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COUNTERING TERROR: TERRORISM LAWS, DOMESTIC VIOLENCE & THE AUSTRALIAN CONTEXT

CATHERINE WALKER-MUNRO* & DR BRENDAN WALKER-MUNRO†

Domestic violence is an insidious choice to use fear, force, control, or coercion. It suppresses the capacity and capabilities of its survivors and 2in violent murder and painful death. Yet despite an emerging discourse that describes domestic violence as a form of “domestic”, “intimate” or “everyday” terrorism, there is a distinct lack of scholarly research on the intersection of laws that apply to both types of offending. Further, there is a lack of understanding about the fundamental typologies of counterterror regulation which could be applied to domestically violent offending. This paper seeks to tackle this gap and provoke discussion in the literature by taking a hypothetical approach to treat domestically violent offenders as security risks in the same way as violent extremists and those with connections to foreign terror organisations.

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I INTRODUCTION

Power. Control. Harm. Fear. These are all words which can easily be associated with acts of domestic violence, but also with acts of terrorism and extremism. Domestic violence (‘DV’) in Australia – a crime which affects hundreds of thousands of Australians and leaves on average two women dead each week¹ – is often referred to as an ‘insidious and

¹ Australian Bureau of Statistics, *Recorded Crime – Victims* (Web Page, 28 July 2022) <<https://www.abs.gov.au/statistics/people/crime-and-justice/recorded-crime-victims/latest-release>>.

pervasive' threat to our way of life.² Those same terms are also associated with the threats to Australia from terrorism.³

This overlap in both terminology and typology has led some scholars to suggest that DV is actually a form of "domestic terrorism", "intimate terrorism" or "everyday terrorism".⁴ Yet despite the overlap and the call by scholars for greater scrutiny, there has been little research on the intersection of the governing both crimes, mechanisms of regulatory power or of the legal implications of DV on national security.

This should be concerning. Not only have studies shown obvious connections between these forms of offending,⁵ there exists a growing scholarly discontent at the marginalisation and normalisation of violence against women. Gentry outlines that Western states often treat violence against women as a personal matter, as opposed to its treatment in developing nations as a security concern to Western interests.⁶

Scholars have been equally concerned with the hyper-criminalisation of domestic violence, with some suggesting that '[t]aking sexual violence seriously... all too often means supporting more or harsher punishments for perpetrators', which has 'inadvertently contributed to the rise of mass incarceration'.⁷ Enforcement responses are

² Caitlin Cassidy, Alex Crowe, 'Law Council report says "insidious and pervasive" domestic violence problem', *Canberra Times* (online, 12 September 2020) <<https://www.canberratimes.com.au/story/6918783/covid-creates-perfect-storm-for-insidious-and-pervasive-problem/>>.

³ Daniel Hurst, 'US-inspired rightwing extremism an "insidious" threat to Australia, study finds', *The Guardian* (online, 9 October 2020) <<https://www.theguardian.com/australia-news/2020/oct/09/us-inspired-rightwing-extremism-an-insidious-threat-to-australia-study-finds>>.

⁴ Michael Johnson, 'Patriarchal terrorism and common couple violence: Two forms of violence against women' (1995) 57(2) *Journal of Marriage and the Family* 283, 284-94. See also Michael Johnson and Kathleen Ferraro, 'Research on Domestic Violence in the 1990s: Making Distinctions' (2000) 62(4) *Journal of Marriage and the Family* 948; Rachel Pain, 'Everyday terrorism: Connecting domestic violence and global terrorism' (2014) 38(4) *Progress in Human Geography* 531; Caron E. Gentry, 'Epistemological failures: everyday terrorism in the West' (2015) 8(3) *Critical Studies on Terrorism* 362; Jo Little, 'Understanding domestic violence in rural spaces: A research agenda' (2017) 41(4) *Progress in Human Geography* 472.

⁵ See, eg, the review in Melanie Zimmermann, 'The relationship between domestic violence and terrorism: A comparison between the United Kingdom and the United States' (Masters Thesis, The University of North Carolina at Chapel Hill, 2018).

⁶ *State v Gentry*, 610 S.E.2d 494, 363 S.C. 93 (SC, 2005).

⁷ Anna Terwiel, 'What Is Carceral Feminism?' (2019) 48(4) *Political Theory* 1, 2.

also largely criticised for retraumatising complainants and failing to respect their needs.⁸ Yet for more than two decades criminological scholars have recognised that ‘for all its faults, we imagine that women will continue to turn to the criminal law, as a potential site for ‘destabilis[ing] and displac[ing] previously dominant meanings of gender’.⁹

The criminal law can, therefore, offer some unique regulatory insights which might ‘permit the state to fulfil its regulatory function in a way that is quicker and more effective than the criminal law process’.¹⁰ This paper thus proposes “borrowing” some of the national security legislation in Australia to apply to DV offending. Part 2 will involve an examination of the protective mechanisms in Australia for DV and terrorism, with a view to charting the similarities between both the targeted conduct and the method of regulatory control. In Part 3 the paper will analyse current anti-terrorism laws and how these have been approached by law enforcement agencies and the courts. Part 4 suggests how the adaptation of elements of the Australian national security framework might be applied to domestic violence offenders, essentially viewing domestic violence as ‘canaries in a coal mine’¹¹ for offences with a national security dimension. Part 5 concludes by making some brief observations for further research in this area.

II LEGAL DEFINITIONS & CHALLENGES

For the purpose of narrowing the scope of the discussion, it is worth defining the two key terms which feature in this analysis. In the case of both “domestic violence” and “terrorism”, this is not easy. The legal definitions have evolved over several decades to be inclusive of a wide range of prohibited conduct, and so our definitions must do likewise. Domestic violence in Australia is defined in various State and Territory laws,

⁸ Anastasia Powell, Nicola Henry, Asher Flynn, *Rape Justice: Beyond the Criminal Law* (Palgrave MacMillan, New York, 2015) cited in Chloe Taylor, ‘Anti-Carceral Feminism and Sexual Assault - A Defense’ (2018) 34(1) *Social Philosophy Today* 29.

⁹ Reg Graycar, Jenny Morgan, ‘Law Reform: What’s in It for Women?’ (2005) 23(1) *Windsor Yearbook of Access to Justice* 393, 395; cited in Jane Wangmann, ‘Law Reform Processes and Criminalising Coercive Control’ (2022) 48(1) *Australian Feminist Law Journal* 57.

¹⁰ Hadassa Noorda, ‘Regulation as punishment’ (2021) 40(2) *Criminal Justice Ethics* 108, 109.

¹¹ Zimmerman (n 5) 32.

usually within the specific statute which provides for protection orders (or however they may be named).¹²

Starting with domestic violence, this paper adopts the definition in the Queensland legislation that domestic violence is the committal of proscribed behaviour by the first person towards a second person, where both those persons are in a ‘relevant relationship’.¹³ This definition thus involves two elements: one proximal and one behavioural. A relevant relationship (the proximal element) is expansively defined to include spouses and family members, as well as persons in an ‘informal care relationship’. Courts are also given a broad remit to determine the circumstances where such informal care relationships may have formed.¹⁴

The proscribed conduct (the behavioural element) is equally expansive and defines behaviours by a first person towards a second person which are abusive physically, sexually, emotionally, psychologically or economically. More recent amendments to the definition have included the concept of “coercive control” and patterns of behaviour, such that DV includes acting ‘in any other way [that] controls or dominates the other person and causes the other person to fear for the second person’s safety or wellbeing or that of someone else’.¹⁵ Threats or other forms of inchoate offending (such as planning, counselling/procuring or aiding/abetting) are equally capable of substantiating domestic violence under this definition.¹⁶ Other State and Territory jurisdictions may differ slightly from the Queensland legislative model, but all of them recognise both a conduct (behavioural) and relationship (proximal) element to domestic violence offending.¹⁷

¹² *Domestic and Family Violence Protection Act 2012* (Qld) (*DFVP Act*); *Family Violence Act 2016* (ACT); *Crimes (Domestic and Personal Violence) Act 2007* (NSW); *Domestic Violence Act 1994* (SA) and *Intervention Orders (Prevention of Abuse) Act 2009* (SA); *Restraining Orders Act 1997* (WA); *Family Violence Protection Act 2008* (Vic); *Domestic and Family Violence Act 2007* (NT); *Family Violence Act 2004* (Tas).

¹³ *DFVP Act* (n 12) s 8(1).

¹⁴ *Ibid* ss 13-20.

¹⁵ Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Bill 2022 (Qld) s 34, inserting *Domestic and Family Violence Protection Act 2012* (Cth) s 22A.

¹⁶ *Ibid* s 8(3).

¹⁷ Andy Myhill, ‘Measuring domestic violence: Context is everything’ (2017) 1(1) *Journal of Gender-Based Violence* 33; Hayley Boxall, Siobhan Lawler, ‘How does domestic violence escalate over time?’ (2021) 626(1) *Trends and Issues in Crime and Criminal Justice* 1.

“Terrorism” on the other hand is defined by reference to the Commonwealth criminal legislation.¹⁸ It also invokes both a proximal and behavioural element. The proximal element in a terrorism offence requires that an act or threat is done with the intention of ‘advancing a political, religious or ideological cause’ as well as ‘coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or... intimidating the public or a section of the public’.¹⁹

The behavioural element of terrorism offences is expansive in a like manner to domestic violence. A terrorist act is one that causes physical harm, damage to property, causes a person's death, endangers any person's life (other than the person taking the act), or creates a serious risk to the health or safety of the public or a section of the public.²⁰ Unlike domestic violence, there are also provisions which outlaw terrorist acts that target electronic systems,²¹ and certain conduct (such as advocacy, protest, dissent or industrial action) can never be classified as terrorist acts.²²

In terms of the behavioural elements of these definitions, both acts seek to weaponise fear to exert control and influence. Not only do both forms of offending demonstrate similarities in *how* they exercise that coercion and influence, but *why* they do so. If DV offenders use violence as a means of both enforcing control and punishing attempts to break free,²³ those who perpetrate terrorism also seek to frighten entire populations into submission and punish attempts to break that hold of fear.²⁴ Consider this analysis of offending typologies in both terrorism and DV:²⁵

- i. Focusing on control and domination;
- ii. Self-justifying of behaviour;

¹⁸ *Criminal Code Act 1995* (Cth) s 100.1.

¹⁹ *Ibid* s 100.1(1).

²⁰ *Ibid* s 100.1(2).

²¹ *Ibid* s 100.1(2)(f)(i)-(vi).

²² *Ibid* s 100.1(3).

²³ Amanda Taub, ‘Control and Fear: What Mass Killings and Domestic Violence Have in Common’, *The New York Times* (online, 15 June 2016)

<<https://www.nytimes.com/2016/06/16/world/americas/control-and-fear-what-mass-killings-and-domestic-violence-have-in-common.html>>.

²⁴ Abby L. Ferber and Michael S. Kimmel, ‘The gendered face of terrorism’ (2008) 2(3) *Sociology Compass* 870, 874-9.

²⁵ David Gadd and Mary-Louise Corr, ‘Beyond typologies: Foregrounding meaning and motive in domestic violence perpetration’ (2017) 38(7) *Deviant Behavior* 781.

- iii. Gradually escalating to physical violence;
- iv. Seeing violence as justifiable and legitimate;
- v. Showing little to no insight;
- vi. Rarely accepting responsibility; and
- vii. Tending toward paranoia and seeking scapegoats.

Despite the apparent similarities between terrorism and DV offending, research continues the latter, marginalising it to the edges of legal discourse and, in some cases, ignoring its relevance. Pain highlights the disparity in the literature as ‘mudd[ying] the boundaries between forms of violence that are usually framed as public, political and spectacular, and forms that are usually framed as private, apolitical and mundane’.²⁶

This is perhaps not just the fault of researchers – terrorism is an easier subject to research. It is plainly apparent when a terrorist attack occurs. Media organisations cover the event extensively, police respond immediately and in force, and the literature abounds with deconstructions of the law immediately following the event. In December 2014, Man Haron Monis took hostages in the siege of the Lindt Café, ultimately killing two of them. This horrific crime resulted *inter alia* in a Coronial inquest²⁷ and the passing of so-called “shoot to kill” laws for NSW Police less than a month after the event.²⁸ As traumatic as this action was, scholars remain divided over whether the attack qualified as a terrorist incident and whether Monis was really a terrorist at all.²⁹

DV on the other hand struggles to achieve the same level of exposure, both in media and legal discourse. The subject has been the target of several inquiries by State governments

²⁶ Pain (n 4) 532.

²⁷ *Inquest into the deaths arising from the Lindt Café siege* (Final report of the NSW Coroner, 24 May 2017).

²⁸ The Terrorism Legislation Amendment (Police Powers and Parole) Bill 2017 (NSW) was assented to on 22 June 2017, inserting sections 24A and 24B into the *Terrorism (Police Powers) Act 2002* (NSW) and permitting the NSW Police Commissioner to authorize lethal force in the event of a terrorist attack; Michael Head, ‘Another expansion of military call out powers in Australia: Some critical legal, constitutional and political questions’ (2019) 5(5) *University of New South Wales Law Journal Forum* 1.

²⁹ Tony King, ‘The true story of the Lindt Café’ (2017) 9(2) *Australasian Policing* 37; George Brandis, ‘Statement on NSW Coroner’s findings and recommendations into the Lindt Cafe siege’ (2017) 9(2) *Australasian Policing* 4. Cf Russ Scott and Rodger Shanahan, ‘Man Haron Monis and the Sydney Lindt Café Siege – Not a Terrorist Attack’ (2018) 25(6) *Psychiatry, Psychology and Law* 839.

(and is the target of one in Queensland at the time of writing³⁰), although nothing at the level of a Federal Royal Commission despite identical calls for one since at least 2015.³¹ The lack of traction has been noted by several authors,³² including prominent DV advocate Rosie Battie who lamented the lack of significant progress six years after a similar Royal Commission concluded in Victoria.³³ The data used for research is also less reliable: researchers have long been aware of the difficulties of relying solely on police report data in circumstances where many survivors and/or witnesses do not report instances of DV to police.³⁴

We propose to confront this disparity between the legal treatments of terrorism and DV, and to suggest how treating DV like a national security problem could provide more useful legal and regulatory mechanisms. Rather than perform a surface-level comparison of terrorism and DV, the threat will be presented from the context of how current laws confront, control, limit and seek to eliminate the threat of terrorism – and how those same effects might be contextually applied to DV as a control mechanism.

III TERRORISM CONTROL AND REGULATORY MECHANISMS

Terrorism offences in Australia are predominantly regulated by the *Criminal Code* (Cth).³⁵ Plainly, the *Criminal Code* proscribes the committal of terrorist acts, but also

³⁰ Queensland Government, *Independent Commission of Inquiry into Queensland Police Service responses to domestic and family violence* (Report, 21 November 2022).

³¹ Judith Ireland, 'Epidemic, but no domestic violence royal commission', *The Sydney Morning Herald* (online, 27 January 2015) <<https://www.smh.com.au/politics/federal/epidemic-but-no-domestic-violence-royal-commission-20150127-12z614.html>>. See also Department of Social Services, *The National Plan to End Violence against Women and Children 2022-2032* (website, 2023) <<https://www.dss.gov.au/women-programs-services-reducing-violence/the-national-plan-to-end-violence-against-women-and-children-2022-2032>>.

³² Ruth Phillips, 'Undoing an activist response: Feminism and the Australian government's domestic violence policy' (2006) 26(1) *Critical Social Policy* 192; David Gadd, Mary-Louise Corr, Claire L. Fox and Ian Butler, 'This is Abuse... Or is it? Domestic abuse perpetrators' responses to anti-domestic violence publicity' (2014) 10(1) *Crime, Media, Culture* 3; Molly Dragiewicz, Bridget Harris, Delanie Woodlock and Michael Salter, 'Digital media and domestic violence in Australia: essential contexts' (2021) 5(3) *Journal of Gender-based Violence* 377.

³³ Wendy Tuohy, "'You still battle': Rosie Batty on five years of family violence action', *The Age* (online, 28 March 2021) <<https://www.theage.com.au/national/you-still-battle-rosie-batty-on-five-years-of-family-violence-action-20210320-p57cic.html>>.

³⁴ Isabella Voce and Hayley Boxall, *Who reports domestic violence to police? A review of the evidence* (Trends and Issues in Crime and Criminal Justice, No. 559, September 2018); Hayley Boxall and Siobhan Lawler, *How does domestic violence escalate over time?* (Trends and Issues in Crime and Criminal Justice, No. 626, May 2021).

³⁵ *Criminal Code Act 1995* (Cth) Pt 5.3.

numerous inchoate offences including providing or receiving training to commit terrorist acts, possessing things connected with terrorist acts, collecting or producing documents 'likely to facilitate' a terrorist act, or planning or preparing for a terrorist act.³⁶ Terrorism offences also feature a strict and stringent regulatory framework. These include preventative detention orders, control orders, and organisational declarations.

A Terrorist organisation declarations

Division 102 of the *Criminal Code Act 1995* (Cth) ('*Criminal Code* (Cth)') provides for a series of response in respect of organisations that are either 'directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act' or are declared by the Governor-General in a regulation as a "terrorist organisation". Before any such declaration is made, the Home Affairs Minister must be satisfied on reasonable grounds that the organisation is either involved in, or advocates, the committing of a terrorist act, and has briefed the Leader of the Opposition in the House of Representatives in respect of the proposed regulation.³⁷ The Code also imposes a three-year sunset on all such regulations passed by the Governor-General and provides for grounds of both automatic (in that the Home Affairs Minister must announce in the Gazette if they no longer hold a reasonable satisfaction that the organisation meets the requisite requirements) and manual delisting (in that an individual or organisation may write to the Home Affairs Minister and seek the delisting of the organisation).³⁸ The Parliamentary Joint Committee for Intelligence and Security also has an oversight role in reviewing any such declarations.³⁹ At the time of writing, twenty-nine organisations have been the subject of regulations issued by the Governor-General.

Once declared, it is in offence under the *Criminal Code* (Cth) to be a member of any such organisation; to intentionally direct its activities, to recruit persons to join that organisation (whether or not that recruitment is actually successful); participate in receiving or providing training to the members of that organisation; receive or collect funds for the organisation; or 'support or resources that would help the organisation'

³⁶ Ibid s 101.1-101.6.

³⁷ Ibid s 102.1.

³⁸ Ibid ss 102.1(3)-(4), 102.1(17)-(18).

³⁹ Ibid s 102.1A(1)-(4).

participate in a terrorist act.⁴⁰ Providing or collecting funds in a manner reckless to their use to facilitate or engage in terrorist acts is also an offence.⁴¹ Commonwealth law permits the assets of those listed organisations to be frozen and dealt with in the same way as if the organisation was the subject to sanctions by the Security Council of the United Nations.⁴²

There are also broader ‘association’ offences in the *Criminal Code* (Cth) which bear passing resemblance to the “consorting” offences which briefly featured as controversial functions of State and Territory “anti-bikie laws”.⁴³ The association must involve the provision of support, and that support ‘assist[s] the organisation to expand or to continue to exist’.⁴⁴ Exemptions also apply for *inter alia* reasons of family relations, religious worship and legal advice.⁴⁵ These provisions set an obviously higher bar than the earlier consorting offences, perhaps in response to criticisms that the “anti-bikie laws” were unconstitutional, a breach of Australia’s international obligations and failed to achieve their stated objectives.⁴⁶

B Control orders

Control orders were established for the purposes of protecting the public from terrorism, preventing the provision of support or facilitating an act, and for preventing engagement in hostile activity in a foreign country.⁴⁷ Procedurally, a senior officer of the AFP (Australian Federal Police) may apply to a court for a control order (if the application has been authorised by the Minister).⁴⁸ The Code is quite strict as to the information requirements that must attend such an application: the applicant’s affidavit,

⁴⁰ Ibid ss 102.1-102.7.

⁴¹ Ibid s 103.1.

⁴² *Charter of the United Nations Act 1945* (Cth) Pt 4; *Charter of the United Nations (Terrorism and Dealing with Assets) Regulations 2008* (Cth).

⁴³ Andrew McLeod, ‘On the origins of consorting laws’ (2013) 37(1) *Melbourne University Law Review* 103, 136-40.

⁴⁴ *Criminal Code* (Cth), s 102.8(1)(a).

⁴⁵ Ibid s 102.8(4).

⁴⁶ Luke McNamara and Julia Quilter, ‘The “bikie effect” and other forms of demonisation: the origins and effects of hyper-criminalisation’ (2016) 34(2) *Law in Context* 5, 13-4; Carmel O’Sullivan, ‘Casting the net too wide: the disproportionate infringement of the right to freedom of association by Queensland’s consorting laws’ (2019) 25(2) *Australian Journal of Human Rights* 263, 265-6; *South Australia v Totani* (2010) 242 CLR 1.

⁴⁷ *Criminal Code Act 1995* (Cth) s 104.1.

⁴⁸ Ibid s 104.2(1).

a copy of the information on which the Minister gave their authorisation, as well as a detailed explanation for restrictions which are proposed as part of the order. Countervailing considerations must also be included, such as the outcomes of all previous applications in respect of the person, as well as reasons why the restrictions in the order ought not be imposed.⁴⁹

Having received that application, the court has two tasks. The first is to satisfy itself of one of the following:

- a) making an order in the terms sought that would ‘substantially assist’ in the course of either ‘preventing a terrorist act’ or ‘preventing the provision of support for or the facilitation of a terrorist act’;
- b) that the individual ‘has provided training to, received training from or participated in training with a listed terrorist organisation’ or ‘engaged in a hostile activity in a foreign country’; or
- c) the person had been convicted of a terrorism offence anywhere in the world.⁵⁰

Having found one or more of those preconditions, the court must then undertake a test of reasonable necessity and appropriateness in respect of each of the ‘obligations, prohibitions and restrictions to be imposed on the person by the order’.⁵¹ In doing so, the court may be aided by reference to a number of things including; the subject’s age, gender, background and upbringing, and their physical and mental health. Perhaps most importantly, the court must take into account any intrusions on their rights to freedom of expression and religion, as well as access to family and education.⁵²

Once made, a control order may contain numerous obligations, prohibitions, or restrictions, each of which is exclusively dealt with in the Code.⁵³ These obligations and restrictions may stop a person from being in certain places or leaving the country; meeting with named persons or classes of persons; and owning or using particular assets (such as computers or mobile phones) without authority of the AFP. A control order may

⁴⁹ Ibid s 104.3.

⁵⁰ Ibid s 104.4(1)(c)(i)-(vii).

⁵¹ Ibid s 104.4(1)(d)(i)-(iii), referring to s 104.1(a)-(c).

⁵² Ibid s 104.4(2A).

⁵³ Ibid s 104.5(3).

also subject the person to certain forms of surveillance or forensic procedures, either at point-in-time or as an ongoing obligation.⁵⁴

These orders are generally interim in nature, with the scheme also providing that control orders must be reviewed by the court as soon as practicable after their making, with the notion to either confirm the order, declaring the order void or revoking it.⁵⁵ Confirmed control orders may be in place for no more than 12 months before mandatory review,⁵⁶ with control orders for persons aged 14 to 18 limited to three months duration.⁵⁷ The AFP Commissioner may also apply to the issuing court to vary or amend a control order.⁵⁸

Somewhat unsurprisingly, the contravention of a control order⁵⁹ or the electronic monitoring requirements⁶⁰ of a control order is a criminal offence, punishable by up to five years imprisonment.

C Preventative detention orders

Another mechanism available in respect of terrorism offences is preventative detention powers, afforded to the AFP as well as State and Territory Police as an ancillary to their traditional powers of arrest. Preventative detention may only occur to prevent a terrorist attack that is capable of being carried out, and could occur, within the next 14 days ('*ex ante* orders') or; to preserve vital evidence of, or relating to, a recent terrorist act ('*ex post* orders').⁶¹

To obtain an *ex ante* order, the AFP officer must be able to provide evidence to the satisfaction of the issuing authority that the subject of the order will engage in a terrorist act, possess something in connection with preparing for a terrorist act, or has done an act in preparation for a terrorist act.⁶² The order must also 'substantially assist' in the

⁵⁴ Ibid ss 104.5A, 104.28C, 104.28D.

⁵⁵ Ibid ss 104.5(1)(e), (1A), (1B), 104.12A.

⁵⁶ Ibid ss 104.5(1)(f), 104.14.

⁵⁷ Ibid Note 2 to s 104.5(1).

⁵⁸ Ibid ss 104.23(1), (2).

⁵⁹ Ibid s 104.27(1).

⁶⁰ Ibid ss 104.27A(1), (2).

⁶¹ *Criminal Code Act 1995* (Cth) s 105.1.

⁶² Ibid ss 105.4(4)(a), 105.4(4)(b).

prevention of the named terrorist act, and that detention is reasonably necessary.⁶³ An *ex post* order requires that a terrorist act has already occurred within 28 days of the date of the application, with the same reasonable necessity requirement⁶⁴ (though in this case, the necessity is to preserve evidence). Both orders may be subject to a condition that prohibits contact with another person.⁶⁵

Under the Commonwealth scheme, preventative detention must be authorised by an ‘insuring authority’, namely a judge of a court (whether State, Territory or Federal),⁶⁶ the President or Deputy President of the Administrative Appeals Tribunal,⁶⁷ or a person who held a commission as a judge in one or more superior courts in the last five years.⁶⁸ No preventative detention order may be made in relation to a person under 16 years of age,⁶⁹ nor can more than one preventative detention order be in place at any one time.⁷⁰

Once made, a person detained under a preventative detention order must be treated humanely and not be subjected to cruel, inhuman or degrading treatment.⁷¹ They also have the right to contact a lawyer or the Commonwealth Ombudsman,⁷² or to contact family members and employers to let them know they are safe.⁷³ Police are not permitted to question or take any identification material from a person subject to a preventative detention order,⁷⁴ and disclosure of the existence of a preventative detention order is an offence punishable by up to five years imprisonment.⁷⁵

States and territories have also enacted their own legislation in relation to preventative detention, each of which allows for the detention of a person for up to 14 days (that

⁶³ Ibid ss 105.4(4)(c), (d).

⁶⁴ Ibid s 105.4(6).

⁶⁵ Ibid ss 105.15(1), 105.16(1).

⁶⁶ Ibid ss 105.2(1)(a), (b).

⁶⁷ Ibid s 105.2(1)(e).

⁶⁸ Ibid s 105.2(1)(d).

⁶⁹ Ibid s 105.5(1).

⁷⁰ Ibid s 105.6.

⁷¹ Ibid ss 105.33, 105.33A.

⁷² Ibid ss 105.36, 105.37.

⁷³ Ibid s 105.35.

⁷⁴ Ibid ss 105.42(1)-(3), 105.43.

⁷⁵ Ibid ss 105.41(1)-(7).

period includes the cumulative period for both Commonwealth and State/Territory preventative detention orders).⁷⁶

D Ancillary Commonwealth offences

It is finally appropriate to conclude this section with a brief examination of some other aspects of national security and counterterror laws that may have broad application to DV (as will be examined in the next section).

The first are the offences against the body politic under Division 80 of the *Criminal Code* (Cth). Whilst traditionally these were limited to offences as against the Crown such as treason and treachery, there are further offences relating to ‘urging violence’ against individuals or groups of persons.⁷⁷ These offences involve an element of intention to direct or urge violence against persons of a group ‘distinguished by race, religion, nationality, national or ethnic origin or political opinion’, where that violence ‘would threaten the peace, order and good government of the Commonwealth’.⁷⁸ The definition of urging or inciting violence in a manner that threatens the body politic therefore appears – deliberately or otherwise – to exclude offending which promotes or incites violence on the basis of “gender” or “biological sex”. Whether this is a drafting error or deliberate omission is unclear.

The second involves advocating for the commission of terrorism offences by ‘counsels, promotes, encourages or urges the doing of a terrorist act or the commission of a terrorism offence’.⁷⁹ These offences also seek to capture actions by persons irrespective of whether the terrorism offence which is encouraged or sought of is actually committed or planned for. In the same way as the above urging or inciting offence, this offence could

⁷⁶ *Terrorism (Police Powers) Act 2002* (NSW) Pt 2A; *Terrorism (Preventative Detention) Act 2005* (Qld); *Terrorism (Preventative Detention) Act 2005* (SA); *Terrorism (Preventative Detention) Act 2005* (Tas); *Terrorism (Community Protection) Act 2003* (Vic) Pt 2A; *Terrorism (Preventative Detention) Act 2006* (WA); *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT); *Terrorism (Emergency Powers) Act* (NT) Pt 2B.

⁷⁷ *Criminal Code Act 1995* (Cth) ss 80.2A(1), (2), 80.2B(1), (2).

⁷⁸ *Ibid* ss 80.2A(1), 80.2A(2), 80.2B(1), (2).

⁷⁹ *Ibid* s 80.2C(3).

be applied to criminalise domestic violence carried out by proxy.⁸⁰ These curiosities of drafting will be explored further in Part 4.

IV TERRORISM RESPONSES IN DV CONTEXTS

At this juncture, it is possible to observe a clear disparity between the criminalisation of certain terrorist offences versus those with a DV nexus. For example, planning or preparing to commit a terrorist act is a separate inchoate offence that both a.) does not require reference to a specific act;⁸¹ and b.) applies extraterritorially.⁸² Planning or preparing to commit DV offences are treated by a deeming provision or existing concepts of criminal responsibility,⁸³ both of which lack extraterritorial application.⁸⁴ Of course, each of the State and Territory DV Acts generally deems conduct meeting the proximal and behavioural definitions of DV as worthy of protection, even where that conduct may not necessarily constitute a criminal offence.⁸⁵

Whilst at the level of “black letter law” these two legal treatments might achieve similar or even identical outcomes, they result in disparate subjectivities on how serious the two offences are.⁸⁶ The concept that ‘moving pollution offences from water-resources legislation to a criminal code may well signal the social idea that pollution is a “real crime” and not just an adjunct to regulatory legislation’ has direct application to the present divergent treatment of DV behaviour.⁸⁷ Being convicted of a DV offence also

⁸⁰ Andrew A. Zashin, ‘Domestic Violence by Proxy: A Framework for Considering a Child’s Return under the 1980 Hague Convention on the Civil Aspects of International Child Abduction’s Article 13(b) Grave Risk of Harm Cases Post Monasky’ (2021) 33(2) *Journal of the American Academy of Matrimonial Lawyers* 571.

⁸¹ *Criminal Code Act 1995* (Cth) s 101.6(2)(b).

⁸² *Ibid* s 101.6(3).

⁸³ *DFVP Act* (n 12) s 8(3); *Domestic and Family Violence Act 2007* (NT) s 17; cf. *Family Violence Act 2016* (ACT) s 5.

⁸⁴ *Constitution of Queensland 2001* (Qld) s 8; *Constitution Act 1867* (Imp) s 2.

⁸⁵ *DFVP Act* (n 12) s 8(4); *Family Violence Act 2016* (ACT) s 13; *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ss 16, 19; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) ss 23, 28; *Restraining Orders Act 1997* (WA) ss 10D and 10F; *Family Violence Protection Act 2008* (Vic) s 5(3); *Domestic and Family Violence Act 2007* (NT) ss 18, 19; *Family Violence Act 2004* (Tas) ss 16, 18.

⁸⁶ Lucy Williams and Sandra Walklate, ‘Policy responses to domestic violence, the criminalisation thesis and “learning from history”’ (2020) 59(3) *The Howard Journal of Crime and Justice* 305; 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.

⁸⁷ Mathew Goode, ‘Codification of the Australian Criminal Law’ (1992) 16(1) *Criminal Law Journal* 5, 9.

carries a different “flavour” of stigma than a conviction for terrorism.⁸⁸ Because the ‘[c]riminal law is a powerful agency of public disapproval and reprobation’, and such disparities can be ‘instrumental in enforcing [or not enforcing] legal and social norms’.⁸⁹ The different subjectivities in treatment are also important from the procedural perspective. For terrorism, the State – and it’s not insignificant resources – stands in the shoes of prosecutor. DV on the other hand is largely viewed by officers of the state (such as police, prosecutors and judges⁹⁰) as a private law argument between two individuals, with police often treating breaches as “minor” or “technical” offences.⁹¹ Thus, police and intelligence agencies end up lavishly funded for terrorism despite very few arrests for terrorism or extremist violence, but not for DV which has tens of thousands of reports every year.⁹²

Further, whilst prosecutions for DV offences are often undertaken at the same time as the issue of administrative protection orders, the consequence of such a hybrid model often results in both police and courts ‘downgrading’ the importance of such orders.⁹³ This can also have flow-on consequences which are entirely unintended, such as the capture of victim-survivors as alleged “perpetrators” of cross-claimed DV.⁹⁴

These outcomes in engaging with DV are an entirely improper treatment of a form of criminal offending which is malicious, driven to inflict fear, and demonstrably leads to

⁸⁸ Where conviction for a terrorism offence is viewed as a serious risk to the body politic: see Noorda (n 10). CF the findings in DV that ‘internalized shame can lead to externalized violence...’: see A. Rachel Camp, ‘Pursuing Accountability for Perpetrators of Intimate Partner Violence: The Peril and Utility of Shame’ (2018) 98(6) *Boston University Law Review* 1677, 1702-7.

⁸⁹ Robyn Holder, *Domestic and family violence: Criminal justice interventions* (Australian Domestic and Family Violence Clearinghouse, University of New South Wales, 2001) 2.

⁹⁰ Ruth Elliffe and Stephanie Holt, ‘Reconceptualizing the child victim in the police response to domestic violence’ (2019) 34(1) *Journal of Family Violence* 589.

⁹¹ Heather Douglas, ‘The criminal law’s response to domestic violence: what’s going on?’ (2008) 30(3) *Sydney Law Review* 439, 444-5.

⁹² Nicola Henry, Asher Flynn and Anastasia Powell, ‘Policing image-based sexual abuse: stakeholder perspectives’ (2018) 19(6) *Police Practice and Research* 565, 573.

⁹³ Lis Bates and Marianne Hester, ‘No longer a civil matter? The design and use of protection orders for domestic violence in England and Wales’ (2020) 42(2) *Journal of Social Welfare and Family Law* 133, 149.

⁹⁴ Ellen Reeves, ‘The potential introduction of police-issued family violence intervention orders in Victoria, Australia: Considering the unintended consequences’ (2022) 34(2) *Current Issues in Criminal Justice* 207.

increasing bouts of physical violence.⁹⁵ Australian policy responses to domestic violence thus need to be more akin to the responses to the “war on terror”, which has arguably been waged for the last two decades.⁹⁶ Approaching DV as a form of terrorism encourages the adoption of novel or altered responses and mechanisms,⁹⁷ by which we intend to suggest how some of the hallmarks of the terrorism regulatory regime may be adapted to potentially confront the legal challenges at the heart of DV.

A “DV content” declarations

The *Criminal Code* (Cth) permits the Governor-General to make regulations which proscribe terrorist organisations, at which point membership, leadership, funding or supporting such an organisation becomes unlawful. These forms of declarations may be able to – with some limited amendment – be applied to individuals or organisations who urge or promote DV or DV-related content.

The advertisement or promulgation of DV-related content is not unheard of. In August 2022 an online influencer named Andrew Tate produced a series of social media posts that stated women ‘belong in the home’ and were ‘a man’s property’.⁹⁸ Though social media companies reacted swiftly by removing his content from online platforms and banning his account, Tate responded by claiming that he would establish an organisation focusing on ‘men’s mental health and also protecting women against violence from men’.⁹⁹

In circumstances where an individual or organisation is involved in, supports, or advocates, the commission of DV offences or DV conduct, these individuals or

⁹⁵ Heather Douglas and Lee Godden, ‘The decriminalisation of domestic violence: examining the interaction between the criminal law and domestic violence’ (2003) 27(1) *Criminal Law Journal* 32, 34. See also Heather Douglas and Robin Fitzgerald, ‘The domestic violence protection order system as entry to the criminal justice system for Aboriginal and Torres Strait Islander people’ (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 41.

⁹⁶ Ruth Phillips, ‘Feminism, policy and women’s safety during Australia’s “war on terror”’ (2008) 89(1) *Feminist Review* 55.

⁹⁷ Pain (n 4) 542 citing Rhonda Hammer, ‘Militarism and family terrorism: A critical feminist perspective’ (2003) 25(3) *Review of Education, Pedagogy, and Cultural Studies* 231.

⁹⁸ Belinda Palmada, ‘Controversial influencer Andrew Tate sets up charity to help women and men’, *News.com.au* (online, 26 August 2022) <<https://www.news.com.au/lifestyle/real-life/news-life/controversial-influencer-andrew-tate-sets-up-charity-to-help-women-and-men/news-story/ba228d845ba7f05d0e89524b3b64df8c>>.

⁹⁹ *Ibid.*

organisations could be proscribed by a similar mechanism. The same safeguards already present in the *Criminal Code* (Cth) – such as the briefing of the Leader of the Opposition in the House of Representatives and the grounds for delisting of persons or organisations – could be adapted to suit the DV context. The Commonwealth Ombudsman could also provide oversight of the issue of such declarations with a minimal imposition of additional work to that agency.

Of course, the imposition of restrictions on individuals and organisations of this type would inevitably invoke arguments involving Australia’s implicit freedom of speech¹⁰⁰ and (dependent on whether the nature of the statements being made has a religious connection¹⁰¹) Australian freedoms of religion.¹⁰² These restrictions also may breach Australia’s international human rights obligations.¹⁰³ In order to properly recognise these legitimate concerns, the interference with the rights must be proportional and related to the “mischief” to which the regulation is directed.

Therefore, any such scheme which proscribes “DV organisations” should not outlaw membership of those organisations, recruitment or funding, or the “consorting” of their members. This is all conduct that in any other context would be lawful in a constitutional democracy, like Australia. Rather, it should be individuals within an organisation who are responsible for ‘material support or encouragement’ to commit DV which should be targeted – individuals like Tate or the Melbourne spyware programmer.¹⁰⁴ Only the provisions of the *Criminal Code* (Cth) which prohibit ‘directing the activities’¹⁰⁵ or ‘supporting’¹⁰⁶ the illicit encouragement of a declared DV organisation would be appropriate in such amended legislation.

¹⁰⁰ *Commonwealth Constitution in Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Kruger v Commonwealth* (1997) 190 CLR 1; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181.

¹⁰¹ Carmel O’Brien, *Blame Changer: Understanding Domestic Violence* (Three Kookaburras, 2013) 132-3.

¹⁰² Joo-Cheong Tham, ‘Possible Constitutional Objections to the Powers to Ban “Terrorist Organisations”’ (2004) 27(1) *University of NSW Law Journal* 482; C.R.G. Murray, ‘Convergences and Divergences: Countering Terrorist Organisations in the United States and the United Kingdom’ (2017) 28(3) *King’s Law Journal* 445.

¹⁰³ Nora Shoki, *Membership in Terrorist Organisations - The Conflict between Individuals’ Rights and State Obligations under International Law* (Master’s Thesis, Orebro University, Autumn 2017) <<https://www.diva-portal.org/smash/get/diva2:1189914/FULLTEXT01.pdf>>; O’Sullivan (n 46).

¹⁰⁴ Nicola McGarrity and George Williams, ‘The Proscription of Terrorist Organisations in Australia’ (2018) 30(2) *Terrorism and Political Violence* 199, 215.

¹⁰⁵ *Criminal Code* (Cth) ss 102.2(1), (2).

¹⁰⁶ *Ibid* ss 102.7(1), (2).

B Expanding DV protection orders

DV is already subject to a protective order regime under the State and Territory laws already mentioned above. For example, Queensland legislation permits courts to issue protection orders or temporary protection orders for the protection of an ‘aggrieved’ against a ‘respondent’.¹⁰⁷ Temporary orders may be made in the period before a court makes a protection order and in circumstances where the aggrieved has not been notified and may not attend court.¹⁰⁸ Police may also issue a ‘police protection notice’¹⁰⁹ which operates in a manner similar to a temporary order and serves as an application for a protection order.¹¹⁰

However, therein lies the first challenge for DV protection orders and the attractiveness of the control order regime. One of the prerequisites to issue a protection order and a police-initiated order is that the court must be satisfied that the proximal element (a ‘relevant relationship’¹¹¹) existed between the aggrieved and the respondent. The quantification of that relationship could be a difficult thing where survivors may have tried to leave, end the relationship, or reconcile any number of times before the court conducts its assessment.¹¹²

Control orders do not require quantification of the proximal element. Proof of a relationship which is contrary to the Australian body politic, or its interests is not necessary. The *Criminal Code* (Cth) merely requires reasonable suspicion on the part of the AFP officer, and the satisfaction of the court as to the necessary preconditions mentioned above. Adapting control orders to a similar scheme in the DV space would be able to take the obligation off the survivor to have to prove the nature of their relationship to secure the State’s protection.

¹⁰⁷ *DFVP Act* (n 12) s 23(1).

¹⁰⁸ *Ibid* ss 23(3), (4).

¹⁰⁹ *Ibid* ss 101, 102, 103.

¹¹⁰ *Ibid* s 112(1).

¹¹¹ *Ibid* s 37(1)(a).

¹¹² Noting that this is a burden of proof on the survivor to demonstrate: see Charlotte Bishop, Vanessa Bettinson, ‘Evidencing domestic violence, including behaviour that falls under the new offence of “controlling or coercive behaviour”’ (2018) 22(1) *The International Journal of Evidence & Proof* 3.

Further, although certain conditions are mandated (i.e. that the respondent be of ‘good behaviour’ towards the aggrieved and any children named in the order¹¹³), courts are given very great latitude in respect of what conditions to apply yet choose not to do so.¹¹⁴ Such conditions can permit the aggrieved to retrieve personal property,¹¹⁵ as well as ‘ouster conditions’ which may force the respondent to leave their ordinary place of residence irrespective of any legal rights they may have to reside there.¹¹⁶ Despite that allowance, there is evidence that these additional restrictions are rarely used, or were applied incorrectly where Police obtained such orders.¹¹⁷ Protective orders are usually granted by the courts without sufficient information about the parties to adequately tailor the conditions, nor an awareness of the broader context within which the offending is occurring.¹¹⁸ Disparate views between Police, courts and survivors on the importance of DV also leave survivors as “pawns in a game”, where police act to keep matters out of court and courts water down protection orders¹¹⁹ (which one study suggests resulted in 75% of cases warranting an ouster condition not receiving such a condition¹²⁰). Recourse to family law orders is also not helpful where partners do not have children or cannot afford Family Court proceedings,¹²¹ with studies in the United Kingdom demonstrating that protective injunctions lack effectiveness in preventing post-separation abuse.¹²²

¹¹³ *DFVP Act* (n 12) s 56(1).

¹¹⁴ *Ibid* ss 57(1), 58.

¹¹⁵ *Ibid* s 59(1).

¹¹⁶ *Ibid* ss 63(1)-(2). A court must also consider imposing a ‘return condition’: see *DFVP Act* (n 12) s 65.

¹¹⁷ Queensland Government, *A Call for Change: Commission of Inquiry into Queensland Police Service responses to domestic and family violence* (Final Report, November 2022) 46, 59, 127.

¹¹⁸ Heather Douglas, ‘Policing Domestic and Family Violence’ (2019) 8(2) *International Journal for Crime, Justice and Social Democracy* 31.

¹¹⁹ Silke Meyer and Ellen Reeves, ‘Policies, procedures and risk aversity: police decision-making in domestic violence matters in an Australian jurisdiction’ (2021) 31(10) *Policing and Society* 1168, 1179.

¹²⁰ Queensland Government Statistician’s Office, *Applications for domestic violence orders in Queensland, 2008–09 to 2017–18* (Research report, 2021) 34, 35.

¹²¹ As the court requires that ‘proceedings...instituted in a court having jurisdiction under... [Part VII]’, whereupon the court ‘may make such order or grant such injunction as it considers appropriate for the welfare of the child’: see *Family Law Act 1975* (Cth) s 68B(1).

¹²² Ana Speed and Kayliegh Richardson, “‘Should I Stay or Should I Go Now? If I Go There will be Trouble and if I Stay it will be Double’: An Examination into the Present and Future of Protective Orders Regulating the Family Home in England and Wales’ (2022) 86(3) *The Journal of Criminal Law* 179; Ana Speed, ‘Domestic abuse and the provision of advocacy services: mapping support for victims in family proceedings in England and Wales’ (2022) 44(3) *Journal of Social Welfare and Family Law* 347; Mandy D. Burton, ‘Falling Through the Fault Lines: Victims Experiencing Poor and Fragmented Legal Responses to Domestic Abuse in England and Wales’, in Sheila Royo Maxwell and Sampson Lee Blair (Eds), *In The Justice System and the Family: Police, Courts, and Incarceration* (Emerald Publishing Limited, 2022) 223-39.

Control orders on the other hand would apply at the Commonwealth level irrespective of jurisdiction of the offender. Such orders could permit police to also impose electronic surveillance measures and forensic identification requirements (easily adaptable to DV offenders and invaluable for proving future offences). These could include requirements to stay away from persons or places, not leave the country, carry and answer a prescribed mobile phone, non-consorting conditions, and/or attend specified training or counselling. Measures may also stop offenders using specific technology, a critical control in preventing modern DV offences.¹²³

Orders could be made if a person is convicted for an offence which exhibits DV as defined in the Act¹²⁴ (like the way post-sentence orders being made after conviction of terrorism offences¹²⁵). Yet many court procedures take the view of canvassing evidence and submissions from the aggrieved,¹²⁶ even letting them cross-examine the person in need of protection (depending on jurisdiction).¹²⁷ Such a process invariably retraumatizes survivor-witnesses, leaving little desire to participate in long and drawn-out proceedings.¹²⁸

Further and much unlike control orders, protection orders (including 'police protection notices'¹²⁹) under the DV regime may only be made by police in certain circumstances (Box 1).

¹²³ *Criminal Code Act 1995* (Cth) ss 104.5(2), (3).

¹²⁴ *DFVP Act* (n 12) s 42(2).

¹²⁵ *Criminal Code Act 1995* (Cth) Div 105A of Pt 3.

¹²⁶ *DFVP Act* (n 12) s 42(4).

¹²⁷ It should be noted that this process has been eliminated by successive amendments at Commonwealth, State and Territory level: see *Family Violence Act 2016* (ACT) s 63(2); *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 41A; *Criminal Procedure Act 1986* (NSW) ss 289VA, 289T; *Domestic and Family Violence Act 2007* (NT) ss 114(2)-(3); *Domestic and Family Violence Protection Act 2012* (Qld) s 151(2); *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 29(4)(b); *Family Violence Act 2004* (TAS) s 31(2B); *Family Violence Protection Act 2008* (Vic) s 70(3); *Restraining Orders Act 1997* (WA) ss 44C, 53D; *Family Law Act 1975* (Cth) s 102NA.

¹²⁸ Heather Douglas, 'Do we need a specific domestic violence offence?' (2015) 39(1) *Melbourne University Law Review* 434, 436.

¹²⁹ *DFVP Act* (n 12) ss 100(3)(c), 112.

Box 1: Comparison between provisions relating to protection orders in Queensland law and control orders under Commonwealth law

<i>Domestic and Family Violence Protection Act 2012 (Qld) s 100</i>	<i>Criminal Code (Cth)</i>
<p>Police officer must reasonably believe DV has been committed</p> <p>Police officer must consider whether it is necessary or desirable to take further action</p> <p>Police officer must consider if a person must be protected immediately AND what is the ‘most effective action to take to immediately protect the person’</p>	<p>Police officer must reasonably suspect that the order would ‘substantially assist’ in preventing the commission of, or support or facilitation to, a terrorist act</p> <p>Police officer must reasonably suspect that the person has:</p> <ul style="list-style-type: none"> * participated in training with a listed terrorist organisation; or * engaged in a hostile activity in a foreign country; or * been convicted in Australia or elsewhere of an offence relating to terrorism.
<p>If those conditions are met, the police officer may apply for:</p> <ul style="list-style-type: none"> * a protection order under part 3, division 1; * variation of a domestic violence order under part 3, division 10; * a police protection notice under division 2; * take the respondent into custody under division 3 and apply for a protection order; * apply to a magistrate for a temporary protection order under division 4. 	<p>If those conditions are met, the police officer may apply for a control order.</p>

Box 1 demonstrates that the threshold for control orders is lower than that of DV – ‘reasonable suspicion’ of particular conduct as opposed to the ‘reasonable belief’

required for a DV order.¹³⁰ Though the making of a control order must ‘substantially assist’ in preventing the commission of, or support or facilitation to, a terrorist act – itself a high bar – police only need to have a ‘reasonable suspicion’ that the control order might achieve that outcome.

That choice of language is more than mere semantics. In *George v Rockett*¹³¹ the High Court of Australia laid the groundwork for the principle that belief is a higher bar than suspicion, being ‘not merely an “apprehension” or even a “fear”’¹³² but a ‘requisite belief...based on reasonable grounds.’¹³³ Conversely, reasonable suspicion ‘involves less than a reasonable belief but more than a possibility... A reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence... Some factual basis for the suspicion must be shown’.¹³⁴

To be clear, we are not advocating for the wholesale adoption of control orders in the domain of DV. Parliament has determined that the interference with human rights occasioned by control orders is only justified in situations involving attacks on the sovereign existence of Australia and supported by reference to the Constitutional defence power.¹³⁵ Attempting to impose control orders in DV at the Federal level could not be achieved by reference to a proper head of Constitutional power. In the absence of creating a national registry, there are also practical issues with such an approach (though they are hardly impossible to overcome). Instead, we would suggest that the DV frameworks in each State adopt the law of a single jurisdiction¹³⁶ to eliminate disparity, adopt key elements of the regulatory framework, and unify the application and supervision process in respect of DV “control orders”.

¹³⁰ Lex Lasry and Kate Eastman, ‘Memorandum of Advice: Anti-Terrorism Bill 2005 (Cth) and the Human Rights Act 2004 (ACT)’ (2005) 9(1) *University of Western Sydney Law Review* 111; Matthew Raj, Marshall, ‘Examining the Legitimacy of Police Powers to Search Portable Electronic Devices in Queensland’ (2019) 38(1) *University of Queensland Law Journal* 99.

¹³¹ *George v Rockett* (1990) 170 CLR 104, 115-6.

¹³² *Prior v Mole* (2017) 261 CLR 265, [24].

¹³³ *Kirkland v Stuart-Veenstra* (2009) 237 CLR 215, [56].

¹³⁴ *R v Rondo* (2001) 126 A Crim R 562, [53].

¹³⁵ Kate Chetty, *The Section 51(VI) Defence Power in the Australian Constitution: Threats to Human Rights During the “War on Terror” and Suggested Remedies* (PhD Thesis, Charles Sturt University, 2015).

¹³⁶ See for example *Health Practitioner Regulation National Law Act 2009* (Qld) and *Heavy Vehicle National Law Act 2012* (Qld), as applied in the States and Territories.

C Preventative detention orders for DV

There are also grounds for a unifying, national approach to implementing preventative detention orders for DV offenders. It is to be remembered that preventative detention orders could be sought by AFP officers either *ex ante* (in the case of a terrorist act suspected to occur within the next 14 days) or *ex post* (to preserve vital evidence of, or relating to, a recent terrorist act).¹³⁷ The issuing authority in the case of a preventative detention order (former Judges nor Presidents of administrative tribunals) is also far broader than that of DV protection orders, which are usually issued by Magistrates.

With few legislative amendments, preventative detention orders could be sought by police in instances of DV. It might – given the numerous and often cumulative aspects of DV as typified by definitions like coercive control – well be necessary to include a caveat to preventative detention orders that hold them in reserve for the most serious situations. Such detention might for example be mandated for “significant” or “substantial” risk of DV within a 14-day timeframe, or where the incident involves imminent threat to life.¹³⁸ The police officer merely need hold ‘reasonable suspicion’ that a DV act has occurred but that the order is ‘reasonably necessary’ to secure vital evidence. There ought also to be a reversal of the onus of proof, that an offender must prove that neither the proximal (relationship) or behavioural (conduct) elements of DV are made out, rather than forcing this onus on the aggrieved.

In the same way as control orders, there should be opportunities for appeal and review for offenders where there has not been a conviction, but in a way that avoids the traumatic experiences of survivors in court rooms and the “weaponisation” of the law.¹³⁹ Firstly, DV offenders cannot cross-apply for control orders – the regime does not allow them standing. Secondly, control orders and preventative detention orders are subject to judicial oversight by virtue of the issuing authority (and in some cases, by mandatory

¹³⁷ *Criminal Code Act 1995* (Cth) s 105.1.

¹³⁸ Amy M. Zelcer, ‘Battling domestic violence: Replacing mandatory arrest laws with a trifecta of preferential arrest, officer education, and batterer treatment programs’ (2014) 51(2) *American Criminal Law Review* 541.

¹³⁹ Bridget Harris and Delanie Woodlock, ‘You Can’t Actually Escape It’: Policing the Use of Technology in Domestic Violence in Rural Australia’ (2022) 11(1) *International Journal for Crime, Justice and Social Democracy* 135; Gina Masterton, Zoe Rathus, John Flood and Kieran Tranter, *Being ‘Hagued’: How weaponising the Hague Convention harms women, family and domestic violence survivors* (QUT Centre for Justice Briefing Paper, May 2022).

reporting from police to oversight agencies such as the Ombudsman). Thirdly, there already exists in the *Criminal Code* (Cth) pathways for variation and revocation of such orders by issuing authorities where the objectives of the regime are no longer being satisfied.¹⁴⁰

This use of preventative detention and control orders together could then also be an important driver for changes in police responses to DV. The prevailing response of police historically has been to consider DV as discrete incidents where on arrival, a dispute is civil in nature and/or not as serious as reported.¹⁴¹ By adding the option for preventative detention orders and control orders, authorised by a wide range of issuing authorities and on grounds of ‘reasonable suspicion’, police could obtain orders severely curtailing the freedom of offenders. Police could drive the application process as representatives of the State using their pool of resources and experience in courts. Offenders who breach orders could be treated with the same level of seriousness as terrorists or extremists – not “civil offenders” or “absconders”, but “threats to the Australian body politic”. Such orders could also provide space and encouragement for survivors and witnesses to make complaints to police,¹⁴² seek long-term protective orders and to plan for their personal safety.¹⁴³

D Ancillary Commonwealth offences

Rounding out this part on recommendations, the *Criminal Code* (Cth) has two further provisions in the counterterrorism space which could be reasonably adapted to apply to DV. With the minimum of legislative amendment, offences which glorify or promote DV could

¹⁴⁰ *Criminal Code Act 1995* (Cth) ss 104.18, 105.17.

¹⁴¹ Andy Myhill, ‘Renegotiating domestic violence: Police attitudes and decisions concerning arrest’ (2019) 29(1) *Policing and Society* 52; Heather Douglas and Robin Fitzgerald, ‘Legal Processes and Gendered Violence: Cross-applications for Domestic Violence Protection Orders’ (2013) 36(1) *UNSW Law Journal* 56, 82.

¹⁴² Richard B. Felson, Jeffrey M. Ackerman and Catherine A. Gallagher, ‘Police intervention and the repeat of domestic assault’ (2005) 43(3) *Criminology* 563; Jo Dixon, ‘Mandatory domestic violence arrest and prosecution policies: Recidivism and social governance’ (2008) 7(1) *Criminology & Public Policy* 663.

¹⁴³ Tanya Mitchell, ‘A dilemma at the heart of the criminal law: The summary jurisdiction, family violence, and the over-incarceration of Aboriginal and Torres Strait Islander peoples’ (2019) 45(2) *University of Western Australia Law Review* 136.

be treated with the seriousness of criminality associated with offences against the Australian body politic.

Firstly, amendments to domestic violence Acts in the various States and Territories should create a new offence capturing any person who ‘counsels, promotes, encourages or urges the doing of a domestically violent act or the commission of a domestic violence offence’.¹⁴⁴ Such offences would outlaw, as a discrete criminal offence punishable by up to seven years imprisonment, the participation in acts of domestic violence by proxy such as the following:

- The release of a survivor’s home address to the offender by a police officer;¹⁴⁵
- Assisting an offender by telling friends and family of the survivor is “crazy” or “making up stories”;¹⁴⁶ and
- Lawyers intentionally participating in unwarranted and groundless “Hagueing” of domestic partners who have fled across international borders.¹⁴⁷

Secondly, Division 80 of the *Criminal Code* (Cth) might be amended to include gender and/or sexuality as a ground for urging violence. These offences do already have some State and Territory analogies, but their appearance is patchwork and uneven.¹⁴⁸ For clarity and removal of ambiguity, the urging and inciting offences in the *Criminal Code* (Cth) could simply have four words appended, such that the sections prohibit the intentional urging of violence towards individuals and groups of individuals ‘distinguished by race, religion, nationality, national or ethnic origin or political opinion, and gender or sexuality’.¹⁴⁹ These provisions, now amended, permit the charging of domestically violent offenders with a Commonwealth criminal offence if their conduct urges or incites violence against men, women, intersex or non-binary persons.

¹⁴⁴ Ibid s 80.2C(3) but modified by the authors.

¹⁴⁵ Cait Kelly, ‘Calls grow to fire Queensland police officer who leaked domestic violence victim’s address’, *The New Daily* (online, 6 September 2020) <<https://thenewdaily.com.au/news/crime-news/2020/09/06/domestic-violence-police-punchard/>>.

¹⁴⁶ Erin Hightower, *An exploratory study of personality factors related to psychological abuse and gaslighting* (PhD Thesis, William James College, 2017) 3, 13-5.

¹⁴⁷ Masterton, Rathus, Flood and Tranter (n 139).

¹⁴⁸ See, eg, *Crimes Act 1900* (NSW) s 93Z(1); *Criminal Code Act Compilation Act 1913* (WA) Ch XI. CF *Criminal Code* (Qld) and *Criminal Law Consolidation Act 1935* (SA) which do not prescribe such offences.

¹⁴⁹ *Criminal Code Act 1995* (Cth) ss 80.2A(1), (2), 80.2B(1), (2).

The public and legal profession would need to be consulted on the reach of such inchoate offences prior to their enactment. As with any increase in the scope of criminal law, there is the risk of unintended consequences. In this example, any prosecution under the *Criminal Code* (Cth) would utilise the codified provisions of criminal responsibility, including recklessness as a fault element.¹⁵⁰ It may not be appropriate that anything should of a deliberate act should be criminalised in that space, to avoid the capture of otherwise innocent conduct such as the provision of legal advice in good faith or reporting on matters of public interest. Equally, including additional categories for “urging and inciting” offences may well run the risk of inflaming tension with religious freedoms.¹⁵¹

V CONCLUSION

The terrorism regulatory mechanisms are already a controversial legal response to a recognised criminological problem. Our paper suggests an equally controversial adaptation of those same mechanisms to the prevention of domestic and family violence. Even if our proposals above were adopted, immediately and in full, there would still be a significant gap in the protection of survivors at the hands of abusive partners, spouses, and family members. Indeed, the Chief Justice of the Family Court once said, ‘when it comes to violence, there is only so much the law can do’.¹⁵²

Yet something must be done. We have suggested that by embedding DV orders within the broader national security framework, police may finally start to take notice of the importance of enforcing DV order breaches. By reversing the onus of proof in preventative detention or control order proceedings, survivors of DV no longer need to

¹⁵⁰ Ibid ss 5.1(1), 5.4.

¹⁵¹ Mohamed Elewa Badar and Polona Florijančič, ‘Killing in the Name of Islam? Assessing the Tunisian Approach to Criminalising Takfir and Incitement to Religious Hatred against International and Regional Human Rights Instruments’ (2021) 39(4) *Nordic Journal of Human Rights* 481; Jeroen Temperman, ‘Combating Anti-LGBT Incitement While Promoting Religious Freedom’, in Jeroen Temperman (Ed) *Religious Speech, Hatred and LGBT Rights: An International Human Rights Analysis* (Brill, Nijhoff, 2021) 54-88.

¹⁵² Alison Caldwell, ‘Domestic violence support networks say Family Court should do more to protect women’, *ABC News Radio* (online, 27 May 2014) <<https://www.abc.net.au/radio/programs/pm/domestic-violence-support-networks-say-family/5482152>>.

prove their relationship with a domestically violent offender. Applications brought by police in circumstances of DV should also be viewed – again, like terrorism – as a long, largely premeditated course of ongoing conduct involving compartmentalised incidents of warning, starting small but ultimately culminating in the murder of an innocent person.

Control orders and preventative detention of offenders, and prohibitions of those who support and encourage them, should be viewed by the legal system as part of a broader strategy of resistance and resilience by survivors to escape coercion and manipulation. Rather than consider protection orders as a burden, Parliament ought to consider *all* the opportunities to tackle the coercion which forms part of a DV relationship. Utilising these levers to limit, control and ultimately enforce sanctions against those who do violence against members of their family, we believe that some greater changes in the broader behaviours (much as has been observed with the decline in fundamentalist terrorism¹⁵³) is equally possible in Australia's future

¹⁵³ Daniel Hurst, 'Asio boss says spy agency will dump terms "rightwing extremism" and "Islamic extremism"', *The Guardian* (online, 17 March 2021) <<https://www.theguardian.com/australia-news/2021/mar/17/asio-boss-says-spy-agency-will-dump-terms-rightwing-extremism-and-islamic-extremism>>.

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