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CONTENTS

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

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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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CONTENTS

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 week[1] – 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

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[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]

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[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;

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[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 inquest[27] 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 writing[30]), 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

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[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 joint 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,

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[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 order[59] or the electronic monitoring requirements[60] 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 requirement[64] (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

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[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

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[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 judges[90]) 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

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[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

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[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 speech[100] and (dependent on whether the nature of the statements being made has a religious connection[101]) 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.

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[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.

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[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 order[113]), 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 orders[119] (which one study suggests resulted in 75% of cases warranting an ouster condition not receiving such a condition[120]). 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]

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[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 Act[124] (like the way post-sentence orders being made after conviction of terrorism offences[125]). 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 retraumatises 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).

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[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

***Domestic and Family Violence Protection Act 2012* (Qld) s 100**	***Criminal Code* (Cth)**
Police officer must reasonably believe DV has been committed Police officer must consider whether it is necessary or desirable to take further action 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'	Police officer must reasonably suspect that the order would 'substantially assist' in preventing the commission of, or support or facilitation to, a terrorist act Police officer must reasonably suspect that the person has: * 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.
If those conditions are met, the police officer may apply for: * 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.	If those conditions are met, the police officer may apply for a control order.

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 jurisdiction[136] to eliminate disparity, adopt key elements of the regulatory framework, and unify the application and supervision process in respect of DV "control orders".

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[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

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[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 counterterror 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.

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[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

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[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 terrorism[153]) 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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STRIKING THE BALANCE: APPLYING A HUMAN RIGHTS APPROACH TO CONSENT FOR PEOPLE WITH DEMENTIA IN RESIDENTIAL AGED CARE

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Older people are often stigmatised as sexless individuals. This perception, and the increasing need for care as people age, means that many older people are subjected to prejudices when entering residential aged care facilities, and denied opportunities for sexual expression. This paper considers the often-forgotten human dignity of people with dementia in aged care facilities and the need to provide opportunities for sexual expression. The paper considers the broad capacity spectrum for older people with cognitive impairments and the difficulties of assessing decision-making abilities. Drawing on international human rights instruments, the paper identifies rights to intimacy and sexual expression, and argues that those rights should be recognised in reforms to aged care legislation and policy. The paper examines some of the existing barriers to intimacy and sexual expression in aged care, including staff attitudes, and, taking NSW as an example, the existing criminal legislation which provides a narrow view of consent. Recommendations are made with respect to emphasising the intrinsic benefits of intimacy and sexual expression for all people, regardless of age or cognitive impairment.

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CONTENTS

I INTRODUCTION

The final report of the *Royal Commission into Aged Care Quality and Safety* ('*ACRC*') and the Australian Law Reform Commission's Elder Abuse Report ('*ALRC Report*'), emphasise the need to treat elderly people with care and respect and ensure that aged care facilities prioritise the rights of their residents.[3] The Royal Commission recommendations reflect

[3] See generally *Royal Commission into Aged Care Quality and Safety* (Final Report, 26 February 2021) vol 1 ('*ACRC*'); Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (Final Report 131, May 2017) ('*ALRC Report*').

the international push for nations to take a human-rights approach towards aged care.[4] However, what this should look like is unclear, particularly when it comes to approaches to intimacy and sexual expression.

Whilst international human rights instruments emphasise the need for recognition of the highest levels of health and wellbeing, [5] and a universal right to dignity and autonomy,[6] there are no explicit rights to sexual intimacy and sexual expression. A range of broader human rights are at stake here. International human rights instruments emphasise not only rights to the highest levels of health and well-being, dignity and autonomy, but also privacy,[7] respect for will and preferences,[8] family and relationships;[9] as well as support for decision-making and safeguarding against abuse and inhumane, degrading treatment.[10] Recognition and facilitation of a right to sexual expression should be incorporated into best practice in the aged care sector, however, there is no clear guidance for aged care providers on these issues.

There are several practical and ethical considerations in recognising rights to sexual intimacy. Aged care facilities are designed with facilitation of medical care in mind, rather than facilitation of intimacy and sexual expression:[11] in part because aged care represents the intersection of a home and care environment for residents, and a workplace for workers.[12] Enduring desire for sexual expression can be undermined by staff attitudes, pathologising of sexual expression in cognitively impaired individuals, and the layouts

[4] See, eg, Becky Farren et al, *Ensuring a Human Rights Based Approach for People with Dementia*, WHO Doc WHO/MSD/MER/15.4. See also Law Council of Australia, 'International Convention On the Rights Of Older Persons' (Blog Post, 9 October 2020) < https://www.lawcouncil.asn.au/media/news/international-convention-on-the-rights-of-older-persons>.
[5] *International Covenant on Economic, Social and Cultural Rights* opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 12 (1) ('*ICESCR*').
[6] *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) ('*CRPD*').
[7] Art 17, *International Covenant on Civil and Political Rights* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').
[8] *CPRD* (n 4).
[9] *ICESCR* (n 3)*; Convention on the Elimination of All Forms of Discrimination Against Women* opened for signature 18 December 1979 (entered into force 3 September 1981) ('CEDAW').
[10] *CPRD* (n 4).
[11] See, eg, Laura Tarzia, Deidre Fetherstonhaugh and Michael Bauer, 'Dementia, Sexuality and Consent in Residential Aged Care Facilities' (2012) 38(10) *Journal of Medical Ethics* 609. See also Margaret Rowntree and Carole Zuffrey, 'Need Or Right: Sexual Expression and Intimacy in Aged Care' (2015) 35 *Journal of Aging Studies* 20.
[12] See generally Esther Wiskerke and Jill Manthorpe, 'Intimacy Between Care Home Residents With Dementia: Findings from a Review of the Literature' (2019) 18(1) *Dementia* 94.

and lack of privacy of many aged care facilities with residents sometimes only able to have single beds or live in shared rooms.[13] Further, dynamics of control and misunderstandings about guardianship and powers of attorney in aged care facilities, can mean that sexual interactions are not private and information about residents' sexuality is routinely shared with family members without considering this to be a violation of residents' rights to privacy.[14] In addition to confusion about how to apply a human rights approach, the law of consent may be a complicating factor.

On 1 June 2022, the *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW) came into force, reforming the law of consent in NSW, Australia's most populous state.[15] The amendments introduced to the *Crimes Act 1900* (NSW) ('*Crimes Act NSW*') included new definitions of consent in *Subdivision 1A Consent and Knowledge of Consent*. Under the new s 61HI (1) 'A person consents to a sexual activity if, at the time of the sexual activity, the person freely and voluntarily agrees to the sexual activity.'[16]

However, relevantly for older people with a cognitive impairment, s 61HJ (1) outlines the circumstances in which there is no consent:

> (1) A person does not consent to a sexual activity if—
>
> (a) the person does not say or do anything to communicate consent, or
>
> (b) the person does not have the capacity to consent to the sexual activity, …[17]

Given the amendments to the *Crimes Act*, it is necessary to consider when and in what circumstances an older person with dementia can consent to sexual activity. According to the common law, capacity is decision specific and entails the ability to know, understand, weigh the various options, and communicate a decision. However, there is a lack of NSW case law applying capacity considerations to the question of consent, especially when it comes to aged care. This paper analyses the impact of NSW affirmative consent laws on

[13] See generally Vanessa Schouten et al, 'Intimacy for Older Adults in Long-Term Care: A Need, a Right, a Privilege – or a Kind of Care?' (2021) *Journal of Medical Ethics*. See, eg, Linda Steele et al, 'Ending Confinement and Segregation: Barriers to Realising Human Rights In the Everyday Lives of People Living with Dementia in Residential Aged Care' (2020) 26 *Australian Journal of Human Rights* 308.
[14] Michael Bauer et al, 'I Always Look Under the Bed For a Man. Needs and Barriers to the Expression Of Sexuality In Residential Aged Care: The Views Of Residents With and Without Dementia' (2013) 4 (3) *Psychology and Sexuality* 296; Rowntree and Zuffrey (n 9).
[15] The long title of the Act is: An Act to amend the Crimes Act 1900 in relation to consent to certain sexual activities that, in the absence of consent, are sexual offences; to amend the Criminal Procedure Act 1986 in relation to directions to juries; and for other purposes. [Assented to 8 December 2021].
[16] *Crimes Act 1900* (NSW) s 61HI(1) ('*Crimes Act*').
[17] Ibid s 61HJ(1).

rights to intimacy for people with dementia in residential aged care. Arguments about criminal law in this paper are limited to NSW, because criminal law in Australia is state based, though aged care legislation is national.

Though not binding in Australia, to the extent that case law in the UK may inform courts in NSW, it is useful to note that case law in that jurisdiction regarding older people with dementia is largely focussed on protecting people from domestic abuse in their private homes.[18] In the UK Court of Protection, the test for capacity for sexual activity includes an evaluation of whether the person understands the sexual nature and character of the activity, the health risks, and that both parties need to consent.[19]

What is unclear is how aged care workers might assess capacity for sexual intercourse or for a wide range of acts of intimacy in practice, and how and whether they would distinguish between sexual activity and non-sexual intimate touching.[20] A number of potential capacity evaluations for use in aged care settings have been proposed, but these are not widely used,[21] and formal testing may not always encompass the challenges of relationships in aged care settings. As Currie has argued in the UK context, although consent laws may appear to add some required nuance to the assessment of capacity, it may not help:

> *in situations of long marriage or partnership where one partner loses capacity for many things due to dementia. The situation where maybe both parties still want to engage in sex but to do so may be deemed unlawful. I think this decision will make those assessments harder by adding another layer of consideration unless this element can be nuanced out, as contraception or sexually transmitted infections can*.[22]

[18] Lindsey, Jaime and Rosie Harding, 'Capabilities, Capacity, and Consent: Sexual Intimacy in the Court of Protection' (2021) 48 *Journal of Law and Society* 60, 60-83.
[19] Lindsey and Harding (n 16) 68; *A Local Authority v JB [2020] EWCA Civ 735;* see also Nick O'Neill and Carmelle Peisah, *Capacity and the Law* (Sydney University Press and the Australasian Legal Information Institute (AustLII), 3rd ed, 2021) 2.4.1.
[20] Cf Lorraine Currie, *Capacity, Consent and Sexual Relations: How Latest Case May Help Social Workers Navigate Challenges* (Blog Post, 17 June 2020) <https://www.communitycare.co.uk/2020/06/17/capacity-consent-sexual-relations-latest-case-may-help-social-workers-navigate-challenges/>.
[21] See, eg, Maggie L Syme and Debora Steele, 'Sexual Consent Capacity Assessment With Older Adults' (2016) 31 *Archives of Clinical Neuropsychology* 495. See also Rosie Harding and Jamie Lindsey, 'How Should Capacity to Consent to Sex be Defined in Law?', *University of Birmingham* (Blog Post, 6 July 2021) <https://www.birmingham.ac.uk/news/2021/how-should-capacity-to-consent-to-sex-be-defined-in-law>.
[22] Currie (n 18).

Capacity to consent to sexual activity is an elusive concept at law, which may contribute to staff attitudes around preventing sexual expression.[23] In aged care settings staff attitudes may also be influenced by the religious affiliations of aged care providers. As O'Neill and Peisah acknowledge, despite the difficulty of capacity assessment in this realm:

> *Rather than working hard to extinguish intimacy-seeking behaviours or disinhibited expression of normal needs, more focus needs to be on the human rights dimension of sexual expression for people with disability, that is, promotion of autonomy and dignity*.[24]

The concern of this article is that the recent amendments to the *Crimes Act NSW* may make this more difficult.

II RIGHTS-BASED APPROACH IN AGED CARE

As previously discussed, there are broad recommendations to apply a rights-based approach to aged care and the application of the *Aged Care Act*.[25] Whilst the Commonwealth Charter of Rights regulates Australian aged care service provision,[26] NSW lacks a Bill of Rights as a reference point, and sexuality is not explicitly stated as a human right in any of the international human rights instruments. There is currently no Convention on the rights of older persons, however the *Convention on the Rights of Persons with Disability* ('*CRPD*') speaks to the rights of older people with dementia,[27] and the ratification of the *CRPD* by the Australian government adds the weight of international

[23] For a comprehensive discussion of the legal requirements for capacity to consent to sexual relationships, see Nick O'Neill and Carmelle Peisah, *Capacity and the Law* (Sydney University Press and the Australasian Legal Information Institute (AustLII), 3rd ed, 2021) 2.4.
[24] Ibid 2.4.2.
[25] See generally *ACRC* (n 1) 76. See also Legislative Council General Purpose Standing Committee No. 2, *Elder Abuse in New South Wales* (Report, 44, June 2016) ('*NSW Elder Abuse Report'*) xiii: *Crimes Act* (n 14); *Aged Care Act 1997* (Cth) ('*Aged Care Act*'); William Mitchell, Andrew Byrnes, Anneliese Bergman and Carmelle Pesiah, 'The Human Right to Justice for Older Persons With Mental Health Conditions' (2021) 29(10) *American Journal of Geriatric Psychiatry* 1027-32.
[26] Australian Government, 'Charter of Aged Care Rights', *Australian Government Aged Care Quality and Safety Commission* (Web Page, 5 September 2022) <https://www.agedcarequality.gov.au/consumers/consumer-rights> ('Charter of Rights').
[27] *CRPD* (n 4).

law.[28] However, as Pritchard-Jones notes, the applicability of the *CRPD* to people with dementia is largely unexplored in literature.[29]

There is limited research related to the application of the law of sexual consent in aged care. Sexual rights scholarship and particularly legal scholarship has concentrated on the sexuality and intimacy related needs of younger people and those who are not cognitively impaired.[30] This is also the case when considering proposals for law reform. Little consideration was given for older people when drafting the amendments to the *Crimes Act NSW*. There is no reference to older people or people with dementia in the explanatory memoranda to the Sexual Consent Reforms Bill,[31] and relatively few submissions with respect to the consultation paper and proposals for consent in relation to sexual offences reference individuals with a disability.[32] Reference to individuals with dementia or older persons are generally absent.

A *Resident, Staff, and Family Attitudes*

Research about the need for intimacy among the aged care population is a recent phenomenon.[33] It focuses broadly on barriers to sexual expression,[34] whether sexual

[28] Ibid. See generally Margaret Campbell, 'Disabilities and Sexual Expression: A Review Of the literature' (2017) 11(9) *Sociology Compass* 1; Kathleen Sitter et al, 'Supporting Positive Sexual Health For Persons with Developmental Disabilities: Stories About the Right To Love' (2019) 47 *British Journal of Learning Disabilities* 255.

[29] Laura Pritchard-Jones, 'Exploring the Potential and the Pitfalls of the United Nations Convention on the Rights of Persons with Disabilities and General Comment No. 1 for People with Dementia' (2019) 66 *International Journal of Law & Psychiatry* 101467.

[30] See generally Pia Kontos et al, 'Citizenship, Human Rights and Dementia: Towards a New Embodied Relational Ethic of Sexuality' (2016) 15(3) *Dementia* 315. See also Emily Setty, 'A Rights-Based Approach to Youth Sexting: Challenging Risk, Shame, And The Denial of Rights to Bodily and Sexual Expression Within Youth Digital Sexual Culture' (2019) 1 *International Journal of Bullying Prevention* 298.

[31] Explanatory Memorandum, Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021 (NSW).

[32] See, eg, Michael Coutts-Trotter, Submission No 3 to New South Wales Law Reform Commission, *Consultation Paper 21 Consent in Relation to Sexual Offences* ; Sex Workers Outreach Project, Submission 15 to New South Wales Law Reform Commission, *Consultation Paper 21 Consent in Relation to Sexual Offences;* Andrew Dyer, Submission Number 2 to New South Wales Law Reform Commission, *Consultation Paper 21 Consent in Relation to Sexual Offences* ; Tim Leach, Submission 73 to New South Wales Law Reform Commission , *Draft Proposals on Consent in Relation to Sexual Offences* ; New South Wales Bar Association, Submission 47 to New South Wales Law Reform Commission, *Draft Proposals on Consent in Relation to Sexual Offences* ; Janet Loughman, Women's Legal Service NSW, Submission 70 to New South Wales Law Reform Commission , *Draft Proposals on Consent in Relation to Sexual Offences.*

[33] See, eg, Tarzia, Fetherstonhaugh and Bauer (n 9). See also Paul Simpson et al, 'Old(er) Care Home Residents and Sexual/Intimate Citizenship' (2017) 37 *Ageing and Society* 243.

[34] See Bauer et al, 'I Always Look Under the Bed For a Man' (n 12). See also Steele et al (n 11).

expression is conceived of as a need or a right,[35] and views of workers, families,[36] communities and residents about sexual intimacy.[37]

There are two unique empirical studies conducted in Australia and New Zealand that consider the views of family, carers and residents with respect to intimacy and sexual expression in aged care.[38] Bauer et al. sought to answer questions regarding the sexual needs of residents and identify barriers to sexual expression.[39] Views of residents were distilled into four categories: 'It still matters', 'Reminiscence and Resignation', 'It's personal', and 'It's an Unconducive Environment.'[40] Residents felt that to facilitate sexual expression care staff needed to appreciate residents' sexual needs and feel comfortable in responding.[41]

Schouten et al. conducted a seminal study in New Zealand in 2021 investigating staff, resident, and family member attitudes towards sex and intimacy in older adults.[42] Their study focussed on whether sexuality was conceptualised as a right, a privilege or a component of wellbeing.[43] 433 staff surveys were taken from 35 facilities across New Zealand with interviews conducted with 75 staff, residents and family members.[44] 64.9% of participants agreed that intimate relationships with pleasurable touch are a 'lifelong human right'.[45] Whilst recognising rights to sexuality broadly, participants were divided on the role of residential aged care facilities in facilitating those rights. Both male and female residents expressed a desire or need for intimate touch, but also expressed some frustration and reported not feeling supported in getting needs met.[46] Many workers who took part in the surveys recognised intimate needs, and asserted that they try to facilitate

[35] See, eg, Rowntree and Zuffrey (n 9).
[36] See generally Michael Gordon, 'The Difficulty of Defining Consent in Older Adults With Dementia', Annals of Long-Term Care (Web Page) < https://www.hmpgloballearningnetwork.com/site/altc/articles/difficulty-defining-consent-older-adults-dementia >. See also Tarzia, Fetherstonhaugh and Bauer (n 9).
[37] See, eg, Bauer et al, 'I Always Look Under the Bed For a Man' (n 12). See also Schouten et al (n 11).
[38] See Schouten et al (n 11). See also Bauer et al, 'I Always Look Under the Bed For a Man' (n 12).
[39] Bauer et al, 'I Always Look Under the Bed For a Man' (n 12) 298.
[40] Ibid 299.
[41] See generally Bauer et al, 'I Always Look Under the Bed For a Man' (n 12) .
[42] Schouten et al (n 11).
[43] Ibid.
[44] Ibid 1.
[45] Ibid 2.
[46] Ibid 3, 4.

them.[47] Whilst some workers may recognise and attempt to facilitate intimate needs, where there is no impetus in policy and legislation, those rights may not be prioritised.

The intersection of human rights and sexuality has been a much greater priority in the disability sector than the aged care sector.[48] In Australia, different regimes of funding, services and assistance apply to people with a disability aged under 65 who are eligible for support through the National Disability Insurance Scheme ('*NDIS*'),[49] and those aged over 65 who are supported by aged care services. NDIS funding may be used by individual recipients to help meet their needs for sexual intimacy in specific cases,[50] however the Court made clear in *WRMF v National Disability Insurance Agency [2019] AATA 1771* that whether NDIS could be used to fund the services of a sex worker has not yet been the subject of judicial determination. A full discussion of the realisation of rights under the NDIS is beyond the scope of this paper.

In the aged care sector, the right to intimacy has been defined as, and tied to, dignity, autonomy, and freedom of opinion, and though sometimes considered as a basic human right,[51] facilitating intimacy can be overshadowed by concerns about the potential for abuse. This is particularly the case for women, who are often seen as vulnerable to abuse

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[47] Ibid.

[48] See, eg, Sonali Shah, '"Disabled People are Sexual Citizens Too": Supporting Sexual Identity, Well-being, and Safety For Disabled Young People' (2017) 2(46) *Frontiers in Education* 1. See also Jan Chrastina and Hana Vecerova, 'Supporting Sexuality in Adults with Intellectual Disability -- A Short Review' (2020) 38 *Sexuality and Disability* 285; Campbell (n 26) ; Renu Addlakha, Janet Price and Shirin Heidari, 'Disability and Sexuality: Claiming Sexual and Reproductive Rights' (2017) 25(50) *Reproductive Health Matters* 4; Anne Kramers-Olen, 'Sexuality, Intellectual Disability, and Human Rights Legislation' (2016) 46(4) *South African Journal of Psychology* 504; Sitter et al (n 26); Disabled People's Organisations Australia, *Joint Position Statement: A Call For a Rights-Based Framework For Sexuality in the NDIS* (Web Page, 28 August 2019) < https://dpoa.org.au/joint-position-statement-a-call-for-a-rights-based-framework-for-sexuality-in-the-ndis/>.

[49] National Disability Insurance Scheme, 'Am I Eligible', <https://www.ndis.gov.au/applying-access-ndis/am-i-eligible>.

[50] See, eg, *WRMF v National Disability Insurance Agency* [2019] AATA 1771. See also *National Disability Insurance Agency v WRMF* (2020) 276 FCR 415.

[51] Tarzia, Fetherstonhaugh and Bauer (n 9); Carmelle Peisah et al, 'Sexuality and the Human Rights of Persons with Dementia' (2021) 29(10) *The American Journal of Geriatric Psychiatry* 102; World Association For Sexual Health, "Declaration of Sexual Rights"(26 Aug 1999) <https://worldsexualhealth.net/wp-content/uploads/2013/08/declaration-of-sexual-rights.pdf>. Alice Miller, Eszter Kismodi, Jane Cottingham, and Sofia Gruskin, 'Sexual Rights as Human Rights: a Guide to Authoritative Sources and Principles for Applying Human Rights to Sexuality and Sexual Health' (2015) 23(46) *Reproductive Health Matters* 16-30; World Health Organization, "Defining Sexual Health" (2006) < https://www.who.int/teams/sexual-and-reproductive-health-and-research/key-areas-of-work/sexual-health/defining-sexual-health>.

and in need of protection.[52] Because aged care providers can be focussed on a medical model of care delivery and the sector is alert to recent criticisms of abuse prevalence,[53] there is a danger that the pendulum will swing too far away from the right to experience sexual intimacy and towards prohibitions on touching and intimacy for older aged care residents with dementia in deeming them without capacity to consent. As the affirmative consent laws are relatively new, there is little information or case law on the application of those laws for people with a cognitive impairment, especially older people. This paper addresses that gap and considers the intersection of rights to intimacy and the *Crimes Act NSW* amendments in the aged care context, arguing that a right to intimacy and sexual expression should be recognised in any changes to aged care legislation.

B *Intimacy and Sexual Expression*

In promoting the need for recognition of rights to intimacy and sexual expression, it is important to have a clear understanding of what is meant by those terms. Sexual expression by residents in residential aged care facilities is varied,[54] and can be seen as lying on a spectrum with everything from daydreaming, touching, hugging, being able to share a bed with another person, kissing and masturbation on one end, to sexual intercourse at the other end.[55] It is necessary to take a broad approach to sexual expression, as someone with dementia may be able to consent to some activities on the spectrum but not to others.

C *The Aged Care Context*

Attending to sexual needs is often made more difficult when people enter care, as prior relationships change,[56] and the views of aged care staff and family members often dictate approaches to intimacy.[57] Families play a large role in decisions and may be consulted

[52] See, eg, Australian Research Centre in Sex, Health and Society, *Norma's Project* (Research Study, June 2014).
[53] Ibid.
[54] See, eg, Lieslot Mahieu and Chris Gastmans, 'Older Residents' Perspectives On Aged Sexuality in Institutionalised Elderly Care: A Systematic Literature Review' (2015) 52(12) *International Journal of Nursing Studies* 1891.
[55] Michael L Perlin and Alison Lynch, 'Love is Just a Four Letter Word: Sexuality, International Human Rights, and Therapeutic Jurisprudence' (2015) 1 *The Canadian Journal of Comparative and Contemporary Law* 9; Mahieu and Gastmans (n 52).
[56] 'Carer Tony Opens Up About Dementia-Friendly, Travel, Sex and Intimacy', *Dementia Australia* (Blog Post, 30 September 2015) <https://www.dementia.org.au/about-us/news-and-stories/stories/carer-tony-opens-about-dementia-friendly-travel-sex-and-intimacy >.
[57] See generally Stephanie Lindsay et al, 'Collaborative Model For End-Stage Dementia Care' (2010) 13(7) *Mental Health Practice Journal* 18; Tarzia, Fetherstonhaugh and Bauer (n 9).

regarding their family members' intimate activities or sexual partners. As Lipinka argues, 'adult children find it especially challenging and emotionally complex to think about their parent or relative as a sexual being with rights and needs as well as care needs.'[58] Staff may be encouraged to consult family members due to a fear of complaints, or because of a mistaken belief about the powers of an enduring guardian. The aged care environment is also seen by many as unconducive to sexual expression. Absence of large beds, lack of privacy and perceptions that staff could just knock and walk in have been cited by people with dementia as barriers to sexual expression.[59]

On My Aged Care, a website designed to be a one-stop shop for aged care information in Australia, intimacy and sexuality do not appear to be a priority for policies in the aged care sector.[60] Sexual expression is not referenced, and sexuality is only referenced in relation to minority rights, with no discussion of broad rights to intimacy.[61] The challenges of managing sexual interests and needs of people with dementia are further complicated by differing understandings about capacity, and a lack of clarity about what is required for a person with dementia to consent to sexual activities.

D *Capacity*

Discussion about a person's capacity to consent to sexual intimacy is inextricably linked to any discussion of sexual expression in older age. Capacity is decision-specific however dementia diagnoses are often conflated with a loss of consent entirely,[62] contributing to the neglect of discussion around rights to intimacy for people in residential aged care facilities. This is made more difficult as people with dementia may not always be able to verbalise their choices, making determining consent, refusal or decisional capacity less straightforward.[63] Whilst someone with dementia may not have capacity to consent to an operation, or sign a transactional contract, some have argued that the decision to engage

[58] Danuta Lipinska, Sally Knocker and Caroline Baker, *Dementia, Sex and Wellbeing: A Person-centred Guide for People with Dementia, Their Partners, Caregivers and Professionals* (Jessica Kingly Publishers, 2018) 20.
[59] Bauer et al, 'I Always Look Under the Bed For a Man' (n 12).
[60] Australian Government, 'Sexuality', *My Aged Care* (Web Page, undated) <https://www.myagedcare.gov.au/search?keys=sexuality&sort_by=score+desc>.
[61] Ibid.
[62] Migita D'Cruz, Chittaranjan Andrade and T S Sathyanarayana Rao, 'The Expression of Intimacy and Sexuality in Persons with Dementia' (2020) 2(3) Journal of Psychosexual Health 215.
[63] Tarzia, Fetherstonhaugh and Bauer (n 9).

in sex is simpler, and the test for threshold capacity should be lower.[64] Consent is decision-specific, so a person might not be able to consent to sexual intercourse, but may be able to consent to other activities on that spectrum. Consistent with Australia's obligations under article 12 of the *CRPD*, people should be provided with support to exercise their capacity.[65] However, a lack of training and guidelines on supported decision making in the sector means that rights are not always supported.[66]

It is important not to set the bar too high, so that voluntary sexual expression can be permitted and encouraged.[67] There have been a number of proposals for approaches to capacity assessments for the decision to consent to sex, however none broadly adopted.[68] Hillman's approach includes an interdisciplinary assessment of cognitive functioning, knowledge, reasoning and voluntariness,[69] and a similar approach is discussed by other academics.[70] The use of an interdisciplinary team means that information regarding underlying considerations including medical, social, familial, financial, and religious issues that contribute to a resident's sexual behaviour can be understood.[71] Ultimately, whilst determining capacity may be difficult, these proposed models demonstrate that assessment is possible with the right tools, attitude, and training.

[64] James P Richardson and Ann Lazur, 'Sexuality in the Nursing Home Patient' (1995) 51(1) *American Family Physician* 121.
[65] *CRPD* (n 4) art 12.
[66] See, eg, Older Persons Advocacy Network, 'Supported Decision-Making Must Be Embedded Across Aged Care' (Position Statement, November 2022). See also Craig Sinclair, Sue Field and Meredith Blake, *Supported decision-making in aged care: A policy development guideline for aged care providers in Australia* (Sydney: Cognitive Decline Partnership Centre, 2nd Edition, 2018).
[67] Alisa Grigorovich and Pia Kontos, 'Advancing an Ethic of Embodied Relational Sexuality to Guide Decision-Making in Dementia Care' (2018) 58(2) *Gerontologist* 219.
[68] See, eg, Syme and Steele (n 19). See also Harding and Lindsey (n 16).
[69] Jennifer Hillman, 'Sexual Consent Capacity: Ethical Issues and Challenges in Long-Term Care' (2017) 40(1) *Clinical Gerontologist* 43.
[70] Shilpa Srinivasan, et al, 'Sexuality and the Older Adul'; (2019) 21(10) *Current Psychiatry Reports* 97.
[71] Hillman (n 67).

III LEGAL FRAMEWORK

A *International Human Rights Instruments*

There is not yet a Convention on the Rights of Older Persons,[72] despite the establishment in 2011 of The Open-Ended Working Group on Ageing.[73] Recently there have been calls from the Secretary-General to accelerate efforts to create proposals for a Convention developing and adopting a coherent, comprehensive, and integrated human rights framework for older persons whilst integrating concerns into existing frameworks.[74]

Article 12 of the *ICESCR* details the right of everyone to enjoyment of the highest attainable standard of physical and mental health.[75] Though not expressly stated in any existing instruments, a right to intimacy and sexual expression can be derived from this right, as medical ethicist Jacob Appel has done in relation to sex rights for the disabled.[76] Experience of intimacy for people with dementia is demonstrated to improve physical and mental health,[77] and whilst safeguards need to be in place to protect people from harm, this does not detract from their need for intimacy and the benefits derived from sexual expression.

A core premise of this paper is that older people have a fundamental need for intimacy and a right to express that need. A rights-based approach to aged care has been defined as one in which human rights norms and principles are integrated into planning and provision of aged care services.[78] Therefore, human rights standards and principles need to be embedded in all aspects of service planning, policy, and practice. In its submission

[72] See generally 12th Open-Ended Working Group on Ageing, 11 to 14 April 2022', *United Nations* (Blog Post, 8 April 2022) <https://www.un.org/development/desa/dspd/2022/04/oewg12-ageing/#:~:text=The%2012th%20Session%20of,at%20the%20General%20Assembly%20Hall>. See also INPEA et al, 'Strengthening Older People's Rights: Towards a UN Convention', ID9382 (June, 2010).
[73] *Follow Up To The Second World Assembly on Ageing,* GA Res 65/182, UN Doc A/RES/65/182 (21 December 2010, adopted 4 February 2011); *Towards a Comprehensive and Integral International Legal Instrument to Promote and Protect the Rights and Dignity of Older Persons,* GA Res 67/139, UN Doc A/RES/67/139 (20 December 2012, adopted 13 February 2013).
[74] See United Nations, 'Message From Michelle Bachelet, United Nations High Commissioner for Human Rights', *11th Session of The Open - Ended Working Group on Ageing* (Web Page, 30 March 2021) <https://www.ohchr.org/en/2021/03/11th-session-open-ended-working-group-ageing>.
[75] See, eg, *Report of the United Nations High Commissioner for Human Rights* , UN Doc A/HRC/49/70 (28 January 2022).
[76] Jacob Appel, 'Sex Rights for the Disabled?' (2010) 36(3) *Journal of Medical Ethics* 152.
[77] See generally Grigorovich and Kontos (n 65).
[78] See Australian Human Rights Commission, Submission to the Royal Commission into Aged Care Quality and Safety, *A Human Rights Perspective on Aged Care* (18 July 2019).

to the *ACRC*, the Human Rights Commission recommended that international human rights instruments relevant to older persons be considered and that the Royal Commission ensure that recommendations align with Australia's obligations under these instruments.[79] While the Royal Commission emphasised the need for a rights-based approach to a revised *Aged Care Act*,[80] it is difficult to find concrete examples of how rights to sexual expression might be codified.

B *National Legislation and Aged Care Guidelines*

All providers of Aged Care are required to comply with the Aged Care Quality Standards,[81] as assessed by the Aged Care Quality and Safety Commission.[82] Providers commit to upholding these standards for residents through the *Charter of Aged Care Rights*.[83]

The *Charter of Aged Care Rights*, established in 2019 includes: rights 'to be treated with dignity and respect, and to live without abuse and neglect'; to have control over and make choices about care, personal and social life, including where those choices involve personal risk; and the right to privacy.[84] However, there continues to be concerns over the translation of those rights into practice.[85] As it stands today, we lack legislation and policies regarding rights to intimacy for people with dementia, with flow on effects for attitudes towards the importance placed on creating opportunities for intimacy in residential aged care settings.

A lack of guidelines about how aged care providers should create opportunities for intimacy is further complicated by the amendments to the under discussion. Under reforms to the *Crimes Act NSW*, staff or families might seek to prevent sexual relationships where one or both parties have a cognitive impairment.[86] While aged care workers are unlikely to prevent intimacy between married couples irrespective of a diagnosis of dementia, decisions about intimacy should not rely on people conforming to particular

[79] Ibid.
[80] *ACRC* (n 1) 79.
[81] *Aged Care Act* (n 23) s 54.2.
[82] 'Quality Standards', *Australian Government Aged Care Quality and Safety Commission* (Web Page, 29 November 2022) <https://www.agedcarequality.gov.au/providers/standards>.
[83] Charter of Rights (n 24).
[84] Ibid.
[85] Australian Human Rights Commission (n 76).
[86] See for instance the US case of Henry Rayhones, who was charged with sexually assaulting his wife in a nursing home: Sarah Kaplan, "Former Iowa Legislator Henry Rayhons, 78, Found Not Guilty of Sexually Abusing Wife with Alzheimer's" (April 23, 2015) Washington Post.

relationship norms. Aged Care providers need to provide clear guidance for staff and families to protect resident's sexual rights.

One helpful example can be found in the recently released, "Ready to Listen Charter of Sexual Rights and Responsibilities".[87] This resource arose from the important work of the Ready to Listen project of the Older Person's Advocacy Network. Being "Ready to Listen" in this context:

> Refers to aged care service providers knowing the risk of sexual assault, understanding indicators, believing those who disclose, acknowledging impacts, providing support and taking proactive steps to protect residents.'[88]

The "#Ready to Listen Charter" of Residents' Rights and Responsibilities spells out 7 sexual rights and two related responsibilities for aged care residents:

1. the right to engage in sexual activity;
2. the right to sexual consent;
3. the right to continue existing sexual relationships;
4. the right to form new sexual relationships;
5. the right to change the way you express your sexuality;
6. the right to sexual privacy;[89]

These positive rights are balanced with:

7. the right to be free from sexual assault;

and two responsibilities:

8. the responsibility to respect other residents;
9. the responsibility to respect staff.[90]

Whilst the "#ReadyToListen Charter" is a good starting point, there is no obligation for providers to adopt the Charter. Furthermore, despite being foregrounded with positive

[87] Catherine Barrett, Kate Swaffer and Yumi Lee, *The #ReadyToListen Dementia MAP. Guidelines for preventing sexual assault of people living with dementia in residential aged care* (2022) Older Person's Advocacy Network.
[88] Ibid 4.
[89] Ibid 7.
[90] Ibid 7-9.

rights, the Charter is largely promoted as an abuse prevention tool, rather than promoting rights to sexual expression.[91]

C *NSW Consent Laws*

As discussed, aged care staff may be concerned that sexual contact or intimacy involving residents with a cognitive impairment is unlawful. The *Crimes Act NSW* details what is required for someone to consent to sexual intercourse at s 61HI.[92]

> 1. Consent generally
> (a) A person "consents" to a sexual activity if, at the time of the sexual activity, the person freely and voluntarily agrees to the sexual activity. [93]

This might signal that any older person with dementia can voluntarily agree to sexual activity, given that the rights of all people to choose to participate in sexual activity are recognised in s 61HF.[94] However, s 61HJ makes it clear that there is no consent where:

> (b) the person does not have the capacity to consent to the sexual activity.[95]

The Act is silent around the requirements for "capacity to consent".[96] Submissions to the NSW Law Reform Commission highlighted this deficiency and the potential problems it creates.[97] Decision-making capacity at law is not well understood, and in aged care facilities, where many residents have appointed enduring powers of attorney or enduring guardians, staff may not distinguish the capacity for different legal decisions that the law requires. Worse still, staff may believe that someone with an enduring guardian is incapable of making "any" decisions, rather than applying the legal situational test for decision-making.

The definition and case law regarding capacity to consent to sexual activity provide little guidance on how these laws might be applied to people with dementia. *R v Morgan*[98] ('*Morgan* case'), the leading Australian case from the 1970s involves a 19-year-old girl

[91] Australian Government, Aged Care Quality Commission, "*World Elder Abuse Awareness Day*", (15 June 2022), https://www.agedcarequality.gov.au/news/media/world-elder-abuse-awareness-day.
[92] *Crimes Act* (n 14) s 61HI.
[93] Ibid s 61 HI sub-div 1A.
[94] Ibid s 61HF.
[95] Ibid s 61 HJ.
[96] Ibid s 61HJ (1)(b).
[97] Cf The Law Society of New South Wales Young Lawyers, Submission to the NSW Law Reform Commission *Draft Proposals of the NSW Law Reform Commission's Inquiry into Consent in relation to Sexual Offences* (29 November 2019) 7.
[98] [1970] VR 337.

with a developmental disability.[99] The Court held that the required capacity meant having sufficient knowledge or understanding to comprehend the nature of the sexual act and to appreciate the difference between that act and an act of a different character, such as a medical examination.[100] Very different considerations about the circumstances of situational consent may arise where they involve a person with dementia, and that person has fluctuating capacity and may be able to consent to sexual activity at some times but not others.[101] Similarly, different questions arise about decisions to engage in sexual acts or intimacy with a long-term spouse, as compared to the facts in the *Morgan* case which involved comparative strangers[102]. For residential aged care facilities, where there is an established risk averse culture and tendency to revert to family wishes, the new consent laws may legitimise the default practice of restricting sexual expression of people with dementia based on the belief that it is not consensual and thus harmful and illegal. As Syme and Steele write, the assessment of sexual consent capacity is 'one of the least-developed capacity domains in terms of assessment and diagnostic strategies.'[103]

IV RIGHTS TO INTIMACY IN THE DISABILITY SECTOR

The need to balance protection and sexual autonomy has a richer history of discussion and debate in the disability sector as compared to aged care. Disability advocacy networks have argued that protection from abuse should not prevent realisation of rights to intimacy.[104] Since the early 1980s and 1990s, scholars have pioneered a nuanced understanding of the sexual lives of people with disabilities,[105] and it is widely recognised in academic literature that people with intellectual disabilities have the same needs for intimacy as adults without a cognitive impairment.[106] In Australia, there has been progress for the disability sector in facilitating rights to intimacy. For example, the

[99] *R v Morgan* [1970] VR 337 ('*Morgan*').
[100] Ibid.
[101] New South Wales Law Reform Commission, *Consent in relation to sexual offences* (Report No 148, September 2020)[6.60].
[102] *Morgan* (n 98).
[103] Syme and Steele (n 19) 496.
[104] Shah (n 46); Addlakha, Price and Heidari (n 46).
[105] See generally Kramers-Olen (n 46).
[106] Elizabeth Rushbrooke, Craig Murray and Samantha Townsend, 'The Experiences of Intimate Relationships by People with Intellectual Disabilities: A Qualitative Study' (2014) 27(6) *Journal of Applied Research in Intellectual Disabilities* 531; Remigiusz J Kijak, 'A Desire for Love: Considerations on Sexuality and Sexual Education of People With Intellectual Disability in Poland' (2010) 29(1) *Sexuality and Disability* 65.

organisation 'Touching Base' was created to connect people with disabilities to sex workers.[107] There is also a push for greater access to sexual education for people with disabilities.[108]

The UN Standard Rules on the Equalisation of Persons with Disabilities provide that people with disabilities have a right to 'experience sexuality, have sexual relationships' and have 'information in accessible form on the sexual functioning of their bodies'.[109] The Courts in the United Kingdom have addressed these rights in several cases before the Court of Protection and on appeal, including for people with dementia. In the 2019 case *London Borough of Tower Hamlets v NB* [2019] EWCOP 17, Hayden J, neatly summarising the dilemma in these cases opined:

> *The omnipresent danger in the Court of Protection is that of emphasising the obligation to protect the incapacious, whilst losing sight of the fundamental principle that the promotion of autonomous decision making is itself a facet of protection. In this sphere i.e., capacity to consent to sexual relations, this presents as a tension between the potential for exploitation of the vulnerable on the one hand and P's right to a sexual life on the other.*

The *CRPD* makes reference to rights that relate to sexual expression: recognising the importance of persons with disabilities' 'individual autonomy and independence, including the freedom to make their own choices;'[110] respect for inherent dignity; and independence of persons.[111] Obligations flowing from those rights include taking measures to modify existing legislation or regulations that discriminate against persons with disabilities,[112] and promoting the training of professionals and staff working with persons with disabilities in the rights recognised in the Convention.[113] Article 25 of the *CRPD* requires the provision of healthcare 'in the area of sexual and reproductive health' and 'the promulgation of ethical standards for public and private health care.'[114]

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[107] 'Joint Position Statement: A Call For A Rights-Based Framework For Sexuality in NDIS', *Disabled People's Organisations Australia* (Web Page, 28 August 2019) <https://dpoa.org.au/joint-position-statement-a-call-for-a-rights-based-framework-for-sexuality-in-the-ndis/>.
[108] See generally Kramers-Olen (n 46).
[109] *UN Standard Rules On The Equalisation of Persons With Disabilities,* GA Res 48/96, UN Doc A/RES/48/96 (4 March 1994) rule 9.2.
[110] Ibid Preamble para 14.
[111] Ibid Preamble paras 1, 7, 14.
[112] Ibid art 4(b).
[113] Ibid art 4(i).
[114] *CRPD* (n 4) art 25.

In Australia, the separation of the disability and aged care sectors may explain in part why rights under the *CRPD* that apply to people with a cognitive impairment, may not be seen as applicable to older people with dementia. Human rights training for staff in the aged care sector working with older people with a cognitive impairment is an imperative. As the Australian Human Rights Commission submission to the Royal Commission into Aged Care opined, it is also vital that attention is given to the most marginal groups and that the needs of the most marginal groups are protected, irrespective of disability, sexual orientation or gender identity.[115]

V FACILITATING RIGHTS

Australian aged care providers might draw on approaches to facilitating intimacy in other jurisdictions. The Dutch Association for Residential and Home Care providers has petitioned Parliament asking that the subject of intimacy in care homes be given greater attention and that it should be incorporated into healthcare professionals' training courses.[116] The incorporation of intimacy and sexual expression as part of training courses for healthcare professionals may influence their attitudes towards intimacy in a residential aged care setting, increasing opportunities for healthy intimate relationships. In Denmark and Switzerland, sexual surrogacy services exist which support the facilitation of shared sexual expression.[117] One example is when trained sex therapists that provide sexual advice are also allowed to do 'limited touching' of clients.[118] In the Australian context, Bauer et al. have developed a 'sexuality assessment tool (SexAT) for residential aged care facilities' which they describe as allowing service providers to identify 'where enhancements to the environment, policies, procedures and practices, information and education/training are required' and to monitor the implementation of initiatives over time.[119] In a similar vein, the Mosaic app has been developed to assist aged care teams to understand LGBTI residents and to plan and deliver inclusive care.[120] However it is important to note that these approaches address social aspects of the right

[115] Australian Human Rights Commission, (n 76) 14.
[116] See generally Wiskerke and Manthorpe (n 10).
[117] Grigorovich et al (n 65).
[118] Ibid.
[119] Bauer et al, 'Supporting Residents' Expression of Sexuality: the Initial Construction of a Sexuality Assessment Tool for Residential Aged Care Facilities' (2014) 14(82) *BMC Geriatrics*.
[120] palliAGED, 'Intimacy and Sexuality: What We Know', https://www.palliaged.com.au/tabid/5734/Default.aspx

to intimacy, but not the legal aspects, including the intersection with the new consent laws discussed in this paper.

VI ADVANCE DIRECTIVES

Another possible approach to ascertaining consent to sexual intimacy for people with dementia is the proposal for Advance Directives on Intimacy, also known as Sexual Advance Directives.[121] Sorinmade, Ruck, Keene and Peisah argue that such directives may respect precedent autonomy, allowing people to outline the relationships they wish to consent to if they lose capacity at a future time,[122] while Boni-Saenz suggests that advance directives can also protect sexual partners from prosecution for sexual assault should their partner lose the ability to consent to sex in the future.[123] This would be of particular relevance in light of the consent laws in NSW. Astle et al. examined public opinions toward sexual advance directives and found that there was general support for them, but highlighted that determining how such directives would be upheld in aged care facilities and within the legal system is an essential step to any future implementation.[124] Joy and Weiss raise particular concerns about the application of advance directives for people with hypersexual behaviours related to frontotemporal dementia behavioural variant, arguing that advance directives could be used to justify exploitative behaviours.[125]

VII RECOMMENDATIONS

As intimacy and sexual expression enriches the lives of people with dementia, opportunities for sexual expression should be prioritised and facilitated. In order to do so, it is necessary to address the attitudes of staff and families. The *Charter of Rights* referred to in the *Aged Care Act* could be amended to include rights to intimacy and sexual expression. The introduction of these rights may alleviate concerns from care providers and their staff about duties of care and intrusive family views. It may also facilitate

[121] Boni-Saenz, Alexander, 'Sexual Advance Directives' (2017) 1(68) *Alabama Law Review* 1.
[122] Oluqatoyin Sorinmade, Alex Ruck Keene, and Carmelle Peisah, 'Dementia, Sexuality , and the Law: The Case for Advance Decisions on Intimacy' (2021) 61 (7) *The Gerontologist* 1001, 1001.
[123] Boni-Saenz, (n 120).
[124] Shelby Astle et al, 'Assessing Public Opinions of Sexual Advance Directives Among Older Adults With Dementia' (2022) 41 (11) *Applied Journal of Gerontology*. See also Michelle Joy and Kenneth Weiss, 'Consent for Intimacy Among Persons With Neurocognitive Impairment' (2018) 46 *Journal American Academy Psychiatry Law*, 286-94.
[125] Michelle Joy and Kenneth Weiss, 'Consent for Intimacy Among Persons With Neurocognitive Impairment' (2018) 46 *Journal American Academy Psychiatry Law* 286-94.

recognition of the broad spectrum of capacity to consent across different sexual and intimate activities. Further research should be conducted on the ways that sexual expression can be facilitated in residential aged care facilities, and the kinds of sexual activity that someone with dementia might be able to consent to. Consideration should be given to the introduction of advance directives, and their potential impact on consent laws should be examined in detail. Widespread recognition of the importance of intimacy and sexual expression for people is required across all age groups, irrespective of cognitive impairment.

To address existing barriers in aged care, organisational practices such as open-door policies should be amended so as to facilitate sexual expression. Further, prohibitions against use of sexual materials and the lack of double beds in facilities are areas that could be changed to improve opportunities for sexual expression. Opportunities for facilitation of sexual expression are very broad.[126] Facilitation of sexual expression in aged care facilities might include both autonomous (e.g. masturbation) and shared sexual expression.[127] Facilitated sexual expression is varied and might include procurement of erotic aids (e.g. vibrators, pornography), creating more environments for socialising for people with dementia or allowing sex workers to enter facilities. In considering what opportunities there are for facilitating sexual expression, NSW is a unique jurisdiction in that it is one of the few where sex work is legal.

To improve opportunities for sexual expression in residential aged care, training programs should be provided to teach staff how they might contribute to the sexual expression of residents. Training may have a dual purpose in changing attitudes of staff towards the prioritisation of opportunities for sexual expression and discussion of ways to implement opportunities for that sexual expression. A combination of policy, legislation, and training has the potential to make the balancing act clearer, so that the balance is not skewed towards protection from harm. Operational changes to aged care facilities are also required to address existing barriers to sexual expression, including addressing resident concerns that their privacy is not protected. Questions about desire

[126] See generally Mahieu and Gastmans (n 52); Hillman (n 67); Tarzia, Fetherstonhaugh and Bauer (n 9); Rowntree and Zuffrey (n 9).
[127] See, eg, Perlin and Lynch (n 53).

for intimacy could be included in the 'Residents Experience' rating which makes up part of the recently introduced star ratings for aged care facilities.[128]

This paper does not argue that sexual intimacy should be valued above protection against risk, but rather, that the balance should not be unnecessarily skewed towards protection. To bring about a rights-based approach which recognises the importance of intimacy, funding and resources are required. Staff to resident ratios and layouts of facilities, which are currently designed to facilitate quick care, would need to change to be conducive to allow for intimacy. The source of that funding and how it is utilised is beyond the scope of this paper.

VIII CONCLUSION

Older aged care residents have rights to intimacy and sexual expression which lie on a spectrum, ranging from hand holding and hugging to sexual intercourse. These rights need to be further articulated and included in Aged Care legislation and Charters of Rights. As demonstrated in this paper, criminal laws may represent a barrier to recognition of rights to consent to intimacy in aged care and need to be amended to help realise those rights for cognitively impaired individuals.

There has been progress towards recognition of rights to intimacy in both the disability sector and in aged care in other jurisdictions which can inform an approach to rights-based care in Australia. Whilst there are several ethical and legal considerations at play, safeguarding from harm can be balanced with providing opportunities for sexual expression. In order to enact a rights-based approach to care, amendments to policy and legislation governing aged care facilities are needed to enable prioritisation of these rights and to challenge the views of workers, residents' family members and people broadly about rights to intimacy and sexual expression.

[128] 'How are Star Ratings Calculated?', *My Aged Care* (Web Page, undated)<https://www.myagedcare.gov.au/quality/how-are-star-ratings-calculated>.

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DEFENDING THE RIGHT TO PROTEST

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Amid rising global protests, the right to protest is being increasingly objected to by business interests and curtailed by governments and legislatures. This article contends that confronted by this political reaction, the right to protest can only be defended through mass struggles rather than legal challenges – although these struggles may well include related legal battles. As history suggests, while legal cases may be important at times, ultimately their outcome will be determined by the sway and swell of political social and class forces

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CONTENTS

I INTRODUCTION

Many of the official contemporary assaults on the right to protest are made under the banner of protecting the public and business operations from what is regarded as disruption or obstruction. Often such legislative and enforcement measures have been introduced in response to tactics adopted by climate change activists. This article points out, however, that these measures are capable of being applied far more broadly to protests of all kinds that are seen as threats to the existing economic and political order and can therefore only be understood in the context of rising social discontent.

This article's underpinning argument is that the right to protest, as it has developed historically, is an essential social, civil and political right, bound up with other basic democratic rights, notably freedom of speech and the rights to associate and organise. It is not purely an individual right, but a societal one that has historically been fought for through mass action. The right to protest is inherently related to struggles, past and present, to build collective, class or mass movements to effect social and political change.

II LEGISLATIVE ATTACKS ON THE RIGHT TO PROTEST

Recent years have seen legislative attacks on the right to protest in Australia and other comparable countries. The potential impact of these laws was underscored in December 2022, when a young woman was sentenced to prison for 15 months with a minimum of eight months before possible parole, for her participation in a climate change protest that only briefly blocked one of the five city-bound vehicle lanes on the Sydney Harbour Bridge. Deanna 'Violet' Coco faced seven charges, including interfering with the safe operation of a bridge, using or modifying an authorised explosive [a flare] not as prescribed, possessing a bright light distress signal in a public place, and resisting arrest. She was also fined $2,500 and initially denied bail to appeal.[1]

Coco was the first person to be convicted under the *Roads and Crimes Legislation Amendment Act 2022* (NSW) ('RCLAA'), which provided for penalties of up to two years in jail and/or a $22,000 fine for disruption to roads, train stations, ports, and public and private infrastructure.[2] Court documents in December 2022 indicated that more than a dozen climate activists faced possible jail time over protests in Sydney.[3] Coco later had her sentence reduced on appeal, with the judge saying it had been based on false police evidence. District Court Judge Mark Williams questioned police assertions on the scale of the disruption and rejected suggestions that Coco was a 'danger to the community'. Williams J ruled that she had been imprisoned on a 'false factual basis', including claims that an ambulance had been impeded. Therefore, Williams J set aside the sentence and instead imposed a 12-month good behaviour bond.[4]

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[1] Mike Head, 'Climate change protester jailed for 15 months in Australia', *World Socialist Web Site* (Web Page, 5 December 2022) <https://www.wsws.org/en/articles/2022/12/06/zrja-d06.html>; Michael McGowan, 'At least a dozen climate activists face jail time under NSW laws used to lock up Violet Coco', *The Guardian* (Web Page, 12 December 2022) <https://www.theguardian.com/australia-news/2022/dec/12/at-least-a-dozen-climate-activists-face-jail-time-under-nsw-laws-used-to-lock-up-violet-coco>.

[2] See *Crimes Act 1900* (NSW) s214A and *Crimes (Sentencing Procedure) Act 1999* s17.

[3] McGowan (n 1).

[4] Tiffanie Turnbull, 'Violet Coco: Activist's jail term overturned in Australia protest row', *BBC News* (Web Page, 15 March 2023) <https://www.bbc.com/news/world-australia-64898508>.

The RCLAA did not use the word protest, but its provisions were so broad that they could be invoked against many forms of protest and not just over climate change. The Act set punishments for anyone who enters, remains on, climbs, jumps from or otherwise trespasses on a 'major road, bridge or tunnel', in a way which 'seriously disrupts or obstructs' vehicles or pedestrians. The same penalties applied to anyone who trespasses on or blocks entry to any part of a 'major facility'. Both types of locations were to be prescribed by regulations, giving the State's executive governments a broad power to designate them. The Act inserted into the *Crimes Act 1900* (NSW) a sweeping new s 214A:

> **Damage or disruption to major facility**
>
> (1) A person must not enter, remain on or near, climb, jump from or otherwise trespass on or block entry to any part of a major facility if that conduct—
>
> (a) causes damage to the major facility, or
>
> (b) seriously disrupts or obstructs persons attempting to use the major facility, or
>
> (c) causes the major facility, or part of the major facility, to be closed, or
>
> (d) causes persons attempting to use the major facility to be redirected
>
> …
>
> (7) In this section— major facility means the following, whether publicly or privately owned—
>
> (a) a railway station or other public transport facility prescribed by the regulations,
>
> (b) a private port within the meaning of the Ports and Maritime Administration Act 1995, or another port prescribed by the regulations,
>
> (c) an infrastructure facility, including a facility providing water, sewerage, energy, manufacturing, distribution or other services to the public, prescribed by the regulations.

Similar provisions were inserted into the *Roads Act 1993* (NSW), including a new s 144G(6) that defined 'major bridge or tunnel' as 'a bridge, tunnel or road prescribed by the regulations for the purposes of this section.'

Recent years have seen remarkably similar laws introduced internationally against protests that threaten business interests or obstruct access to 'critical' infrastructure, which can include roads and other public places traditionally used for protests. In addition to other countries, such legislation has been passed in Britain, the United States,

and Australia. Significantly, these laws go beyond proscribing alleged violent conduct in order to outlaw peaceful actions that allegedly disrupt social or commercial activities.

In 2022 and 2023, the British government brought forward an escalating series of measures to strengthen police powers, severely affecting the right to protest. Public Order Bills[5] sought to make it unlawful for a person to interfere with the use or operation of key national infrastructure, including airports, the road network and railways. Protests would be deemed illegal if they would cause 'serious disruption' to two or more individuals, or to an organisation. The bills sought to give police the power to shut down protests before any disruption occurred.[6] A coalition of 74 human rights and other organisations objected that the provisions 'constitute a drastic, further expansion of police power, allowing the police to intervene in and impose conditions on protests that have a 'more than minor', rather than 'serious' impact'.[7]

The potential for these provisions to effectively outlaw demonstrations was displayed in May 2023 during the coronation proceedings for King Charles III. Newly enacted powers under the *Public Order Act 2023* (UK), given Royal Assent by the King several days earlier, were invoked by London's Metropolitan Police. These officers arrested 64 anti-monarchy protesters and other people for offences including affray, public order offences, breach of the peace and conspiracy to cause a public nuisance. Among those arrested to prevent their participation in demonstrations were leaders of Republic, a registered pressure group that advocates the abolition of the monarchy and its replacement with a parliamentary republic. Before any protesting had begun, six members of Republic, including its leader, were arrested near Trafalgar Square where the group planned to hold a rally near the statue of the deposed monarch Charles I (1600-1649). Police seized

[5] See: Joint Committee on Human Rights, Government creating hostile environment for peaceful protest, report finds, 17 June 2022 <https://publications.parliament.uk/pa/jt5803/jtselect/jtrights/351/report.html>.
[6] Luke McGee, 'The British government wants to hand police unprecedented powers to handle protesters. Human rights activists say it's an affront to democracy', *CNN* (Web Page, 17 January 2023) <https://edition.cnn.com/2023/01/17/uk/uk-public-order-bill-police-protests-intl-gbr-cmd/index.html>.
[7] Liberty Human Rights, 'Joint Briefing on The Public Order Bill For Report Stage in The House Of Lords', (Online Report, January 2023) <https://www.libertyhumanrights.org.uk/wp-content/uploads/2019/03/Joint-civil-society-briefing-for-Report-Stage-of-the-Public-Order-Bill-January-2023-1.pdf>.

a vanload of placards reading 'Not My King.' A video viewed by millions of people on Twitter showed a reporter asking why the arrests were being carried out and a police officer replying: 'I'm not going to get into a conversation about that, they are under arrest, end of'.[8]

In the United States, particularly since 2017, many bills have been introduced to outlaw or restrict protests. As of January 2023, according to the International Center for Not-for-Profit Law's US Protest Law Tracker, 45 states had produced 249 bills, with 39 enacted and five pending. The database documented that anti-protest bills were often introduced in response to prominent protest movements, including demonstrations against police violence, campaigns against new oil and gas pipelines, rallies on college campuses, and protests supporting better wages and working conditions for teachers.[9] Prototypes for many of these bills were produced by the American Legislative Exchange Council (ALEC) in the aftermath of the 2016 Dakota Access Pipeline protests. These initiatives were largely driven by oil and energy corporations through ALEC, a pro-business think-tank.[10]

In Australia, quite similar laws have been introduced at both the federal and state levels, epitomised by the New South Wales measures. The *Criminal Code Amendment (Agricultural Protection) Act 2019* (Cth) was notable. It potentially extended criminal liability, with prison terms of up to five years, to people convicted of using social media or other telecommunications to promote or advertise protests against agribusinesses. It created two new offences in the *Criminal Code Act 1995* (Cth)[11] ('*Criminal Code*') that would apply where a person used a carriage service to transmit, make available, publish, or otherwise distribute material to incite another person to trespass,[12] or commit

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[8] Robert Stevens, 'London Police Carry Out Mass Arrests During Coronation Of King Charles', World Socialist Web Site (Web Page, 9 May 2023) <Https://Www.Wsws.Org/En/Articles/2023/05/07/Siop-M07.Html>.

[9] The International Center for Not-for-Profit Law , 'US Protest Law Tracker', *The International Center for Not-for-Profit Law* (Web Page, January 2023) <https://www.icnl.org/usprotestlawtracker/>.

[10] Alex Hertel-Fernande, State Capture: How Conservative Activists, Big Businesses, and Wealthy Donors Reshaped the American States — and the Nation (Oxford University Press, 2019); Nina Lakhani, 'Revealed: rightwing US lobbyists help craft slew of anti-protest fossil fuel bills', The Guardian (Web Page, 15 September 2022) <https://www.theguardian.com/us-news/2022/sep/14/rightwing-lobbyists-at-heart-of-anti-protest-bills-in-republican-states#:~:text=The%20American%20Legislative%20Exchange%20Council,guise%20of%20protecting%20critical%20infrastructure>.

[11] *Criminal Code Act 1995* (Cth) sch 1 *('Criminal Code*').

[12] Ibid s 474.46.

property offences,[13] on premises defined as agricultural land. The *Criminal Code* s 11.4 defines incitement loosely as 'urging' the commission of an offence, 'even if committing the offence incited is impossible'. In a submission to the Senate Legal and Constitutional Affairs Legislation Committee in 2019, the Law Council of Australia pointed to the potential politically chilling impact of these provisions.[14]

This trend has only continued. As noted by the Human Rights Watch World Report 2023, in 2022 several Australian states introduced laws targeting peaceful climate and environmental protesters with disproportionate punishments and excessive bail conditions. Along with New South Wales, 'new anti-protest laws passed in the States of Victoria and Tasmania also invoke severe penalties for non-violent protest'.[15] As the Human Rights Watch then reported, the legislation being debated in the Tasmanian parliament would permit protesters to be fined up to $12,975 or be jailed for 18 months for a first offence. Similarly, organisations could be fined up to $103,800 if they were judged to have obstructed workers or caused 'a serious risk'.[16] In Victoria, legislation before parliament would authorise sentences of up to 12 months in jail or $21,000 in fines against protesters convicted of attempting to prevent native forest logging, banning them from protest areas.[17] In 2023, the South Australian parliament passed new laws that impose severe punishments of up to three months' jail for anyone whose activity caused an 'obstruction' in a public place, even 'indirectly'. The amendments to the State's *Summary Offences Act* banned any activity that allegedly disrupts 'free passage of a public place.'[18] That could include handing out leaflets on a footpath or in a public mall, demonstrating outside parliament house, participating in a workers' march against low pay and intolerable conditions, or joining a picket during a strike. The legislation was passed through both houses of state parliament in a matter of hours, despite several

[13] Ibid s 474.47.
[14] Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Criminal Code Amendment (Agricultural Protection) Bill 2019* (Submission, 31 July 2019).
[15] Human Rights Watch, *World Report 2023* (Report, January 2023) 50-1 <https://www.hrw.org/sites/default/files/media_2023/01/World_Report_2023_WEBSPREADS_0.pdf>.
[16] Ibid.
[17] Ibid.
[18] *Summary Offences Act 1953* (SA) s 58.

hastily called protests, and shock and condemnation voiced by a wide range of civil liberties, legal and other non-government organisations.[19]

The adoption of such laws, with the potential to be used widely to outlaw protests that threaten business interests, needs to be placed in a broader context, both contemporarily and historically.

III THE CONTEMPORARY RISE OF MASS PROTESTS

One of the most striking, and potentially significant features of the world political situation since the beginning of the second decade of the 21st century has been the rise of mass protests, both domestically and globally. Although the issues may be various, and often take a national form, their true character and root causes can be gauged only by considering the international scale of this development.

Several studies have examined this phenomenon which has developed on every inhabited continent. One academic study, published in 2022, concluded that the underlying causes lay in rising social unrest and political disaffection:

> *The two first decades of the twenty-first century saw an increasing number of protests around the world. From Africa to Europe, from the Americas to Asia, people have taken to the streets demanding real democracy, jobs, better public services, civil rights, social justice, and an end to abuse, corruption and austerity, among many other demands. What these protests have in common—regardless of where they take place geographically or where their demonstrators are on the political spectrum—are failures of democracy and of economic and social development, fueled by discontent and a lack of faith in the official political processes. The main findings of this study indicate that social unrest rose in every region during the period covered*.[20]

The study classified the almost 3,000 protests it reviewed into four main categories, by descending frequency of occurrence:

(i) protests related to the failure of political representation and political systems, which focused on the lack of real democracy, corruption and other grievances;

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[19] Mike Head, 'South Australian Labor government imposes draconian anti-protest laws', *World Socialist Web Site* (Web Page, 3 June 2023) <https://www.wsws.org/en/articles/2023/06/03/tvur-j03.html>.
[20] Isabel Ortiz et al, *World Protests: A Study of Key Protest Issues in the 21st Century* (Palgrave Macmillan, 2022) 1-2.

(ii) protests against economic injustice and austerity reforms;

(iii) protests for civil rights, ranging from indigenous or racial rights to women's rights and personal freedoms; and

(iv) protests for global justice and a better international system for all, instead of for the few.[21]

The fourth category included 'environmental and climate justice, based on the historical responsibilities for climate change and calling for urgent action to redress climate change and protect the environment'. That was a cause of 359 protests, nearly 13 percent of all protests in the study.[22] The study noted:

> *Decades of neoliberal policies have generated more inequality, eroded incomes and welfare to both the lower and the middle classes, fueling frustration and feelings of injustice, disappointment with malfunctioning democracies and failures of economic and social development, and a lack of trust in governments. In 2020, the coronavirus pandemic has accentuated social unrest.*[23]

The protests included 'the Arab Spring', the 'Indignados' (Outraged) and 'yellow vests' movements of Europe, the 'Occupy' movement in the United States, and in the 'Estallido Social' (Social Upraising) in Chile and other countries in Latin America. The research identified 250 methods of protest, including relatively new ones, such as 'digital and online activism'.[24] The study kept records of protest movements across 15 years, marking them as 'protest events' when they spanned more than one year, for a total of 2,809 protest events. By this method, the number of such events each year more than tripled between 2006 and 2020, from 73 to 251.[25] The study concluded that the protests were of historic proportions and significance:

> *There have been periods in history when large numbers of people rebelled against the way things were, demanding change, such as in 1848, 1917, and 1968; today we are*

[21] Ibid, 1-3.
[22] Ibid, 47.
[23] Ibid 112.
[24] Ibid 4.
[25] Ibid 16.

> *experiencing another period of rising outrage and discontent, and some of the largest protests in world history*.[26]

The above excerpt refers to the 1848 revolutions across Europe, which largely failed to overthrow the old monarchies, the February and October 1917 revolutions in Russia, which culminated in the establishment of a Soviet government, and the general strikes, anti-Vietnam War and civil rights movements of the 1968 period.

IV HISTORICAL STRUGGLES

Like all such fundamental democratic rights, the right to protest is a product of immense social struggles throughout history, and not the law itself. Protest rights may be partly recognised in law, often in an attenuated and limited form, but they arise from centuries of frequently convulsive struggles against authoritarian forms of rule. Globally, this can be traced back for thousands of years, to events such as the slave revolts led by Spartacus during the Roman Republic.[27] However, modern examples of battles for the right to protest, at least in the Western context, primarily arises from the first challenges to feudal order reflected in the Magna Carta of 1215, and the subsequent development of the English, French and American revolutions against absolutism in the 17th and 18th centuries.

Then came the development of mass politics, bound up with the rise of capitalism, the growth of the working class, and the eruption of social, industrial, and other struggles during the 19th and 20th centuries for political, organisational and freedom of speech rights.

Throughout history, despite lip service paid to it, the right to protest has been often contested or curtailed by governments and legislatures and objected to by business interests. For these reasons, the right to protest can be defended only through similar mass struggles, not legal challenges, although these struggles may well include related legal battles. While legal cases may be important at times, their outcome will be

[26] Ibid 112.
[27] Keith Bradley, *Slavery and Rebellion in the Roman World, 140 B.C.–70 B.C.* (Indiana University Press, 1989) 83–101.

determined ultimately, as history suggests, by the sway and swell of political social and class forces.

The rights of assembly and protest in countries with a British heritage are often attributed to parliamentary democracy, augmented by the common law that is regarded as developing organically, at least since 1215. This uncritical approach ignores or downplays the bitter struggles that have been waged and are still being waged for freedom of assembly and protest. For example, according to a New South Wales parliamentary briefing: 'The right to protest peacefully is a defining feature of liberal democracy, a system of government characterised by the tolerance of dissenting minority opinion'.[28] According to the report, 'the legal basis of the right to protest' is derived from 'the common law right to peaceful assembly' dating back to the Magna Carta.[29]

At the same time, the briefing noted that this 'important' and seemingly ancient right has been subjected to extensive limits by the criminal law in New South Wales, including the *Summary Offences Act 1988* (NSW), *Crimes Act 1900* (NSW), *Inclosed Lands Protection Act 1901* (NSW), *Forestry Act 2012* (NSW), *Mining Act 1992* (NSW) and *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW). Since the publication of this brief in 2015 the list of such provisions has grown to include the 2022 amendments discussed above. This tendency toward eviscerating protest rights underscores the thesis of this article: such democratic rights depend on the broader struggle – beyond parliaments, the law, and the courts – to defend and extend democracy.

Scholarly analyses of the history of protest law have generally not identified the dynamic relationship between social and political struggles and the law. However, some studies have empirically established connections between the rise of protest movements in certain periods and their impact on the course of history in defiance of the official and legal responses. For example, in relation to the American Revolution, Antonia Malchik noted:

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[28] Tom Gotsis, NSW Parliamentary Research Service, *Protests and the law in NSW Briefing Paper No 07/2015* (Briefing Paper No 7/2015, NSW Parliamentary Research Service, June 2015) 1.
[29] Ibid 5-6, citing James Jarrett and Vernon Mund, 'The Right of Assembly' (1931) 9(1) *New York University Law Quarterly Review* 1; George Smith, 'The Development of the Right of Assembly – A Current Socio-Legal Investigation' (1967) 9(2) *William & Mary Law Review* 359, 361-2.

> *How we characterise crowds depends on who commands the narrative. The Boston Tea Party, where protesters dumped 342 chests of tea into Boston Harbor in 1773 in response to a tax they disliked, is taught to US schoolchildren as one of the founding myths both of America and of our modern idea of patriotism wrapped in protest against one's government. Its name – the Boston Tea Party, not the Boston Tea Riot – evokes joyousness and order, not anger and chaos. On the other hand, at least one British newspaper of the time called it a 'riot', and the British government responded with harsh laws that Americans dubbed the Intolerable Acts. If America had lost its revolutionary war, our children today would likely be taught the British perspective: rather than patriotic, the dumping of tea was unlawful and chaotic, the entire evening a riot resulting in the egregious destruction of property*.[30]

Similarly, in examining the Peterloo Massacre of 1819 and the development of the mass Chartist movement in Britain, which demanded the right to vote, Michael Lobban noted the connection between the rise of mass movements for democratic and social rights and the repressive responses of the ruling authorities. He concluded:

> *Until the end of the eighteenth century, when riotous activity was relatively common, the ruling classes were not as frightened of crowds as they would later become—indeed, the idea of national police force scared them more. The fear of the crowd grew as the crowd was seen as a threat to the established order; and paradoxically, this occurred when the crowds were becoming less turbulent, but more organized. The fact that they were political crowds made them a threat: the fact that they might pose a public order threat allowed the authorities to clamp down on them* (footnotes removed).[31]

Instructing the jury in the trial of Henry Hunt and other organisers of the St Peter's Fields meeting, Justice Bayley said the banners carried by participants objecting to 'taxation without representation' and being 'sold like slaves' were themselves evidence of a seditious conspiracy and unlawful assembly.[32]. 'Is the telling a large body of men they are sold like slaves likely to make them satisfied and contented with their situation in society?' he asked rhetorically.[33]

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[30] Antonia Malchik, 'Riot Acts' *Aeon* (Web Page, 23 December 2019) <https://aeon.co/essays/the-history-of-riot-shows-the-importance-of-democratic-tumult>.
[31] Michael Lobban, 'From Seditious Libel to Unlawful Assembly: Peterloo and the Changing Face of Political Crime c1770–1820' (1990) 10(3) *Oxford Journal of Legal Studies* 307, 352.
[32] *R v Hunt* (1820) 1 St Tr NS, at 479 cited in Lobban (n 31) 344.
[33] Ibid.

In that massacre, cavalry troops charged into a crowd of 60,000 to 80,000 people gathered at St Peter's Field, Manchester, for a public meeting which had been declared illegal, to demand parliamentary representation. Shortly after the meeting began, local magistrates called on the military to arrest the speakers on the platform and to disperse the crowd. Soldiers on horses charged in with sabres drawn, killing 15 people, and injuring 400–700, including women and children.[34]

Whereas the arrested speakers were charged with sedition, found guilty and jailed, a test case against four members of the armed forces ended in acquittal because the court ruled that their actions had been justified to disperse an illegal gathering.[35] Nine days after the massacre, the Home Secretary, Lord Sidmouth, had conveyed Prince Regent's gratitude to the magistrates for their action in 'preservation of the public peace'.[36]

It could be argued that these historical experiences are no longer relevant due to the emergence of more democratic forms of rule. However, the global unrest documented above suggests otherwise. Once again, momentous protests are arising, challenging the survival of ruling authorities. As some studies have documented, there has been a considerable reversion by governments, legislatures and judiciaries towards more repressive responses to public assemblies. For instance, Professor Tabatha Abu El-Hage contrasted the 2021 removal of Occupy gatherings in the United States protesting against gross economic inequality, to earlier records which displayed greater official tolerance of protest assemblies.[37]

An examination of this history demonstrates the need for a method of approach that critically examines the socio-economic tensions and class conflicts that fuel protests and provide the context for the shifting governmental and legal reactions. This framework of analysis has been outlined with regard to the changing face of what can be classified as 'crimes against the state'—those offences officially regarded as threatening the existence of the economic and political order itself:

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[34] Robert Reid, *The Peterloo Massacre* (William Heinemann Ltd, 1989) 161-8*;* see also Robert Poole, *Peterloo: The English uprising (*Oxford University Press, 2019) 345-52.
[35] Ibid 204-5.
[36] Anthony Babington, *Military Intervention in Britain* (Routledge, 1990) 46–58.
[37] Tabatha Abu El-Haj, 'All Assemble: Order and Disorder in Law, Politics and Culture' (2014) 16(4) *U Pa J Const L* 949.

> *In every epoch, the offences, both common law and statutory, have become more draconian, far-reaching and severely punished whenever the ruling establishment has felt threatened by domestic opposition, particularly from the plebeian masses, or by foreign rivals, especially once war loomed or armed hostilities broke out. Far from being fixed, or clearly defined by legal criteria, offences evolved and sharp shifts occurred in the frequency of prosecution of various offences, in response to perceived political dangers.*[38]

A similar approach is needed to the law of protest. Significantly, the authorities and the courts have regarded perceived threats to the established order to be far more serious when they involve the working class. In 1842, English Chief Justice Tindal declared that if an audience came from the 'poorer class', that could make an otherwise lawful statement a seditious one:

> *He that addresses himself to a crowded auditory of the poorer class, without employment or occupation, and brooding at the time over their wrongs; whether imaginary or real, will not want ready hearers…*[39]

That ruling was delivered in the context of the mass trials conducted at the height of the Chartist movement.[40]

V PROTESTS AND 'VIOLENCE'

Aside from preventing 'disruption' or 'obstruction', governmental, legislative, police and military measures against protests are often justified on the grounds of protecting society or its members from violence. Commonly, distinctions are drawn between 'non-violent' protests, which are supposedly tolerated, at least partially, and 'violent' ones, which are criminalised. Governments frequently insist they are upholding the right to peaceful protest, subject to restrictions deemed 'reasonable' and 'proportionate', even while curtailing protest rights in the name of combatting violent, riotous, menacing, or disorderly expressions of dissent.

Some theorists of protest oppose 'violent' methods, either on normative or programmatic grounds. Among them is Chris Hedges. In *Wages of Rebellion: The Moral Imperative of*

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[38] Michael Head, *Crimes Against the State: From Treason to Terrorism* (Ashgate, 2011) 21.
[39] *R v Harris and Twenty-eight Others* (1842) Car & M 661, note (a); 174 ER 678.
[40] Lobban (n 31) 350–1.

Revolt, he argued that a revolution is inevitable in the United States, where political and corporate elites hold the power, and repressed, increasingly impoverished Americans, have a 'moral imperative' to revolt. Hedges said the United States government had become one of 'totalitarian corporate power'.[41] It had 'cowed the nation' to make people submit their freedoms to it, making them too fearful to revolt. However, throughout history the masses had eventually woken up and revolted.[42]

Hedges contended that most successful revolutions were non-violent. Yet, history has often shifted fundamentally on the back of violent overthrows of authoritarian regimes, not least the English Civil War of the 1640s, the American Revolution of 1776, the French Revolution of 1789 and the Russian Revolution of 1917. In each instance, the violence originated in the vicious responses of the ruling order.

Hedges advocated non-violent civil disobedience almost exclusively for practical reasons, saying that non-violence was ultimately more effective than violence. He did not unequivocally condemn violence on moral grounds. Rather, violence or property damage legitimised the state's violent response in the eyes of the masses, whose emotional reaction was key to the success of a revolution.

Some scholars have sought to make similar distinctions between violent and non-violent protest methods in the context of the United States constitutional right to assemble, despite the difficulty of drawing lines between the two. Their studies have shown that judicial decisions bracket threatened damage to property with potential physical harm to people. Martin McMahon reviewed cases showing that alleged violence against either persons or property was enough to transform a political demonstration into a 'riot'.[43] To this point, Margot Kaminski concluded that 'a law that bans large assemblies that are physically harmful or destructive is likely constitutional'.[44]

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[41] Chris Hedges, *Wages of Rebellion: The Moral Imperative of Revolt* (Knopf Canada, 2015) 17.
[42] Ibid 66.
[43] Martin J. McMahon, What Constitutes Sufficiently Violent, *Tumultuous, Forceful, Aggressive, or Terrorizing Conduct to Establish Crime of Riot in State Courts*, 38 A.L.R. 4th 648 §§ 18–19 (1985) cited in Tabatha Abu El-Haj, 'Defining Peaceably: Policing the Line Between Constitutionally Protected Protest and Unlawful Speech' (2015) 80(4) *Missouri Law Review* 961.
[44] Margot Kaminski, 'Incitement to Riot in the Age of Flash Mobs' (2012) 81 *U CIN L REV* 10.

Tabatha Abu El-Haj applied a broader standard to the protests against police killings and violence in the United States, defending the right of crowds to be 'disruptive'. She said rioting, or what was depicted as rioting, had been used for centuries to push forward progress, usually as a last resort. Abu El-Haj argued that such considerations should be taken into account when interpreting the United States Constitution's First Amendment:

> *While there is no question that some of the participants in the Baltimore crowds, like those in Ferguson, crossed the line between constitutionally protected and unlawful assembly, angry and leaderless crowds that form to respond to perceived abuses of governmental power are always disruptive. More importantly, the Founders fully understood this when they singled out assembly for First Amendment protection*.[45]

In *Languages of the Unheard*: *Why Militant Protest is Good for Democracy*, Stephen D'Arcy argued that the crucial distinction is between democratic and undemocratic action, rather than violence and non-violence.[46] He proposed a 'democratic standard' that allowed participants, in some circumstances, to 'set aside discussion and apply forceful pressure through adversarial, confrontational protest'.[47]

D'Arcy wrote that a riot is the last resort of the disenfranchised and oppressed, citing Martin Luther King, who once insisted: 'What we must see is that a riot is the language of the unheard.' King did not defend riots but said they were understandable as frustrated responses to persistent injustice and unresponsive systems of power. D'Arcy went further, arguing for 'justifiable militancy' and drawing an analogy to the use of physical force to protect a child:

> *As a practical matter, almost everyone who claims to oppose all violence would in fact support the use of physical force to repel a child's attacker. We should, therefore, regard sweeping pronouncements against all violence with a suspicious eye. For the most part, these declarations are a way of hiding the difficult questions behind a veil of superficial moral certainty*.[48]

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[45] Tabatha Abu El-Haj, 'Defining Peaceably: Policing the Line between Constitutionally Protected Protest and Unlawful Assembly' (2015) 80(4) *Missouri L REV* 962, 963. See also Abu El-Haj (n 32) 951, 1032-9.
[46] Stephen D'Arcy, *Languages of the Unheard*: *Why Militant Protest is Good for Democracy* (Zed Books, 2013) 3.
[47] Ibid 4.
[48] Ibid 1-7.

D'Arcy suggested that by this 'democratic standard', outbursts of rebellion could sometimes be defensible, even admirable, and extended this approach from 'spontaneous revolts' to other forms of confrontational protest or rebellion, such as general strikes, sit-ins, road blockades and occupations, sabotage, and armed insurgencies. He contended that militancy could be a civic virtue, an aid to democracy and a principled response to the intransigence of elites and the unresponsiveness of institutions to the public interest.

D'Arcy differentiated 'riots' associated with a quest for equality from other 'genres' of rioting such as rioting at sports events, acquisitive rioting (looting), and authoritarian rioting, such as the Tulsa race riot of 1921, which was used to further oppress marginalised people. In fact, using 'riot' to describe both sporting events and political or social protest could be a calculated political move to depict protest or assembly as unlawful and unjustified.

However, D'Arcy rejected revolutionary socialism as an alternative to the capitalist order. He counterposed his 'democratic standard' to what he called the amoralist view, that the end justifies the means. D'Arcy claimed that this was argued by Leon Trotsky, the co-leader of the October 1917 Soviet Revolution in Russia. However, that contention flies in the face of what Trotsky actually wrote and advocated in justifying both the October 1917 Revolution and the struggle against the Stalinist betrayal of that revolution. In *Their Morals and Ours*, Trotsky specifically rejected the charge of 'amoralism'.[49]

Trotsky insisted that all methods of struggle, including deception and violence, had to be judged according to their contribution to human liberation from every form of slavery and submission. Taking the example of the American Civil War that led to the abolition of slavery, but which involved the use of severe methods by the North led by Abraham Lincoln, Trotsky wrote:

> *A slave-owner who through cunning and violence shackles a slave in chains, and a slave who through cunning or violence breaks the chains – let not the contemptible eunuchs tell us that they are equals before a court of morality!*[50]

[49] Leon Trotsky, *Their Morals and Ours: The Moralists and Sycophants Against Marxism* (New Park Publications, 1968) 7.
[50] Ibid 32.

Replying to critics who nevertheless asked whether all means are morally legitimate for the goal of human liberation, Trotsky argued that not all means were acceptable:

> *Permissible and obligatory are those and only those means, we answer, which unite the revolutionary proletariat, fill their hearts with irreconcilable hostility to oppression, teach them contempt for official morality and its democratic echoers, imbue them with consciousness of their own historic mission, raise their courage and spirit of self-sacrifice in the struggle*.[51]

VI CONCLUSION

Trotsky was justifying revolution, not just protest. Nevertheless, this historical worldview, that of Marxism, offers a better guide to asserting and defending the right to protest, rather than arbitrary distinctions between violence and non-violence or appeals to a 'democratic standard' that deny the root causes of dissent. Ultimately, defending the right to protest is bound up with the necessity to rid the world of its driving forces: social inequality and oppression. This would include recognising the right of climate activists to obstruct traffic and corporate activities if that raises public consciousness of the need for root and branch political change to avert a planetary and social catastrophe.

As this article has demonstrated, legislative and enforcement measures introduced in response to tactics adopted by climate change activists can be broadly applied to all forms of protest that may be seen as a threat to the existing economic and political order. These developments can be understood only in the context of deepening social unrest on a global scale. In the words of the study cited earlier, we have entered 'another period of rising outrage and discontent'. The right to protest has been fought for historically through mass action. It can be defended only in that fashion, in the struggle for fundamental economic, social and political change.

[51] Ibid 44.

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THE CANADIAN RESIDENTIAL SCHOOL SYSTEM: AN INTERNATIONAL LAW FAILURE

BRIANNA DARWIN*

The government of Canada set out to completely rid the country of any traces of Indigenous culture, language, and rights. By implementing the Indian Act, it became illegal for an Indigenous child to attend any school other than a Residential School. Further, it deemed truancy a crime to which their parents would be punished by a fine or imprisonment while their children were kidnapped and placed in a Residential School. These schools were in operation in Canada from approximately 1880 to 1996. They wreaked havoc on Indigenous lives and culture, specifically for Indigenous children. This article opens up this chapter of history, and questions Canada's acts through the prism of the international framework of state responsibility. It puts forth the claim that the churches that ran the schools ought to be deemed as organs of Canada. At the backdrop of this critique is a conversation with other scholars who captured the structural indeterminacies in international law that facilitate maintaining a blind eye toward injustices afflicted against Indigenous people.

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CONTENTS

I INTRODUCTION

'Kill the Indian in him, and save the man.' – Richard Henry Pratt.[1]

The above quote illustrates how Indigenous peoples were once viewed and treated globally. Richard Henry Pratt was an American military officer who fathered the movement of assimilation of Indigenous populations in America by creating the first 'Indian boarding school' of many to come.[2] The quote was later used with a slight reword by Canadian Prime Minister, Stephen Harper, in his official statement of apology to former students of the Residential Schools.[3] Harper detailed that it was now a common

[1] Richard Henry Pratt, Brigadier General, 'The Advantages of Mingling Indians with Whites' (Speech, National Conference of Charities and Correction at the Nineteenth Annual Session Denver, Colorado, 23-29 June 1892) <https://carlisleindian.dickinson.edu/sites/all/files/docs-resources/CIS-Resources_1892-PrattSpeech.pdf >.
[2] David Wallace Adams 'Foreword' in Richard Henry Pratt, *Battlefield and Classroom: Four Decades with the American Indian, 1867-1904*, (Yale University Press, 1964) xi.
[3] Stephen Harper, Former Prime Minister of Canada, 'Statement of Apology to Former Students of Indian Residential Schools' (Speech, Government of Canada Ottawa, June 11, 2008) < https://www.rcaanc-cirnac.gc.ca/eng/1100100015644/1571589171655 >.

belief that Aboriginal cultures were once held to be inferior when he stated that the purpose of the Residential School system was to 'kill the Indian in the child'.[4] Although perhaps a case of misconstrued words throughout time, the intention behind them remains the same – to remove all traces of Indigenous culture and to indoctrinate white Euro-centric ideals into the minds of the Indigenous youth.

This paper will examine the international legal system's failure to hold Canada responsible for the legislative implementation of the Residential School System ('RSS') and critique the structural issues that might have led to these inadequacies.

This paper will commence with a case study, establishing the responsibility of Canada as a state for the international wrongdoings of the churches who ran the RSS. Subsequently, it will delve into an academic discussion focusing on the domestication of the Indigenous issue and transitional justice. Finally, the paper will contemplate the extent to which the Indigenous question falls within the purview of international law.[5]

II CASE STUDY

A *Brief Context - The Residential School System*

In operation from approximately 1880 to 1996, the RSS was put in place with the objective to 'educate' Indigenous children: imbue them with Euro-Canadian and Christian ways of life, and assimilate them into a white society.[6] Attendance was not only made mandatory via the *Indian Act 1876*[7] but it was made illegal for an Indigenous child to attend any other school.[8] The RSS was severely underfunded, which resulted in poor education that was mainly focused on religious teaching and practical skills like cleaning,

[4] Ibid.
[5] It is with heartfelt acknowledgment that I recognise that similar consequences of colonialism are seen across the globe, including in Australia, the US, Africa, and beyond. However, as an Indigenous Canadian, I chose to focus this piece specifically on the Indigenous issues within Canada as I have personal experience with the generational trauma that ensued from these Residential Schools.
[6] Erin Hanson et al, 'The Residential School System' *Indigenous Foundations, First Nations and Indigenous Studies UBC* (Website, September 2020)<http://indigenousfoundations.arts.ubc.ca/the_residential_school_system/ >.
[7] CRC 1927, c 98
[8] *Indian Act 1876,* CRC 1927, c 98, s 3, 3(4) ('*Indian Act 1876*').

sewing, and farming.[9] The reality at these so-called schools was far from the image that was projected to the rest of the world by the government and the church.

The events that took place in the RSS were horrific. Stories depict the entailing physical and psychological abuses along with harsh punishments for speaking Indigenous languages (such as receiving needles through their tongue)[10] or otherwise acknowledging their Indigenous heritage.[11] In very recent years, there have been shocking discoveries made at a few of the RSS sites. The most significant discovery was made near Regina, Saskatchewan, where a total of 751 unmarked child graves were uncovered.[12] This discovery, together with others made at RSS sites across Canada, brings the total of unmarked child graves filled with remains to 1,323.[13] These findings reflect the searches of only a handful of the hundreds of RSS sites. While there were approximately 150,000 children to pass through the RSS, there were only around 80,000 survivors accounted for in 2012.[14]

B *State Responsibility*

The very basic idea of 'responsibility' comes from the concept of response to a wrong. In the legal context, this would entail responding to an unlawful act or a breach of obligation. For there to be a responsibility for a state to respond to a breach, there must be an obligation to prevent or not partake in the acts that led to the breach. It was not until 2001 that the International Law Commission codified these ideas of state responsibility in the form of draft articles.[15] Article 1 of the *Responsibility of States for Internationally Wrongful Acts*[16] ('*RSIWA*') very clearly states that 'every internationally wrongful act of a

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[9] Ibid.
[10] David B. MacDonald & Graham Hudson 'The Genocide Question and Indian Residential Schools in Canada' (2012) 45(2) *Canadian Journal of Political Science* 427, 432. See also Celia Haig-Brown, *Resistance and Renewal: Surviving the Indian Residential School* (Indians of North America, 2006); Assembly of First Nations, *Breaking the silence: an interpretive study of residential school impact and healing as illustrated by the stories of First Nation individuals* (Assembly of First Nations, 1994).
[11] Hanson (n 6).
[12] Ian Profiri 'Hundreds of Bodies Discovered at Former Canada Residential School for Indigenous Children', *Jurist* (online, 25 June 2021) <https://www.jurist.org/news/2021/06/hundreds-of-bodies-discovered-at-former-canada-residential-school-for-indigenous-children/>.
[13] Ibid.
[14] MacDonald and Hudson (n 10) 431.
[15] *Draft Articles on Responsibility of States for Internationally Wrongful Acts,* as contained in *Report of the International Law Commission on the Work of its 53rd Session,* UN Doc A/55/10 (2000) ('*Draft Articles*').
[16] UN Doc A/RES/56/83 ('*RSIWA*').

State entails the international responsibility of that State.'[17] Further, Article 2 of *RSIWA* articulates that an internationally wrongful act might consist of an act or omission that is both attributable to the state and a general breach of international obligation.[18] Therefore, States are to be responsible for their own internationally wrongful acts along with internationally wrongful acts that can be attributed to them.

C *Attributable to the State*

For attribution, Article 4(1) of the *RSIWA* draft articles declares that:

> *(1) The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organisation of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.*

The State acts only through its agents and therefore any conduct by a State organ will be considered an act of the State to which it operates under.[19] The organ and the State are two distinct and separate identities, yet they hold the same liability. Therefore, the State can be held liable for any conduct of the organ, even when the organ exceeds or contravenes the State's authority. [20]

To be an organ of a State, an entity will have that 'status in accordance with the internal law of the State'.[21] However, even if the status of the organ does not flow from internal law it is possible to equate an organ's actions with the State, but only if the entity acted in 'complete dependence' on the State.[22] What is required is that the organisation or group received its authority from the State including acting under instructions or under the direction or control of the state in carrying out the conduct. [23] This requires

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[17] *RSIWA* (n 16) art 1; James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002) 77-80.
[18] *RSIWA* (n 16) art 2; Crawford (n 17) 81-5.
[19] *RSIWA* (n 16) art 4; Crawford (n 17) 95-6.
[20] *Draft Articles* (n 15) art 4 'Commentary'; James Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013) 156.
[21] *RSIWA* (n 16) art 4(2).
[22] The 'effective control' test was affirmed in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 43, 388 (*'Bosnian Case'*).
[23] Two levels of control have been identified, 'strict control' and 'effective control' *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986]

demonstrating direct interference over the activities or operations giving rise to the internationally wrongful act including financial assistance, military assistance, intelligence sharing, selection, support and supervision of the leadership.[24] Proving that an entity is a State organ requires an exceptional degree of State control.[25]

D *An Organ of Canada – Is Responsibility Attributable?*

While the Government of Canada began funding the RSS around 1867 (at the time of confederation) the first Indigenous boarding school can be traced back to 1620.[26] The boarding schools in operation pre-confederation were largely funded by the churches alone. Once confederation occurred, the Canadian government saw the utility in funding these school with hopes of 'taming the savages' and bending Indigenous will to conform with Euro-centric ideals and ways of life.[27] Prior to the resurrection of the federally funded RSS, the government of Canada requested that Nicholas Davin study and report back on the 'Indian Boarding Schools' that were appearing throughout the United States of America.[28] His report was hopeful for success in taking away the Indigenous children's 'simple Indian mythology' by methods of 'aggressive civilisation'.[29] The report further insisted that the RSS be run by the Christian churches.[30]

In breaking down the requirements for an entity to be considered an organ of the State, one would start with the question of funding. The RSS was funded by the government of Canada.[31] In Davin's report, there were thorough details on exactly how much the RSS

ICJ Rep 14, 62 [109], 64 [115] ('*Nicaragua Case*'); *Bosnian Case* (n 22) 392; *RSIWA* (n 16) art 7; Crawford (n 20) 106-9.

[24] *Bosnian Case* (n 22) [241], [388], [394]; *Nicaragua Case* (n 23) [112]. See also Kristen E Boon 'Are Control Tests Fit for the Future? Slippage Problem in Attribution Doctrines' (2014) 15(2) *Melbourne Journal of International Law* 330, 347-50.

[25] Ibid 393.

[26] Robert Carney 'Aboriginal Residential Schools Before Confederation: The Early Experience' (1995) 61 *Historical Studies* 13, 13.

[27] Denise Ferreira da Silva, 'Voicing 'Resistance': Race and Nation in the Global Space' in Yitzhak Sternberg and Eliezer Ben-Rafael (eds), *Identity, Culture and Globalisation: The Annals of the International Institute of Sociology* (Brill, 2001) 427-42; Ikechi Mgbeoji, 'The Civilised Self and the Barbaric Other: Imperial Delusions of Order and the Challenges of Human Security' (2006) 27(5) *Third World Quarterly* 855.

[28] Nicholas Flood Davin 'Report on Industrial Schools for Indians and Half-Breeds' (Public Archives of Canada, 1879) < https://www.canadiana.ca/view/oocihm.03651/29 >.

[29] Ibid 1, 14.

[30] Ibid 2.

[31] Rachel L. Burrage, et al. 'Beyond Trauma: Decolonizing Understandings of Loss and Healing in the Indian Residential School system of Canada' (2022) 78(1) *Journal of Social Issues* 27, 31.

would cost the government,[32] along with how much money the RSS could make the government by way of raising cattle and farming vegetables.[33] However, as mentioned above, financial support alone is insufficient to deem the church an organ of Canada.

What would be considered next is whether the church was completely dependent on or under the control of Canada at the time the atrocities were committed. Article 2 of RISWA explains that the conduct of an organ shall constitute the conduct of the State if it is exercising legislative functions of the State.[34] Further, the conduct of an organ is to be considered the conduct of the State if it is exercising governmental authority without the presence of official authorities.[35] The churches were acting under the authority of the *Indian Act 1876* which was amended in 1927 to make it mandatory for every Indigenous child to attend the RSS and further deemed truancy a crime should an Indigenous child fail to attend such a school within three days' notice of being told to attend.[36] Truancy was to result in the parent being charged a fine or liable to imprisonment along with the child being arrested without warrant and remanded to the school by a 'Truancy Officer'.[37]

These children were legally forced under the care and authority of the church by the government's legislation. It would be valid to say that the churches were organs of Canada as they were acting under legislative authority and fully funded by the government. The churches would not have had the facilities to board the children, nor would they have had the mass numbers of children under their care if it were not for the government providing them with instruction, support, and authority. Therefore, it is likely that the churches would be found to be completely dependent on and under the control of the Canadian government. Of course, there is nothing in the *Indian Act 1876* that explicitly permits abuse, so the next step would be to consider whether the churches, as they could be established as organs, acted in a manner that exceeded or contravened instruction.[38]

[32] Davin (n 28) 4.
[33] Davin (n 28) 2, 3.
[34] *RSIWA* (n 16) art 2.
[35] *RSIWA* (n 16) art 9.
[36] *Indian Act 1876* (n 8) s 3.
[37] Ibid s 3(4).
[38] *RSIWA* (n 16) art 7.

E *Article 7 – Excess of Authority or Contravention of Instruction*

Under Article 7 of the *RSIWA*, it is stated that any conduct of an organ shall be considered conduct of the state, even if authority is exceeded or instruction is contravened.[39] A detailed report from the Truth and Reconciliation Commission of Canada on the RSS was released in 2015 after discussions with more than 6,000 survivors of and witnesses to the RSS.[40] It discusses a myriad of tragic and horrific punishments ranging from physical, mental, and sexual abuse (including rape)[41] to forcing children who had been sick to eat their own vomit,[42] all encapsulated by institutionalised child neglect.[43] The abused children began to abuse each other, as abuse was all that they knew.[44] There was no safe place for the children within the RSS, no one they could look to for protection. One might think, as children are often told, that if they are hurt they can tell an adult who will attempt to remedy the situation. However, what were these neglected children to do when it was, in fact, the adults who were hurting them?

With thousands of first-hand stories regarding the rampant abuses within the RSS, it is impossible to deny that the churches were acting in excess of authority and in contravention of instruction, contrary to Article 7 of the *RSIWA*. Similar to the law of vicarious liability, where an employee must have been acting in the course of their employment, the churches were committing internationally wrongful acts in the course of implementing the legislative authority of the government (i.e., in the course of their employment at the RSS).

In acting beyond the power of the legislation that provided for the RSS, the churches exceeded authority by deliberately enforcing harsh punishments on the children and, further, did not follow instruction by allowing a toxic environment rampant with abuse to form within the RSS. The state should be held accountable for its organ's actions as per the *RSIWA* and customary international law for the harm committed.

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[39] Ibid.
[40] Canada, Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future* (2015), 6 < https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Executive_Summary_English_Web.pdf>.
[41] Ibid 107.
[42] Ibid 89.
[43] Ibid 4.
[44] Ibid 109.

III DISCUSSION

A *The Domestication of the Indigenous Question*

The question of who is Indigenous has long been a debate worldwide. The question was brought back to the forefront post-colonisation, and often debated within the United Nations (UN) and beyond so that it could become obvious exactly whose issues were to be dealt with.[45] The query seems to have been answered by Cobo, Special Rapporteur for the UN in his *Study of the Problem of Discrimination Against Indigenous Populations*.[46] Cobo detailed that Indigenous peoples are those who have historical continuity with their pre-colonial societies that have developed on their territories and consider themselves to be distinct from others in the current post-colonial society.[47] Further, that they are non-dominant in society and aim to preserve their ancestral lands along with their cultural identity through their own cultural practices, social institutions, and legal traditions.[48]

This big question of who is Indigenous could easily be construed as a distraction from the real issues that need to be addressed, like that of loss of ancestral lands, language, and culture. However, as Martínez stated, the question relating to Indigenous peoples was domesticated.[49] What this means is that jurisdiction to rule on and deal with any issues relating to the treatment of Indigenous peoples was removed from the hands of international law and placed in those of domestic law, which is objected to by many Indigenous parties to the treaties in question.[50] This could possibly be because the trust to address issues faced by the Indigenous populations adequately is to be placed with those who are the cause of those same issues.

Indeed, there was hope when the Economic and Social Council established the Permanent Forum on Indigenous Issues in 2000, but that hope was diminished when the *United*

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[45] Anna Meijknecht 'The Re(Emergence) of Indigenous Peoples as Actors in International Law' (2002) 10(4) *Tilburg Foreign Law Review* 315, 316.
[46] José R. Martínez Cobo, *Report of the Special Rapporteur on the Study of the Problem of Discrimination Against Indigenous Populations,* UN Doc E/CN.4/Sub.2/1983/21 (5 August 1983).
[47] Ibid 379.
[48] Ibid 379.
[49] Miguel Alfonso Martínez, *Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Peoples*, UN Doc E/CN.4/Sub.2/1999/20 (22 June 1999), [192].
[50] Ibid 117.

Nations Declaration on the Rights of Indigenous Peoples ('*UNDRIP*') was released in 2007.[51] What *UNDRIP* did was formally domesticate Indigenous issues and ultimately absolve the UN and the international community of all liability for the relevant issues relating to Indigenous peoples and communities worldwide.

As treaties were negotiated from Nation to Nation, it is important to note that in Canada, Indigenous peoples are treated like that of a special interest group as opposed to a Nation. This is treated as a justification for the UN's actions in washing its hands free of the Indigenous question. While not morally right, this justification acts to *legally* absolve the UN of its duty to rectify any wrong done to Indigenous peoples, cultures, and lands. Arguably, this predominately places the blame for the UN's lack of interference on Canada, for its refusal to view Indigenous peoples as a Nation.

Under Article 8 of *UNDRIP*, paragraph 2 says that:

> *States shall provide effective mechanisms for prevention of, and redress for: … (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights … (d) Any form of forced assimilation or integration…*

These statements effectively remove liability from the international sphere and places the burden on the state to rectify the wrongdoings.

One could argue that Article 8 *UNDRIP* reflects international law's attempt at using its voice to remedy the injuries caused by the RSS, however, there is apparent safeguard in place to protect the states. Article 46, paragraphs 1 and 2 state that:

> *1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorising or encouraging any action which would dismember or impair totally or in part, the territorial integrity or political unity of sovereign and independent States.*
>
> *2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law, and in accordance with international human rights obligations. Any such limitations shall*

[51] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/Res/61/295 (2 October 2007, adopted 13 September 2007).

> *be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.*

Article 46(2) justifies limiting the rights that are set out in *UNDRIP* under the guise of territorial integrity and political unity. With a slight twist of words, any state could justify limiting certain rights provided by *UNDRIP* by invoking Article 46.

UNDRIP ultimately bestows responsibility upon the States to ensure the negative impacts of colonisation and the RSS are reconciled, ridding international law of any burden to do the same, while simultaneously providing an excuse for States to not take action. It is unclear whether adopting *UNDRIP* is positive for the rights of Indigenous peoples. Although, we have yet to have any sort of real-life examples as Canada has continued to assert that *UNDRIP* is inconsistent with Canadian law and, therefore, continues to refuse to formally adopt it.

In 1996 at the Inter-sessional Working Group on the UN Draft Declaration on the Rights of Indigenous Peoples in Geneva, Steven Newcombe founder of the Indigenous Law Institute asked what sort of practical significance *UNDRIP* would have for Indigenous Nations and Peoples.[52] Newcomb was told that, 'to the extent that words have meaning, and to the extent that meanings configure reality, the Declaration has importance.'[53] When attempting to rationalise and understand this statement, it was said that those who work within the domain of international law and human rights are 'masters of linguistic subtlety and nuance,' who understand that a minor change in wording could potentially reconstruct reality.[54]

In taking advantage of this knowledge and linguistic power, it has become clear that States are attempting to ensure that *UNDRIP* provides no disruption to the State's domination over Indigenous peoples, as the domination has been proven to be rather beneficial to the states both politically and economically.[55] Thus, it is clear that the

[52] Steven T Newcomb 'The UN Declaration on the Rights of Indigenous Peoples and the Paradigm of Domination' (2014) 20(3) *Griffith Law Review* 578, 584.
[53] Ibid 585.
[54] Ibid.
[55] Ibid 586.

motivations behind states being in favour of domesticating the Indigenous question are purely political and economic.

B *Transitional Justice*

As horrendous as the RSS was and still is, it is only a tiny portion of the harm done to Indigenous peoples in Canada. Transitional justice offers opportunities to re-establish the responsibility of states toward their Indigenous populations, however 'whether they will have transformational capacity, will depend in part on the political context in which they take place'.[56] For instance, in 2006, the Conservative government proposed the idea of extending human rights to Indigenous populations in a manner that, in turn, limited state obligation and threatened the collective rights of self-determination of Indigenous peoples.[57]

Although the Truth and Reconciliation Commission (TRC) has done a great job at making the voices of survivors of and witnesses to the RSS heard, its aim, as stated in its Mandate, is to 'put the events of the past behind us so that we can work towards a stronger and healthier future'.[58] It appears as though the government's intention with transitional justice is to put an end to their liability for wrongs committed in the past through apologies and mild forms of compensation for survivors of the RSS rather than to commence the beginning of amends and actual reparations.

The TRC's publications, along with the government's official apology for the RSS hold a surprising lack of reference to the deeper issues of colonisation while focusing solely on coming to an end of scrutiny faced for the past. It has been argued that decolonisation should be at the forefront of transitional justice for the Indigenous peoples of Canada, which ought to include decolonisation of the mind and of the structural transformation.[59] The former involves challenging colonial assumptions, privileged ignorance and taking ownership of colonial history.[60] The latter, 'calling for a transformation of the social,

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[56] Courtney Jung 'Canada and the Legacy of the Indian Residential Schools: Transitional Justice for Indigenous People in a Non-Transitional Society' (Research Brief No 295, Aboriginal Policy Research Consortium International, October 2009) 2.
[57] Ibid 1.
[58] Ibid 13.
[59] Augustine S. J. Park 'Settler Colonialism and the Politics of Grief: Theorising a Decolonising Transitional Justice for Indian Residential Schools' (2015) 16 *Human Rights Review* 273, 277.
[60] Ibid; See generally Paulette Regan, *Unsettling the settler within: Indian residential schools, truth telling, and reconciliation in Canada* (UBC Press, 2010).

political, cultural and economic injustices that often constitute the root causes of acute, extraordinary abuses'.[61]

C *An International Law Issue*

In the fifteenth century European forces used the international law of colonialism to dominate and conquer Indigenous peoples, their lands, and their assets in what is now known as the 'Doctrine of Discovery'.[62] Further known as one of the first principles of international law, the Doctrine of Discovery allowed Christian European countries to claim rights over Indigenous territories not yet known to the Europeans.[63] Thus, it is essential to note that international law, as we know it today, consists of doctrines and principles that developed out of Europe and were influenced by European experience.[64]

Suppose the colonisation that provided for a world of abuse and cultural genocide for the Indigenous populations was allowed for and excused by international law, then why was international law so quick to rid itself of the question of reparations and amends to the Indigenous peoples for the wrongs it authorised? This appears to be a theme, sometimes known as the public/private divide in international law. [65] It seems to want to rid itself of complex or perhaps controversial issues so as not to upset the states it relies on to function and maintain its level of power and dominance.[66]

IV CONCLUSION

The question appears to be whether the RSS should be an international law issue and, further, how it could or has already become an international law issue. Having established that the actions carried out within the RSS by the churches could and should be attributable to Canada, there is no question that there should be a level of state

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[61] Ibid. See also Rosemary Nagy 'The scope and bounds of transitional justice and the Canadian truth and reconciliation commission' (2013) 7(1) *International Journal of Transitional Justice* 52, 52-73.
[62] Robert J. Miller 'The Doctrine of Discovery: The International Law of Colonialism' (2019) 5 *Indigenous Peoples' Journal of Law, Culture, and Resistance* 35, 35.
[63] Robert J. Miller 'The International Law of Colonialism: A Comparative Analysis' (2011) 15(4) *Lewis & Clark Law Review* 847, 848-9.
[64] Antony Anghie 'The Evolution of International Law: Colonial and Postcolonial Realities' (2007) 27(5) *Third World Quarterly* 739, 740.
[65] See generally Paulina García-Del Moral 'A Feminist Challenge to the Gendered Politics of the Public/Private Divide: On Due Diligence, Domestic Violence, and Citizenship' (2013) 18(6-7) *Citizenship Studies* 661, 665-7.
[66] Ibid.

responsibility in the international sphere. However, blocking this from coming to fruition are general principles of international law, such as *UNDRIP*, which have fully domesticated the Indigenous question.

UNDRIP has been argued to be a consequence of 'states constructing and institutionalising in law and policy a framework of domination against Indigenous peoples'.[67] Meaning that international law has always been and continues to be used as a tool of domination. Further, *UNDRIP* has been criticised as addressing the broader human rights of Indigenous peoples rather than the rights that Indigenous peoples require to survive as distinct peoples.[68] There are already in place several sources that protect general human rights in the international and domestic forums.[69] What is needed are formal and potentially binding international protections for Indigenous populations that go beyond simple recognition of past wrongs and, further, explore what decolonisation would entail.

[67] Newcomb (n 52) 578.
[68] Irene Watson 'The 2007 Declaration on the Rights of Indigenous Peoples: Indigenous Survival – Where to from Here?' (2014) 20(3) *Griffith Law Review* 507, 507.
[69] *Universal Declaration of Human Rights,* GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).; *Canadian Human Rights Act,* RSC 1985, c H-6; *Canada Act* 1982 (UK) c 11, sch B pt I.

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