes a significant, but neither exclusive nor necessarily dominant, aspect of domestic abuse (e.g. Johnson and Ferraro 2000), and that there are other, often more serious, forms of abuse, including psychological, emotional and economic abuse (collectively referred to in this chapter as non-physical abuse). Much of the attention in this area has focused on psychological abuse, which includes verbal abuse (ridicule, harassment, name-calling, etc.), isolation, jealousy, possessiveness and threats or abuse to a victim's children, friends, pets or possessions (Crowell and Burgess 1996).

Non-physical forms of domestic abuse have been analysed through the perspectives of public health and human rights law. The myriad negative health consequences of this form of abuse have now been clearly established (e.g. Garcia-Moreno et al. 2006). Significantly, policymakers and academics have also emphasised the human rights abuse inherent in the intimidation and control of a spouse, restricting their freedom of movement, limiting their access to other family members or curtailing their social activities (Crown Prosecution Service 2015; Stark 2009). Increasingly, the 'public' language of human rights has been employed to analyse the 'private' harms produced by domestic violence (Libal and Parekh 2009).

Models of domestic abuse developed by Michael Johnson (1995, 2006) ('intimate terrorism') and Evan Stark (2007) ('coercive control') have been particularly influential in framing the harms associated with non-physical abuse. These researchers go beyond merely cataloguing a diverse range of psychologically and economically abusive behaviours, and have developed models of abuse that use the core concepts of control and coercion to link a wide range of behaviours, analysing their function and identifying the key motivation of the men who engage in this gendered form of abuse. Their models emphasise that the severity of abuse cannot be measured simply by aggregating physical harms, and reject 'incident-based' explanations of domestic violence. Moreover, they acknowledge that coercive and controlling behaviours are not categorically different from ordinary gendered behaviour; they occur at the extreme end of the spectrum of power relations that exist in ordinary heterosexual intimate partner relationships. Distinguishing tolerable (normative) from abusive conduct in intimate relationships, therefore, creates challenges (Hoffman 1984; O'Leary 1999). Consequently, criminalising coercive and controlling behaviour requires distinguishing conventional (albeit perhaps dysfunctional) intimate and family relationships from those which are 'controlling and coercive' and warrant legal proscription.

Nevertheless, broad definitions of domestic abuse, encompassing a wide range of harms, have been increasingly incorporated in government policies and have

impacted on the civil law. But until recently these expanded understandings of domestic abuse have had little impact on the criminal law. Several common law jurisdictions have now addressed this 'gap' by introducing 'standalone' family violence offences that criminalise non-physical abuse of family members, particularly intimate partners. In 2004, the State of Tasmania in Australia created the offences of emotional abuse or intimidation and economic abuse (*Family Violence Act 2004* (Tas) ss 8–9). In England and Wales 'coercive or controlling behaviour' was criminalised in 2015 (*Serious Crime Act 2015* (E&W) s 76), with Ireland adopting a similar offence of 'coercive control' in 2018 (*Domestic Violence Act 2018* (IR) s 33), and Scotland enacting a related offence of 'domestic abuse' in 2018 (*Domestic Abuse (Scotland) Act 2018* (Scot) s 1). These developments have been lauded for criminalising the coercive and controlling behaviour which is 'at the heart of domestic abuse' (Neate 2015). They have also been criticised for being difficult to operationalise, dissipating limited resources and placing too much faith in the power of the criminal law (Fitz-Gibbon and Walklate 2018; Walklate et al. 2018). These issues are explored in this book. In this introductory chapter, we chart the introduction of these new offences and locate them within public health concerns and an emerging engagement of the criminal law with human rights. We identify some of the key features of these offences as well as common concerns expressed about their construction and operation. The authors in this book outline the key concept of coercive control (Stark, Chap. 2), as well as its centrality to domestic violence (Tyson, Chap. 4) and economic abuse (Singh, Chap. 3). They identify the distinctive characteristics of the new offences in England (Wiener, Chap. 8), Scotland (Scott, Chap. 9) and Tasmania (Barwick et al., Chap. 7) and provide a comparative analysis of their construction (Bettinson, Chap. 10). Alternative formulations of offences that might capture non-physical forms of domestic abuse are outlined (Douglas, Chap. 12), as well as the possibility of using coercive control to inform other aspects of the operation of criminal justice systems (Wangmann, Chap. 11).

Before moving to detailed consideration of these issues, we establish a framework for these considerations, identifying the wrongdoing that the new offences are designed to remedy, the distinctive (and different) forms of the offences, and the general issues raised by introducing this novel type of offence into the criminal law.

1.2 The Lacuna: Liability at Common Law for Causing Non-Physical Harm

Traditionally, the criminal law proscribed activity which resulted in physical injury (or the threat of physical injury) to another. For instance, the common law offences of assault and battery clearly require physical contact or the threat thereof. (Of course, although the criminal law protected the physical integrity of persons, it did not do so consistently. The historical reluctance of the criminal law to acknowledge

as criminal physical violence against a female domestic partner has been well established: Pleck 1987; Schelong 1994; Siegal 1995). But in relation to circumstances where there was no actual violence but simply a threat made, it is noteworthy that common law assault required a threat of imminent and unlawful violence (*Knight v R* (1988)). From at least the last quarter of the nineteenth century, it is clear that there was a requirement of a threat to do a 'corporal hurt' to another (Sheridan and Bakewell 1879, p. 181). This requirement is often echoed in modern formulations of statutory offences of assault (e.g. *Criminal Justice Act 1988* (UK) s 39; *Summary Offences Act 1986* (Vic) s 23) as well as the offences of threatening to kill or threatening to cause serious injury—which usually require a threat to inflict physical harm of some sort (e.g. *Offences Against the Person Act 1861* (UK) s 16; *Crimes Act 1958* (Vic) ss 20–21; *Criminal Law Consolidation Act 1935* (SA) s 19).

Other forms of harm experienced by victims of domestic abuse—in particular psychological abuse and economic abuse—were recognised to some degree in the defences of duress and marital coercion, but the conduct of the abuser did not constitute an offence per se: it was beyond the ambit of laws governing assault and battery. Thus, commonplace aspects of domestic abuse—such as chronic verbal abuse and humiliation of a person by their spouse, or preventing a person from accessing jointly acquired assets or income (O'Leary 1999; Dobash and Dobash 1998)—could cause considerable harm to victims, but such behaviour was not easily captured by the criminal law (if at all). Consequently, many contemporary commentators and reformers identified a 'gap' in the criminal law that permitted significant abuse within domestic relationships to go unpunished (e.g. Bettinson and Bishop 2015; Bishop and Bettinson 2017; Home Office 2014; Scottish Government 2018a, para [1.1]; Quilter, Chap. 6). This lacuna, in conjunction with a growing recognition of the significant harms associated with non-physical abuse, underpinned calls for the introduction of novel, standalone domestic violence offences which would criminalise conduct that caused (or was intended to cause) psychological and other non-physical harms to an intimate partner or other family member (e.g. Special Taskforce on Domestic and Family Violence in Queensland ('Special Taskforce') 2015).

1.3 Contemporary Offences Involving Non-Physical Harms

Although distinctive, the new offences that criminalise non-physical abuse are not totally unprecedented. They can be located within broader developments in criminal law that occurred in the last quarter of the twentieth century. During this period, in some jurisdictions, the law of assault evolved or was statutorily modified to recognise some forms of psychological harm. In addition, the modern statutory offences of stalking and/or harassment penalised some non-physical forms of abuse.

And in relation to domestic abuse, civil laws governing protective, restraining, intervention orders indirectly criminalised a wider range of abusive behaviours than was directly prohibited by the criminal law by imposing criminal sanctions for breaches of those orders.

1.3.1 Assault

Modern laws governing assault have sometimes evolved to include non-physical harm experienced by victims. This occurred either through changes in interpretations of offence requirements or amendments to statutory definitions. For instance, in England and Wales and New South Wales, Australia, offences of assault causing 'actual bodily harm' are now interpreted to include psychological harm within the meaning of 'bodily harm'. Thus, the Crown Prosecution Service (CPS) for England and Wales advises that—

> Psychological harm that involves more than mere emotions such as fear, distress or panic can amount to [actual bodily harm]'. (CPS, n.d.)

In these circumstances in England and Wales, expert psychiatric evidence must be called (*R v Chan-Fook* [1994]); in practice, this means that for the purposes of prosecuting this type of assault, the psychological injury experienced by the victim must amount to a recognised psychiatric illness. Similarly, in New South Wales, Australia a very serious psychological injury going beyond mere transient emotions, feelings and states of mind (NSW) may constitute actual bodily harm (*Shu Qiang Li v R* [2005] at [45]).

In other jurisdictions, legislative definitions in assault offences have allowed non-physical harms to meet statutory definitions of injury. For example, in Queensland, Australia the definition of 'injury' in s 663A of the Criminal Code includes psychiatric injury as 'bodily injury' within the meaning of that section; consequently, it is possible to commit assault by causing another person to experience a psychiatric injury, such as posttraumatic stress disorder (*R v Beaton; ex parte Smee* [1997]). Similarly, in Victoria, Australia from 1985 until 1 July 2013, some statutory assaults could be prosecuted where the victim experienced a particular form of mental harm (hysteria). Thus, under ss 16–18 of the *Crimes Act 1958* (Vic) it was theoretically possible to prosecute a person who intentionally or recklessly caused 'hysteria' to another. The curious and archaic reference to hysteria—a term that is not used as a specific diagnosis in modern taxonomies of psychiatric disorder (North 2015) and was most frequently employed in psychoanalysis to refer to the conversion of a psychic injury to a physical injury—would seem to have permitted prosecution for an assault that resulted in purely non-physical (mental) harm. Since 2013, the Victorian definition of injury has been replaced by an even more expansive definition that includes temporary or permanent 'harm to mental health' (which includes psychological harm but does not include an emotional reaction such as distress, grief, fear or anger unless it results in

psychological harm: *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic) s 3). Interestingly, neither definition appears to have generated prosecutions based on mental harm *simpliciter*. There does not appear to be a single reported case of a successful prosecution (or unsuccessful for that matter) under these provisions for an assault resulting in purely psychological injury. Consequently, despite these shifts in definitions of 'injury' and 'actual bodily harm' in the laws of assault, the impact has been minimal.

The lingering reluctance of the criminal law to recognise those who experience non-physical harms as victims of criminal wrongdoing was recently confirmed by an appellate court in Tasmania; the court restricted crimes compensation to victims of actual or threatened physical violence, thereby excluding offences that involve coercion and intimidation, emotional abuse and intimidation or economic abuse (*Attorney-General (Tas) v CL* [2018]).

1.3.2 Stalking and Harassment

Laws developed in the 1990s relating to stalking and harassment gave tangible recognition to non-physical (psychological, mental or emotional) harm. These laws generally prohibit behaviour that is repeated and constitutes a course of conduct—an important prelude to the new family violence offences.

The introduction of stalking offences, initially enacted in the United States and then quickly adopted in England and Wales, Scotland, New Zealand and Australia, was a bold development that proscribed certain conduct performed with the intent to cause, *inter alia*, certain forms of non-physical harm to victims. In England, stalking involving harassment or 'serious alarm or distress' for the victim is an offence (*Protection from Harassment Act 1997* (E&W) ss 2A(1), 4A(1)(b)(ii)). In Scotland, stalking that is likely to cause 'fear or alarm' is prohibited (*Criminal Justice & Licensing (Scotland) Act 2010* (Scot) s 39). And in Australia, stalking statutes commonly prohibit causing mental harm, which can include 'psychological harm' and suicidal thoughts (*Crimes Act 1958* (Vic) s 21A(8)). Under all these statutes it is not necessary to establish that the victim experienced a medically diagnosed, or diagnosable, condition; victims who report lesser or more transient disturbances (e.g. 'shattered', 'visibly distressed', 'tearful') might satisfy a requirement of 'serious alarm or distress' or 'psychological harm' (*RR v The Queen* [2013]). Indeed in some jurisdictions, it is not necessary to establish any harm at all to the victim, so long as the offender intended or was reckless about causing mental harm and a reasonable person would have foreseen such harm as likely (e.g. *Crimes Act 1958* (Vic) s 21A(2)(g)).

In relation to the application of stalking laws, while courts have demonstrated a willingness to interpret stalking laws relatively expansively when the relationship between the parties is that of strangers or ex-partners, these laws have not generally been applied to behaviour that occurs while a marital, de facto or other intimate relationship is ongoing (see McMahon et al., Chap. 5). While courts, prosecutors

and police now acknowledge that many activities that could constitute stalking occur within abusive ongoing intimate relationships, there remains an enduring reluctance to identify stalking that occurs in a relationship where the parties were cohabiting at the time of the relevant behaviour.

1.3.3 Restraining/Protection/Family Violence Orders

In the absence of laws that can readily and specifically be used to prohibit non-physical abuse, perhaps the most commonly utilised legal strategy to protect victims from this form of abuse has been through the use of protection orders. Variously known as restraining, protection, family violence, intervention, or apprehended violence orders, these civil orders are intended to be preventive and protective; they can be taken out by victims to protect themselves from future, anticipated violence by an intimate partner or family member.

Definitions of what constitutes 'family violence' or 'domestic violence' for the purpose of these orders differ in various jurisdictions. In Australia, the definitions of family violence are generally expansive and include emotional, psychological and economic abuse; sometimes they also specifically include coercive and controlling behaviour. For instance, in family violence legislation in Victoria, Australia 'family violence' is defined to include behaviour by a person towards a family member that—

> (i) is physically or sexually abusive; or
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> (ii) is emotionally or psychologically abusive; or
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> (iii) is economically abusive; or
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> (iv) is threatening; or
>
> (v) is coercive; or
>
> (vi) in any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person (*Family Violence Protection Act 2008* (Vic) s 5).

(See also, England and Wales: *Protection From Harassment Act 1997* (E&W) s 5 (not limited to domestic relations); Australia: *Restraining Orders Act 1997* (WA) s 5A; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8; *Domestic and Family Violence Protection Act 2012* (Qld) ss 8, 11–12; *Domestic and Family Violence Act 2007* (NT) ss 5, 8. The remaining Australian jurisdictions do not yet define family violence to include economic and emotional abuse: *Crimes (Domestic and Personal Violence) Act 2007* (NSW); *Domestic Violence and Protection Orders Act 2008* (ACT) s 13 (though the ACT legislation does include causing nervous shock as a form of domestic violence)).

The more expansive definitions adopt a human rights perspective, expressly noting that 'family violence is a fundamental violation of human rights' (*Family Violence Protection Act 2008* (Vic) Preamble (b)) and sometimes specifying that

family violence includes preventing a person from doing something that the person is lawfully entitled to do (or hindering the person from doing the act) and/or compelling the person to do something that the person is lawfully entitled to abstain from doing (*Criminal Code Act Consolidation Act 1913* (WA) s 388D(1) definition of 'intimidate').

The purpose of these orders is distinctive. In England, their function is preventative and protective rather than punitive (Crown Prosecution Service, n.d.). In Australia, the New South Wales Court of Appeal noted the distinctive protective function of these orders, not just in relation to protecting the physical integrity of victims but also their human rights:

> Apprehended Violence Orders constitute the primary means in this State of asserting the fundamental right to freedom from fear. The objects served by such orders are quite distinct from those that are served by civil adversarial proceedings or proceedings in which an arm of the State seeks to enforce the criminal law. (*John Fairfax Publications Pty Ltd v Ryde Local Court* [2005] at [20]).

These civil orders link to the criminal law through sanctions for their breach. Respondents who breach civil orders (including by engaging in emotionally or psychologically abusive behaviours) commit a criminal offence: (e.g. *Protection From Harassment Act 1997* (E&W) s 5(5); *Family Violence Protection Act 2008* (Vic) ss 37–37A, 123-–123A and 125A). The criminalisation of the causing of psychological or emotional harm only occurs where the relevant conduct occurs after a relevant order is already in place (making such an order/notice a required precondition for prosecution). Thus, the abusive behaviour is only indirectly criminally proscribed; the proscribed non-physical abuse only has criminal consequences when the intervention order is breached. A question that arises is why the human rights of victims should only be indirectly protected by the criminal law when a court order is in place? The issue becomes particularly pressing as not only does this suggest that the wrongfulness lies in the breach of a court order as opposed to the abuse itself (Douglas 2015, p. 438, 2007), but there is a significant reason to doubt the effectiveness of these orders.

Multiple studies have identified inconsistencies in responses by police (Douglas and Stark 2010; Robertson et al. 2007), which suggests that only a minority of breaches are prosecuted (Bagshaw et al. 2010), and that there is little understanding of the psychological and emotional abuse that occurs (Bagshaw et al. 2010). Moreover, critics point to the relatively light sentences imposed when breaches are prosecuted (Sentencing Advisory Council (Vic) 2009, pp. 133–134). And while a meta-analysis of relevant international studies concluded that these orders 'are associated with a small but significant reduction in domestic violence' (Dowling et al. 2018, p. 1), it also noted that about half of victims who obtained a protection order would experience some form of re-victimisation (Dowling et al. 2018, p. 7). In essence, these orders are of limited value in keeping victims safe.

In the light of the aforementioned limitations, and in the context of contemporary discussions of family violence, governments, activists and academics have identified a 'gap' in the criminal law that permitted (and in many jurisdictions, continues

to permit) non-physical abuse to go unpunished (e.g. Home Office 2014; Bettinson and Bishop 2015; Bishop and Bettinson 2017). Although there are perils associated with 'gap-filling' lawmaking (see Quilter, Chap. 6; Wiener, Chap. 8), this lacuna provided a powerful underpinning for the introduction of the new standalone family violence offences that criminalise non-physical abuse. The issue of whether such offences should be introduced in more common law jurisdictions is also being debated (Whiting 2014). These developments were the catalyst for this book.

1.4 Coercive Control, Human Rights Abuse and Liberty Crimes

It is against the background of the traditional limits of the criminal law that standalone offences that directly criminalise non-physical abuse of family members were introduced. In 2004 Tasmania, Australia, introduced an offence prohibiting emotional abuse or intimidation and another offence of economic abuse (*Family Violence Act 2004* (Tas) ss 8–9). These offences were justified by reference to the work of Dr. Lenore Walker, a pioneer in the study of domestic violence and the developer of 'battered woman syndrome'. Walker had observed that most abused women experienced multiple forms of abuse and they—

> describe[d] incidents involving psychological humiliation and verbal harassment as their worst battering experiences, whether or not they ha[d] been physically abused (Walker 1979, p. xv).

For a decade, the Tasmanian offences were unique in common law countries. However, the development of policy relating to family violence and the enactment of the offence of controlling or coercive behaviour in England and Wales in 2015, and the offences of domestic abuse in Scotland and coercive control in Ireland in 2018, were underpinned by another advance in the understanding of domestic abuse: the role of coercion and control in abusive relationships. Developed to address perceived inaccuracies, reductionism and demeaning aspects of earlier approaches to family violence (Stark 1995, p. 975), influential models of abuse incorporating notions of coercion and control were developed by Michael Johnson (2006) and Evan Stark (2007), while others employed these concepts to outline the strategies used by abusive men (e.g. Dutton and Goodman 2005). While differing, these approaches shared a reframing of domestic abuse as more than 'the number of hits' (O'Leary 1999; Dobash and Dobash 1998), and identified coercive control as a highly gendered pattern of male domination, power and control that characterised severely abusive relationships but which did not necessarily involve high levels of physical violence.

Ultimately, the most influential model of psychological and physical abuse and economic oppression was Stark's (2007) concept of 'coercive control'. This model provides a framework to explain the ongoing control and coercion inherent in the micro-management of controlling a woman's activities, stopping or changing the

way she socialises, limiting her access to family and friends, controlling her finances, monitoring her via online communication tools, and repeatedly 'putting her down' (e.g. telling her she is worthless), humiliating and embarrassing her. The model explains how this conduct undermines a victim's capacity for independent decision-making and inhibits effective resistance to, and escape from, the abusive relationship (Stark 2012).

Significantly, Stark frames abuse involving coercive control as a crime against liberty and equality (Stark 2012); domestic violence is analysed as a form of human rights abuse. Stark eschews conventional terms such as 'psychological abuse' as limited, incomplete and misleading, and prefers to speak of 'liberty harms' (Stark 2007, p. 397). Abuse based on coercive control is a 'liberty crime' (Williamson 2010). In relation to victims, Stark has observed that—

> what is done to them is less important than what their partners have prevented them from doing for themselves by appropriating their resources; undermining their social support; subverting their rights to privacy, self-respect, and autonomy; and depriving them of substantive equality (Stark 2009, p. 13).

This approach is distinctive because it shifts the discussion of family violence away from a focus on physical aggression, rejects a public/private dichotomy, and explicitly reframes domestic violence as a violation of the human rights of victims, perpetrated by private individuals (rather than the state) (Pogge 2001). In this framework, domestic abuse is not simply private, abusive conduct perpetrated by pathological men; it involves a complex interplay of physical and non-physical abuse that violates victims' rights to liberty, security, freedom from torture, and freedom of thought, conscience, and religion by subjecting them to a pattern of intimidation, isolation, manipulation, physical violence, threats of physical harm, stalking, destruction of personal property and restrictions on their movement. In this context, Stark (2006, p. 1019) also reframes physical violence; it is not simply an assault and battery, but a form of achieving subordination.

Stark favours criminalising coercive control as 'liberty crimes' (Stark 2009) and has described the Scottish offence of domestic abuse as the 'new gold standard' for criminalising this conduct (Brooks 2018). However, he emphasises that simply expanding the range of abusive behaviours which are subject to criminal sanctions is not the solution to domestic abuse; these reforms should incorporate an affirmative concept of freedom and must be embedded within broader policy and social reforms that work to eliminate coercive control and the gendered discrimination and power imbalance that creates the conditions in which this form of gendered abuse occurs (Stark, Chap. 2). In this respect, Stark's model of criminalisation carries on the work of feminists such as Turkheimer (2004) and Burke (2007), who promoted the development of a new standalone domestic violence offence that would criminalise coercive control and complement existing assault laws (Turkheimer 2004, pp. 1019–1020; Burke 2007, pp. 601–602).

Those scholars noted the potential impact of an offence that criminalised coercive control model. As Stark observed:

> Although some of the tactics deployed in coercive control are already illegal, such as stalking, others, such as taking a woman's money, confining her in the house, or continually demeaning or harassing her, rarely prompt outside intervention when they occur in relationships, although they would be illegal if committed against a stranger (Stark 2012, p. 31).

The implications of the increasing recognition of coercive control in intimate partner relationships for developing new domestic abuse offences are manifold:

- Consistent with feminist theorising over many years, the coercive control model recognises that domestic abuse is not an 'incident' but is constituted by a pattern of behaviours. The model emphasises that abuse is ongoing and chronic, and that the harm sustained is cumulative.
- The coercive control model emphasises that physical violence is only one constitutive element (an important element, but just one nevertheless) of a complex pattern of abusive conduct. Physical violence can be isolated and severe, routine and minor, or almost entirely absent in abusive relationships. Thus, this approach recognises that it is possible to have situations of extreme domestic abuse where there are high levels of fear and entrapment but low levels of physical injury.
- New laws should not simply protect victims from economic, psychological or emotional harms but should embody an affirmative concept of freedom that protects human rights.
- If new criminal laws are to be consistent with the model of coercive control, behaviours that were not previously criminalised will now fall within the ambit of proscribed conduct.
- Recognising that separation is a process rather than an event, and that separating from an abusive partner does not bring safety but is likely to result in an escalation in violence, means that any new, relevant offences should not be limited to abusive relationships where the parties were cohabitating at the relevant time but should also include both past intimate relationships as well as 'on-again-off-again' relationships.
- Children who observe domestic abuse are not merely 'witnesses' but are victims themselves.

To varying degrees, the new standalone domestic abuse offences incorporate these characteristics. They criminalise non-physical abuse of family members thereby giving effect to expansive approaches to family violence that address what most researchers and activists have argued for many years—that the infliction of psychological harm and economic restrictions are core aspects of family violence. The conversion of this recognition into criminal offences was underpinned by two major developments: the increasing recognition of domestic violence as a public health problem, and the emerging impact of human rights considerations on the criminal law.

1.4.1 Domestic Abuse: A Public Health Perspective

A consolidating body of research has confirmed the negative impact of non-physical forms of domestic abuse. Most victims experience both physical and psychological abuse (Street and Arias 2001), with a small proportion of victims experiencing psychological abuse only. For instance, a study of more than one thousand women in the United States reported that 54% had experienced abuse from their partner; 40% experienced both physical and psychological abuse, and 14% experienced psychological abuse only (Coker et al. 2000). But the absence of physical violence does not bring lesser sequelae; those who experience only psychological abuse are as likely to report adverse health outcomes as those exposed to physical abuse (Coker et al. 2000; Follingstad 2009).

The outcomes of long-term non-physical abuse are significant: elevated levels of substance abuse (Straight et al. 2003), depression (VicHealth 2004), anxiety (VicHealth 2004), posttraumatic stress disorder (Mechanic et al. 2008), suicide attempts (Devries et al. 2011), homelessness (Australian Institute of Health and Welfare 2014), chronic stress, hypertension and a range of other physical ailments (Coker et al. 2000; Sackett and Saunders 1999; Follingstad et al. 1990). Indeed, some studies have reported that psychological abuse is a stronger contributor to the development of several of these disorders than physical abuse (Arias and Pape 1999; Baldry 2003). This finding is consistent with reports from victims, who typically rate psychological abuse as having a more negative impact than all but the most extreme levels of physical violence (Folingstad et al. 1990; Stark 2007, p. 278; Tolman 1992; Walker 1979, p. xv). In the words of one victim, 'It's the emotional scars that scar the worst, more so than physical violence' (quoted in Bolger 2015).

Consequently, physical violence constitutes a significant, but neither exclusive nor necessarily dominant, part of the experience of family violence (Johnson and Ferraro 2000; Stark 2007). The psychological abuse that typically accompanies physical violence can itself also have profound consequences, and constitutes a significant public health problem. This point was made by Alison Saunders, the former Director of Public Prosecutions in England, when she was explaining the reason for the introduction of the controlling or coercive behaviour offence:

> Being subjected to repeated humiliation, intimidation or subordination can be as harmful as physical abuse, with many victims stating that trauma from psychological abuse had a more lasting impact than physical abuse (Crown Prosecution Service 2015).

1.4.2 Human Rights Abuse and the New Offences

In addition to accumulating knowledge about the public health consequences of non-physical domestic abuse, a further catalyst to the development of the new offences was the increasing framing of domestic violence as an abuse of the human rights of

victims. This is directly reflected in the construction of the offences—they do not simply protect the physical, psychological and economic integrity of victims, but do so within a human rights framework, distinctively constructing non-physical harms as breaches of freedom from fear and torture, freedom of movement, thought, etc.

Although the antecedents of this approach can be found in the work of nineteenth-century feminists such as Frances Cobbe (1878, p. 72) and a smattering of contemporary legal scholars (e.g. Hogg 2017; McQuigg 2011; Tadros 2005), the recent catalyst came from international obligations and treaties that increasingly recognised violence against woman as a human rights issue. For instance, the *Convention on Preventing and Combating Violence Against Women and Domestic Violence* (the Istanbul Convention) categorises violence against women as a violation of human rights and a form of discrimination (art 3(b)). Article 3(a) expansively defines violence against women as—

> all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.

Significantly, the Istanbul Convention requires that states criminalise psychological violence where the conduct is intentional, seriously impairs the psychological integrity of the victim, and takes place through coercion or threats (art 33). The Explanatory Report accompanying the Convention indicates that psychological violence refers to a course of conduct rather than a single event, and is intended to capture an abusive pattern of behaviour occurring over time—the similarities to the standalone offences are clear.

The Istanbul Convention is a recent (albeit direct and expansive) expression of a fundamental individual, civil and constitutional rights that were previously established under earlier international treaties and conventions such as the *International Covenant on Civil and Political Rights* and the *Convention on the Elimination of all Forms of Discrimination against Women*. Although the United Kingdom has not yet ratified the Istanbul Convention (and countries which are not members of the Council of Europe are not eligible to do so), it has established a powerful benchmark against which laws, policies and practices can be evaluated and explored. There have also been more local attempts to give effect to specific rights via a legislative framework (e.g. *Human Rights Act 1998* (UK); *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT); *Human Rights Act 2019* (Qld); Chalmers 2014, pp. 491–492; Griffin 2008).

Governments and their agencies in common law countries are increasingly acknowledging their obligations under these instruments when developing policy and law in relation to domestic abuse. For instance, the Scottish Government noted its obligations to protect the right to life and to prohibit torture or inhuman or degrading treatment or punishment under the *European Convention on Human Rights* (ECHR), acknowledging that the Convention imposed 'an overarching duty… to put in place mechanisms to protect the life and well-being of a person who is at risk of domestic abuse' (Scottish Government 2018a, para [1.11]). In England and Wales, the CPS similarly observes that the offence of controlling or