

# PROSECUTING NON-PHYSICAL ABUSE BETWEEN CURRENT INTIMATE PARTNERS: ARE STALKING LAWS AN UNDER-UTILISED RESOURCE?

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*The prevention of family violence — including economic and psychological abuse — is currently a major priority for governments in Australia and New Zealand. Traditionally, the criminal law in those jurisdictions has focused exclusively on physical violence. However, there is increasing interest in also targeting non-physical forms of abuse. Many of these behaviours are indirectly criminalised via family violence legislation, which requires an intervention order to be in place before the behaviour is deemed criminal. This article investigates whether those behaviours are also directly criminalised by stalking laws, particularly in the context of an ongoing intimate relationship, where the partners are cohabitating. The extent to which stalking laws can be, and are being, used to prosecute offenders for psychologically or emotionally abusing their intimate partners is investigated, as well as the broader issue of whether stalking laws are an adequate mechanism for dealing with this form of abuse. We conclude that, although stalking provisions can be used to prosecute non-physical family violence against current intimate partners, restricted community and expert understandings of stalking suggest that a more appropriate solution would be to construct a new family violence-specific offence to deal with this form of abuse.*

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## I INTRODUCTION

Whether criminal prosecution should extend to those who engage in non-physical abuse (emotional, financial and psychological) of their intimate partners has emerged as a key concern in the criminal law following the introduction of the new offence of controlling or coercive behaviour in England and Wales in 2015.<sup>1</sup> This article investigates whether stalking laws in Australia and New Zealand could or should be used to prosecute those who engage in this form of abuse, locating the analysis within a framework of recent family violence legislative reforms and policy developments.<sup>2</sup>

There is little doubt that stopping family violence has become one of the top priorities of governments in Australia and New Zealand. The Tasmanian government has published an action plan to take a coordinated approach to family violence.<sup>3</sup> A special taskforce established by the Queensland

<sup>1</sup> *Serious Crime Act 2015* (UK) s 76. In Australia, the potential introduction of a special, new offence to address this problem (based on the provision adopted in England and Wales) was an issue in the 2017 Queensland State election: Chris O'Brien, 'Queensland Election: LNP Pledges Domestic Violence Offence, Crackdown on School Truancy', *ABC News* (online, 7 November 2017) <<https://www.abc.net.au/news/2017-11-07/lnp-pledges-new-offence-of-domestic-violence/9124126>>, archived at <<https://perma.cc/JYB5-RCVG>>.

<sup>2</sup> The term 'family violence' is employed in this paper to designate a broad range of abuse (physical, sexual, psychological or social) by one family member towards another. The term 'domestic violence' is only used where it is the relevant term employed in a specific policy or statute.

<sup>3</sup> Government (Tas), *Safe Homes, Safe Families: Tasmania's Family Violence Action Plan 2015–2020* (Report, 2015).

government made 140 recommendations for a whole-of-government response to domestic violence.<sup>4</sup> The New Zealand government is currently considering wide-sweeping legislative amendments designed to improve victim safety.<sup>5</sup> The Victorian government has agreed to adopt all 227 recommendations of the Royal Commission into Family Violence,<sup>6</sup> recently issuing a 10-year plan to put those recommendations into effect.<sup>7</sup> Underpinning these new government strategies is a consistent theme: combatting family violence is simply not possible without a coordinated and collaborative response between agencies and organisations;<sup>8</sup> and the problem must be addressed in a cohesive, multi-faceted and holistic manner.

One of the tools that is often employed in response to family violence is the criminal law. For instance, although the prosecution of physical assaults within the family as criminal offences has had a chequered history,<sup>9</sup> it is now generally recognised that a physical or sexual assault on an intimate partner should be prosecuted and punished.<sup>10</sup> Contemporary conceptualisations of

<sup>4</sup> *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (Report, 2015).

<sup>5</sup> New Zealand Ministry of Justice, *Safer Sooner: Strengthening New Zealand's Family Violence Laws* (Report, 2016).

<sup>6</sup> See *Royal Commission into Family Violence: Summary and Recommendations* (Report, March 2016).

<sup>7</sup> *Ending Family Violence: Victoria's Plan for Change* (Report, 2016).

<sup>8</sup> See generally Sandra Walklate, Kate Fitz-Gibbon and Jude McCulloch, 'Is More Law the Answer? Seeking Justice for Victims of Intimate Partner Violence through the Reform of Legal Categories' (2018) 18(1) *Criminology & Criminal Justice* 115, 124–7.

<sup>9</sup> Elizabeth Pleck, 'Criminal Approaches to Family Violence, 1640–1980' (1989) 11 *Crime and Justice: A Review of Research* 19; Reva B Siegel, "'The Rule of Love': Wife Beating as Prerogative and Privacy' (1996) 105(8) *Yale Law Journal* 2117; Melissa Murray, 'Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life' (2009) 94(4) *Iowa Law Review* 1253.

<sup>10</sup> Throughout this article, we focus primarily on heterosexual relationships, female victims, and intimate partner violence. In sheer volume, this accounts for the vast majority of reported family violence (recent data from the Australian Bureau of Statistics indicate that 23% of women report having experienced emotional abuse from an intimate partner since they were 15, and 16% report being a victim of physical violence: Australian Bureau of Statistics, *Personal Safety, Australia, 2016* (Catalogue No 4906.0, 8 November 2017)). This does not, however, exhaustively define family violence. Men may be victims of family violence, current intimate partners may be same sex or transgender, and family members other than intimate partners may be perpetrators. For example, a couple in England were recently charged with coercive and controlling behaviour of the male partner's parents: Jenny Desborough, 'Couple Accused of Threatening to Kill Parents on Trial', *Watford Observer* (online, 28 October 2017) <<https://www.watfordobserver.co.uk/news/15624452.couple-accused-of-threatening-to-kill-parents-on-trial/>>, archived at <<https://perma.cc/K9QU-RR4S>>.

family violence, however, now emphasise that it involves more than physical violence; it also includes non-physical abuse as an integral component.<sup>11</sup> While the dynamics of ‘physical abuse’ and ‘non-physical abuse’ are interactive, ‘non-physical abuse’ broadly refers to conduct that may result in myriad diverse harms, variously described in terms such as ‘psychological’, ‘mental’, ‘emotional’, ‘social’ and ‘economic’. There is considerable overlap between these various terms, but collectively they operate to distinguish these harms from physical harms. That is, what these harms generally share is intangibility; they are subjectively experienced by the victim without any necessary and invariant physical manifestation.

Definitions of family violence in relevant civil legislation now typically include psychological or mental harm as forms of family violence,<sup>12</sup> and acknowledge that ‘domestic violence extends beyond physical violence and may involve the exploitation of power imbalances and patterns of abuse over many years.’<sup>13</sup> For instance, the definition of ‘family violence’ in s 5 of the *Family Violence Protection Act 2008* (Vic) includes:

- (a) behaviour by a person towards a family member of that person if that behaviour —
  - (i) is physically or sexually abusive; or
  - (ii) is emotionally or psychologically abusive;<sup>14</sup> or
  - (iii) is economically abusive;<sup>15</sup> or

<sup>11</sup> We recognise that dichotomising physical and non-physical abuse is artificial, as non-physical harms may have physical consequences and vice versa. However, in this article we focus on harms caused by non-physical abuse as the *primary* harm when considering criminalisation.

<sup>12</sup> *Family Violence Act 2018* (NZ) ss 2(c), 3.

<sup>13</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9(3)(d); *Family Violence Act 2016* (ACT) s 2(c).

<sup>14</sup> Emotional or psychological abuse is defined as ‘behaviour by a person towards another person that torments, intimidates, harasses or is offensive to the other person’: *Family Violence Protection Act 2008* (Vic) s 7.

<sup>15</sup> Economic abuse is defined in s 6 of the *Family Violence Protection Act 2008* (Vic) (emphasis in original) as:

[B]ehaviour by a person (the *first person*) that is coercive, deceptive or unreasonably controls another person (the *second person*), without the second person’s consent —

- (a) in a way that denies the second person the economic or financial autonomy the second person would have had but for that behaviour; or
- (b) by withholding or threatening to withhold the financial support necessary for meeting the reasonable living expenses of the second person or the second

- (iv) is threatening; or
- (v) is coercive; or
- (vi) in any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person.<sup>16</sup>

Relevant legislation in Queensland and the Australian Capital Territory is similarly broad and includes non-physical abuse, such as emotional or psychological abuse, economic abuse, threatening or coercive behaviour and behaviour that controls or dominates the victim.<sup>17</sup>

This conceptualisation of family violence in civil laws raises the issue of how far the *criminal law's* reach should extend in regulating abuse in familial relationships. In particular, to what extent should governments intervene and use the coercive power of the criminal law to protect family members from harms that have not been traditionally recognised by the criminal law, such as non-physical abuse?

In considering this issue, there is a need for a principled approach that balances the gendered and substantive harms associated with non-physical abuse with the appropriate limits of the criminal law. On the one hand, there are significant negative outcomes associated with long-term psychological abuse by an intimate partner. Elevated levels of substance abuse,<sup>18</sup> depression or anxiety,<sup>19</sup> post-traumatic stress disorder,<sup>20</sup> homelessness,<sup>21</sup> involvement in

person's child, if the second person is entirely or predominantly dependent on the first person for financial support to meet those living expenses.

<sup>16</sup> Ibid s 5(1)(a).

<sup>17</sup> *Family Violence Act 2016* (ACT) s 8(1)(a); *Domestic and Family Violence Protection Act 2012* (Qld) s 8(1).

<sup>18</sup> Erin S Straight, Felicity WK Harper and Ileana Arias, 'The Impact of Partner Psychological Abuse on Health Behaviors and Health Status in College Women' (2003) 18(9) *Journal of Interpersonal Violence* 1035, 1047.

<sup>19</sup> VicHealth, *The Health Costs of Violence: Measuring the Burden of Disease Caused by Intimate Partner Violence* (Report, 2004) 11 <<https://www.vichealth.vic.gov.au/media-and-resources/publications/the-health-costs-of-violence>>, archived at <<https://perma.cc/BLV6-WPSN>>.

<sup>20</sup> Mindy B Mechanic, Terri L Weaver and Patricia A Resick, 'Mental Health Consequences of Intimate Partner Abuse: A Multidimensional Assessment of Four Different Forms of Abuse' (2008) 14(6) *Violence against Women* 634, 649.

<sup>21</sup> In 2016–17, 40% of all clients receiving assistance from homelessness agencies (n = 114,757) cited family violence as the main reason for homelessness. The majority of this group were women and children: Australian Institute of Health and Welfare, *Specialist Homelessness Services Annual Report 2016–17* (Web Report, 12 February 2018) <<https://www.aihw.gov.au/reports/homelessness-services/specialist-homelessness-services-2016-17/contents/client-gro>

the criminal justice system,<sup>22</sup> chronic stress, and a range of other physical ailments<sup>23</sup> have been identified in victims of psychological abuse. On the other hand, the criminal law is ‘a powerful, expensive, and invasive tool.’<sup>24</sup> It should only be used as a last resort<sup>25</sup> and, when used, should extend only as far as absolutely necessary.<sup>26</sup>

With that *de minimis* caveat in mind, there are two primary ways in which non-physical forms of family violence are currently criminalised. First, a broad range of behaviours are *indirectly* criminalised through what Andrew Simester and Andreas von Hirsch have referred to as a two-step prohibition.<sup>27</sup> The first step involves a court making a civil order imposing certain restrictions on a respondent who has already engaged in some form of family violence and who poses a risk of committing further violence.<sup>28</sup> The second step is to then punish that person if they act in contravention of those conditions.<sup>29</sup> This latter step is the mechanism through which emotional and psychological abuse is indirectly criminalised. In each state and territory of Australia, and in New Zealand, a respondent who breaches an intervention order by engaging in any of the specified behaviours that classify as ‘family violence’ will have committed a criminal offence.<sup>30</sup> As the definitions of

ups-of-interest/clients-who-have-experienced-domestic-and-family-violence>, archived at <<https://perma.cc/Q9C5-YXX7>>.

<sup>22</sup> Prison Reform Trust, ‘*There’s a Reason We’re in Trouble: Domestic Abuse as a Driver to Women’s Offending*’ (Report, 2017) 9 <[http://www.prisonreformtrust.org.uk/Portals/0/Documents/Domestic\\_abuse\\_report\\_final\\_lo.pdf](http://www.prisonreformtrust.org.uk/Portals/0/Documents/Domestic_abuse_report_final_lo.pdf)>, archived at <<https://perma.cc/TP3X-9MXM>>.

<sup>23</sup> Ann L Coker et al, ‘Physical Health Consequences of Physical and Psychological Intimate Partner Violence’ (2000) 9(4) *Archives of Family Medicine* 451, 454.

<sup>24</sup> AP Simester and Andreas von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Hart Publishing, 2011) 211.

<sup>25</sup> Douglas Husak, ‘The Criminal Law as Last Resort’ (2004) 24(2) *Oxford Journal of Legal Studies* 207; Jonathan Schonsheck, *On Criminalization: An Essay in the Philosophy of the Criminal Law* (Kluwer Academic Publishers, 1994).

<sup>26</sup> See generally Michael S Moore, ‘Liberty’s Constraints on What Should Be Made Criminal’ in RA Duff et al (eds), *Criminalization: The Political Morality of the Criminal Law* (Oxford University Press, 2014) 182; Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press, 2007) 6.

<sup>27</sup> Simester and von Hirsch (n 24) ch 12.

<sup>28</sup> See *ibid* 213.

<sup>29</sup> *Ibid*.

<sup>30</sup> *Family Violence Act 2016* (ACT) s 43; *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 14(1); *Domestic and Family Violence Protection Act 2012* (Qld) s 177(2); *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 31(2); *Family Violence Act 2004* (Tas) s 35(1); *Family Violence Protection Act 2008* (Vic) s 123; *Restraining Orders Act 1997* (WA) s 61; *Domestic Violence Act 1995* (NZ) s 49.

'family violence' in each jurisdiction are broad and generally incorporate emotional abuse, psychological abuse, economic abuse and controlling or coercive behaviours,<sup>31</sup> a respondent will have contravened an intervention order if they engage in such conduct. That breach offence is then usually punishable by a maximum of two years' imprisonment,<sup>32</sup> although there are some jurisdictions in which an aggravating factor (such as persistent or multiple contraventions) will increase that maximum penalty to five years.<sup>33</sup> Simester and von Hirsch have explicated a number of advantages to two-step prohibitions — for example, they improve the prosecution's ability to prove that the defendant 'knew or ought to have known' that their behaviour was wrong.<sup>34</sup> There are, however, concerns in relation to two-step prohibitions in the context of family violence. Criminalising non-physical abuse only when it is in breach of a court order can: misidentify the real harm of the behaviour; result in inappropriately low penalties; and give the impression that family violence per se is decriminalised in the absence of an intervention order.<sup>35</sup> An over-reliance on civil preventive orders may also constitute under-criminalisation (a failure to adequately employ the criminal law) given that the true targets are significant wrongs and harms.<sup>36</sup> Further, this civil-criminal hybrid form of criminalisation may negatively affect the legitimacy of the law as a whole, because it bypasses the procedural rights that should accompany the criminal process.<sup>37</sup>

<sup>31</sup> See, eg, *Family Violence Protection Act 2008* (Vic) ss 5–7.

<sup>32</sup> See, eg, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 14(1); *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 31(2); *Restraining Orders Act 1997* (WA) s 61(1). In New Zealand, the maximum penalty for breaching a protection order is three years' imprisonment: *Domestic Violence Act 1995* (NZ) s 49(3).

<sup>33</sup> See, eg, *Domestic and Family Violence Protection Act 2012* (Qld) s 177(2)(a); *Family Violence Act 2004* (Tas) s 35(1)(d); *Family Violence Protection Act 2008* (Vic) ss 123A(2), 125A(1).

<sup>34</sup> Simester and von Hirsch (n 24) ch 12; Marilyn McMahon and Paul McGorrery, 'Criminalising Emotional Abuse, Intimidation and Economic Abuse in the Context of Family Violence: The Tasmanian Experience' (2016) 35(2) *University of Tasmania Law Review* 1, 21 ('Criminalising Emotional Abuse').

<sup>35</sup> Heather Douglas, 'Do We Need a Specific Domestic Violence Offence?' (2015) 39(2) *Melbourne University Law Review* 434, 438. See also Heather Douglas, 'Not a Crime Like Any Other: Sentencing Breaches of Domestic Violence Protection Orders' (2007) 31(4) *Criminal Law Journal* 220.

<sup>36</sup> Andrew Ashworth and Lucia Zedner, 'Preventive Orders: A Problem of Undercriminalization?' in RA Duff et al (eds), *The Boundaries of the Criminal Law* (Oxford University Press, 2010) 59.

<sup>37</sup> Jennifer Hendry and Colin King, 'Expediency, Legitimacy, and the Rule of Law: A Systems Perspective on Civil/Criminal Procedural Hybrids' (2017) 11(4) *Criminal Law and Philosophy* 733, 750–4.

The second and more straightforward way in which non-physical abuse can be criminalised is through *direct* criminalisation, with offences not preconditioned on the existence of a civil order. Although it is unlawful in each of the jurisdictions of Australia and New Zealand to physically assault a family member,<sup>38</sup> regardless of whether a court order is in place, the same is not yet true of most forms of non-physical family violence. Thus far, Tasmania is the only jurisdiction in Australia to have expressly extended the criminal law to address these forms of intimate partner abuse.

In 2005, new offences came into effect in Tasmania that criminalised certain non-physical harms in the context of family violence: specifically, emotional abuse and economic abuse.<sup>39</sup> To be found guilty of these offences, there is no requirement that an intervention order be in place. In their first decade of operation, these offences appear to have been charged infrequently, with the Tasmanian Sentencing Advisory Council reporting only eight convictions for the offences by 2015.<sup>40</sup> More recent research by police prosecutor Kerryne Barwick, in conjunction with Paul McGorrery and Marilyn McMahon, however, indicates that there have now been at least 40 successful convictions, an increase which they attribute to a change in the way in which the limitation period associated with the offence is framed.<sup>41</sup> Nevertheless, this is still a small number when compared to the number of family violence incidents and prosecutions in Tasmania each year.<sup>42</sup> This relative scarcity of prosecutions for non-physical abuse could be a result of a

<sup>38</sup> With the exception that parents are permitted to use physical force to punish their children in all Australian states, via the defence of 'reasonable chastisement' or 'lawful correction': see, eg, *Crimes Act 1900* (NSW) s 61AA; *Criminal Code Act* (NT) s 11; *Criminal Code Act 1899* (Qld) s 280; *Criminal Code Act 1924* (Tas) s 50.

<sup>39</sup> *Family Violence Act 2004* (Tas) ss 8–9.

<sup>40</sup> Sentencing Advisory Council (Tas), *Sentencing of Adult Family Violence Offenders* (Final Report No 5, October 2015) 26.

<sup>41</sup> Kerryne Barwick, Paul McGorrery and Marilyn McMahon, 'Ahead of Their Time? Offences of Economic and Emotional Abuse in Tasmania, Australia' in Marilyn McMahon and Paul McGorrery (eds), *Criminalising Coercive Control* (Springer, forthcoming). Whereas previously the only behaviour an offender could be convicted of was behaviour that had occurred in the six months immediately preceding charges being laid, s 9A of the *Family Violence Act 2004* (Tas) now permits years of abuse to be charged so long as the most recent act constituting the 'course of conduct' occurred in the 12 months preceding charges being laid.

<sup>42</sup> In 2016–17, Tasmania Police recorded 3,098 family violence incidents, and laid 2,917 charges for family violence offences: Department of Police, Fire and Emergency Management (Tas), *2016–17 Annual Report* (Report, October 2017) 33, 36 <<https://www.police.tas.gov.au/uploads/DPFEMAnnualReport20162017-b.pdf>>, archived at <<https://perma.cc/L3LV-99CQ>>.



number of factors, including overlap between the provisions, a certain amount of redundancy in their wording, a lack of clarity around when control or intimidation will be ‘unreasonable’ (a key element of the offences), a short limitation period and a purported criminalisation of emotional abuse that does not seem to *actually* have that effect.<sup>43</sup> In any event, the mere existence of the Tasmanian provisions constitutes an important and unique prelude to the present discussion about the criminalisation of non-physical abuse. In other Australian jurisdictions and New Zealand, there are no specific provisions directly criminalising psychological abuse, emotional abuse, verbal abuse or economic abuse between intimate partners. In other countries, on the other hand, in the context of increased recognition of the severe and adverse impact of non-physical abuse, new offences have been enacted or are currently being considered: in England and Wales, a new offence of ‘controlling or coercive behaviour’ has been enacted;<sup>44</sup> Ireland has recently introduced a similar offence;<sup>45</sup> and Scotland has enacted the related offence of ‘domestic abuse’.<sup>46</sup> The question therefore emerges: should more Australian jurisdictions and New Zealand directly and specifically criminalise non-physical abuse?

It is an important question, and one which should be answered by first considering whether, despite most jurisdictions not having *specifically* criminalised non-physical intimate partner abuse, such behaviours might already be *generally* criminalised through existing criminal laws; after all, a new law should only be introduced if there is a ‘gap’ that needs filling. The most immediately relevant laws that might be used to prosecute offenders for non-physical abuse of an intimate partner are those that prohibit stalking.<sup>47</sup> This is because there are significant overlaps between stalking and family violence. Both types of behaviour are likely to result in non-physical harms to victims,<sup>48</sup> and both offence types are premised on the proscription of *repeated*

<sup>43</sup> McMahon and McGorrery, ‘Criminalising Emotional Abuse’ (n 34) 14–22.

<sup>44</sup> *Serious Crime Act 2015* (UK) s 76.

<sup>45</sup> *Domestic Violence Act 2018* (Ireland) s 39.

<sup>46</sup> *Domestic Abuse (Scotland) Act 2018* (Scot) s 1.

<sup>47</sup> There has also recently been a suggestion in the United States that ‘false imprisonment’ offences might also already capture non-physical forms of domestic abuse between intimate partners: Alexandra Michelle Ortiz, ‘Invisible Bars: Adapting the Crime of False Imprisonment to Better Address Coercive Control and Domestic Violence in Tennessee’ (2018) 71(2) *Vanderbilt Law Review* 681.

<sup>48</sup> Keith E Davis, Ann L Coker and Maureen Sanderson, ‘Physical and Mental Health Effects of Being Stalked for Men and Women’ (2002) 17(4) *Violence and Victims* 429, 437–40; Beth Bjerregaard, ‘An Empirical Study of Stalking Victimization’ (2000) 15(4) *Violence and Victims* 389.

behaviours (ie ‘courses of conduct’) that are likely to result in those harms.<sup>49</sup> It is a key feature of both intimate partner abuse and stalking that the effect of recurrent incidents is cumulative; that is, the impact of the totality of the behaviour is almost invariably greater than the simple additive effect of each individual incident.<sup>50</sup> Indeed, not only are there conceptual overlaps between stalking and family violence,<sup>51</sup> many jurisdictions expressly link the two concepts in legislation. By way of illustration, in Queensland<sup>52</sup> and the Northern Territory,<sup>53</sup> the definitions of ‘domestic violence’ include stalking. The definitions of ‘family violence’ in Tasmania<sup>54</sup> and the Australian Capital Territory<sup>55</sup> have a similar inclusion. Additionally, in New South Wales, stalking provisions expressly include reference to domestic relationships<sup>56</sup> and specify that, in determining whether a person’s conduct amounts to stalking, courts may have regard to any previous domestic violence by the offender.<sup>57</sup> This seems to acknowledge that there is at least a link, and perhaps even overlap, between stalking and domestic violence. Indeed, when stalking legislation was originally introduced in New South Wales, it was actually *limited* to domestic relationships.<sup>58</sup>

However, commentators have noted that when stalking occurs within domestic relationships, traditional attitudes and practices associated with domestic violence may impede legal responses.<sup>59</sup> There is some evidence to support this claim. Studies from the United Kingdom have reported that

<sup>49</sup> See, eg, Douglas, ‘Do We Need a Specific Domestic Violence Offence?’ (n 35) 451–2; Heather Douglas, ‘Do We Need an Offence of Coercive Control?’ (2018) 144 *Precedent* 18, 20.

<sup>50</sup> See, eg, Bonnie Brandl, Candace J Heisler and Lori A Stiegel, ‘The Parallels between Undue Influence, Domestic Violence, Stalking and Sexual Assault’ (2005) 17(3) *Journal of Elder Abuse & Neglect* 37, 43–8.

<sup>51</sup> Of course, while there are conceptual overlaps between stalking and family violence, the conduct is not entirely synonymous. There are, for example, many forms of stalking outside the context of familial relationships that are entirely distinct and, conversely, some forms of family violence that do not constitute stalking (such as economic abuse).

<sup>52</sup> *Domestic and Family Violence Protection Act 2012* (Qld) s 8(2)(i).

<sup>53</sup> *Domestic and Family Violence Act 2007* (NT) s 5(d).

<sup>54</sup> *Family Violence Act 2004* (Tas) s 7(a)(iv).

<sup>55</sup> *Family Violence Act 2016* (ACT) s 8(2)(d).

<sup>56</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13(2): ‘[C]ausing a person to fear physical or mental harm includes causing the person to fear physical or mental harm to another person with whom he or she has a domestic relationship.’

<sup>57</sup> *Ibid* s 8(2).

<sup>58</sup> *Crimes Act 1900* (NSW) ss 562A(1) (definition of ‘stalking’), 562AB, as at 19 December 1993.

<sup>59</sup> Amanda Pearce and Patricia Easteal, ‘The “Domestic” in Stalking’ (1999) 24(4) *Alternative Law Journal* 165, 166.

police are reluctant to identify non-physical abuse as stalking.<sup>60</sup> There was also reluctance by the judiciary to accept behaviour as stalking when the abuse was directed at an intimate partner. Thus, early case law in England and Wales suggested that stalking laws were not an appropriate mechanism to protect persons in ongoing intimate relationships from non-physical abuse. In *R v Hills*,<sup>61</sup> the Court of Appeal (England and Wales) concluded that an ongoing relationship between the parties precluded the application of England's stalking laws, observing:

It is to be borne in mind that the state of affairs which was relied upon by the prosecution was miles away from the 'stalking' type of offence for which the 1997 Act was intended. That is not to say that it is never appropriate so to charge a person who is making a nuisance of himself to his partner or wife when they have become estranged. However, in a situation such as this, when they were frequently coming back together and intercourse was taking place (apparently a video was taken of them having intercourse) it is unrealistic to think that this fell within the stalking category which either postulates a stranger or an estranged spouse. That was not the situation when the course of conduct relied upon was committed.<sup>62</sup>

'Estrangement' was therefore found to be a precondition of criminal liability for stalking.<sup>63</sup> This is, however, no longer the position at common law. There have now been several cases where men have been convicted of stalking their then-current female partners.<sup>64</sup> Despite this development, guidance published

<sup>60</sup> See, eg, Michelle Weller, Lorraine Hope and Lorraine Sheridan, 'Police and Public Perceptions of Stalking: The Role of Prior Victim–Offender Relationship' (2013) 28(2) *Journal of Interpersonal Violence* 320, 331–4.

<sup>61</sup> [2001] 1 FLR 580.

<sup>62</sup> *Ibid* 586 [31] (Otton LJ).

<sup>63</sup> *Ibid*.

<sup>64</sup> In *R v Curtis* [2010] 3 All ER 849, 857 [32], Pill LJ, in the Court of Appeal, held that although the defendant's conduct could not constitute a course of conduct, they could 'not exclude the possibility that harassment ... may include harassment of a co-habitee'. That said, the Court of Appeal subsequently clarified that the provision 'is not normally appropriate for use as a means of criminalising conduct, not charged as violence, during incidents in a long and predominantly affectionate relationship': *R v Widdows* [2011] 2 FLR 869, 874 [29] (Pill LJ) (emphasis added). Given that limited case law is available, reference can also be made to multiple media reports of cases in which family violence offenders in the United Kingdom have been accused of stalking their intimate partner: see, eg, Martin Evans, 'Jealous Husband Pretended to Be an Ex-Boyfriend to Stalk His Own Wife, Then Comforted Her as She Became a Recluse', *The Telegraph* (online, 25 January 2018) <<https://www.telegraph.co.uk/news/2018/01/25/jealous-husband-pretended-ex-boyfriend-stalk-wifethen-comforted/>>, archived at <<https://perma.cc/L5RU-GMEL>>; Thomas

by the Crown Prosecution Service of England and Wales still advises that stalking and harassment charges ‘may be appropriate if the victim and perpetrator were previously in a relationship *but no longer live together*’.<sup>65</sup> This suggests that if the parties cohabited at the time of the offence, stalking would not be an appropriate charge. Consequently, the applicability and use of stalking laws to prohibit non-physical abuse in intimate relationships warrants exploration.

While there is an extensive body of research and commentary on stalking by *previous* intimate partners, the use of stalking laws to criminalise non-physical abuse of a *current* intimate partner has, to date, received almost no attention in criminal law and criminology discourses.<sup>66</sup> This article addresses that gap by exploring the relationship between stalking and family violence, and investigating three key issues relating to stalking laws in Australia and New Zealand.

First, applying statutory interpretation principles, we explore whether stalking laws *can* be used to prosecute non-physical abuse between intimate (and especially cohabitating) partners. Second, looking at available crime statistics in the various jurisdictions, we establish the extent to which stalking laws *are* used to prosecute non-physical abuse between intimate partners. Finally, balancing competing rule of law principles, we evaluate whether stalking laws *should* be used to regulate non-physical abuse of intimate partners.

We conclude that although stalking laws both can be, and in some circumstances are being, used to prosecute intimate partners for non-physical abuse during the relationship, labelling those offenders’ behaviour as stalking is incongruous and likely to lead to under-recognition and under-prosecution

Burrows, ‘Businessman Stuck a Tracking Device on His Wife’s Car and Festeoned Their Home with Pictures of Her Boss When He Found Out She’d Been Sending Him Flirty Messages’, *Daily Mail* (online, 13 November 2017) <<https://www.dailymail.co.uk/news/article-5076901/Businessman-stalking-campaign-against-wife.html>>, archived at <<https://perma.cc/3LY4-8DA6>>; James Dunn, ‘Husband Who Put a Tracking Device On His Wife’s Car because He Thought She Was Having an Affair Is Convicted of Stalking’, *Daily Mail* (online, 20 January 2017) <<https://www.dailymail.co.uk/news/article-4137304/Husband-tracked-wife-s-car-convicted-stalking.html>>, archived at <<https://perma.cc/CBM9-HKTL>>.

<sup>65</sup> ‘Controlling or Coercive Behaviour in an Intimate or Family Relationship’, *Crown Prosecution Service* (Web Page, 30 June 2017) <<https://www.cps.gov.uk/legal-guidance/controlling-or-coercive-behaviour-intimate-or-family-relationship>>, archived at <<https://perma.cc/44XU-U7BF>> (discussing the difference between the offences of controlling or coercive behaviour and those involving stalking and harassment).

<sup>66</sup> Cf Douglas, ‘Do We Need a Specific Domestic Violence Offence?’ (n 35) 451–2; Douglas, ‘Do We Need an Offence of Coercive Control?’ (n 49) 20.

of the abuse. The more appropriate response, we advocate, is the establishment of a specific family violence offence that accounts for non-physical abuse.

## II CAN STALKING LAWS BE USED TO PROSECUTE NON-PHYSICAL ABUSE BETWEEN CURRENT INTIMATE PARTNERS?

Stalking legislation was first enacted in California in 1990,<sup>67</sup> and was then quickly introduced in many common law countries. Indeed, within a decade, legislation prohibiting stalking or harassment was introduced in most jurisdictions in the United States,<sup>68</sup> Canada,<sup>69</sup> England and Wales,<sup>70</sup> New Zealand,<sup>71</sup> and every state and territory in Australia.<sup>72</sup> Queensland was the first Australian jurisdiction to pass stalking legislation, with the then-Attorney-General describing stalking as

a generic term ... which collectively describes a wide variety of fact situations where one person may follow, contact, put under surveillance, or otherwise harass or intimidate a second person, but stops short of committing an offence against that person or his or her property.<sup>73</sup>

Although originally triggered by the stalking of celebrities,<sup>74</sup> debates about stalking soon encompassed discussions of family violence.<sup>75</sup> A crisis was identified in the legal regulation of family violence, particularly involving

<sup>67</sup> Cal Pen Code § 646.9 (Deering).

<sup>68</sup> Emily Finch, *The Criminalisation of Stalking: Constructing the Problem and Evaluating the Solution* (Cavendish Publishing, 2001) 98.

<sup>69</sup> *Criminal Code*, RSC 1985, c C-46, s 264.

<sup>70</sup> *Protection from Harassment Act 1997* (UK).

<sup>71</sup> *Harassment Act 1997* (NZ).

<sup>72</sup> *Crimes Act 1900* (ACT) s 35; *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13(1); *Criminal Code Act 1983* (NT) sch 1 s 189; *Criminal Code Act 1899* (Qld) sch 1 ch 33A; *Criminal Law Consolidation Act 1935* (SA) ss 19–19AA; *Criminal Code Act 1924* (Tas) sch 1 s 192; *Crimes Act 1958* (Vic) s 21A; *Criminal Law Amendment Act 1994* (WA) s 9.

<sup>73</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 9 November 1993, 5473 (Dean Wells, Attorney-General).

<sup>74</sup> Privacy Rights Clearinghouse, *Are You Being Stalked? Tips for Protection* (Fact Sheet No 14, June 1994).

<sup>75</sup> Ann W Burgess et al, 'Stalking Behaviors within Domestic Violence' (1997) 12(4) *Journal of Family Violence* 389.

women who were being harassed by their ex-partners.<sup>76</sup> Pre-existing legal remedies<sup>77</sup> were either not properly utilised or did not cover the scope or nature of stalking behaviours.<sup>78</sup> Although some behaviours might previously have been separately prosecuted as, for example, public order or criminal damage offences, they were typically prosecuted in a fragmented manner that detracted from the seriousness of the totality of the conduct.<sup>79</sup> Prosecuting them under the new stalking offences allowed the court to hear about a course of conduct in which the impact of the totality of incidents greatly exceeded that of individual events.<sup>80</sup> The new offences also addressed a matter central to stalking but traditionally regarded as largely outside the ambit of the criminal law: protection from mental harm.<sup>81</sup> This aspect of the new stalking offences was highlighted when the Attorney-General of New South Wales introduced stalking legislation into Parliament and observed that the new law 'recognises that many stalkers do not necessarily seek to arouse a fear of personal injury; often the purpose of a stalking campaign is to maintain control over an ex-partner, or inflict psychological damage'.<sup>82</sup>

Justice systems responded to these newly-recognised stalking behaviours by creating a system of dual regulation, incorporating and permitting both civil and criminal responses. This meant that not only did New Zealand and all states and territories in Australia introduce a criminal offence of stalking,

<sup>76</sup> In the United Kingdom, anti-harassment legislation was enacted on the basis that the legislation would provide domestic violence victims with greater certainty: see, eg, United Kingdom, *Parliamentary Debates*, House of Lords, 24 January 1997, vol 577, cols 917–18 (Lord Mackay of Clashfern).

<sup>77</sup> Prior to the introduction of anti-stalking legislation, several criminal offences could be used to prosecute some stalking behaviours. For example, 'following', 'watching' and 'besetting' were criminalised in New South Wales by the offence of intimidation or annoyance by violence or otherwise (which specifically prohibited watching, besetting or following another: *Crimes Act 1900* (NSW) s 545B) and in Western Australia by app B sch s 550 of the *Criminal Code Act Compilation Act 1913* (WA) (which made it an offence to use or threaten violence, persistently follow, hide property, or watch or beset another with intent to compel them to engage in, or abstain from, a lawful activity).

<sup>78</sup> Karen Whitney, 'Western Australia's New Stalking Legislation: Will It Fill the Gap?' (1999) 28(2) *Western Australian Law Review* 293, 294–6; Emma Ogilvie, *Stalking: Legislative, Policing and Prosecution Patterns in Australia* (Australian Institute of Criminology, 2000) 53–6.

<sup>79</sup> See generally Finch (n 68) ch 1.

<sup>80</sup> See *ibid*.

<sup>81</sup> Deborah Wiener, 'Stalking and the Infliction of Mental Harm' (Conference Paper, Stalking: Criminal Justice Responses Conference, 7–8 December 2000) 3–4.

<sup>82</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 25 November 1999, 3676 (Jeff Shaw, Attorney-General).

but they also introduced a civil intervention order (referred to as a protection order, harassment order, personal safety intervention order or similar).<sup>83</sup>

The definitions of stalking in both the civil and criminal legislation are identical in many jurisdictions,<sup>84</sup> although the maximum penalty for breaching the civil order is often much lower than the maximum penalty for the criminal offence of stalking (despite there being an aggravating feature of the behaviour occurring in breach of a court order).<sup>85</sup> In practice, stalking has primarily been dealt with via the civil process,<sup>86</sup> but the criminal offences have not been ignored. In Victoria alone, there were nearly 2,000 charges of stalking sentenced in the Magistrates' Court in the three-year period up to 30 June 2016.<sup>87</sup> This dual response to stalking behaviours — permitting either civil or criminal remedies — stands in stark contrast to how the justice system presently responds to non-physical family violence. In New Zealand and in all Australian jurisdictions except Tasmania, victims of non-physical behaviours constituting 'family violence' must almost exclusively rely upon the two-step (indirect) criminalisation of those behaviours; there is no specific criminal law counterpart for non-physical family violence.

At least, there is no criminal law counterpart *unless* stalking laws could apply to those behaviours. Stalking provisions in the various jurisdictions are drafted broadly. They do not require a particular prior relationship between offender and victim, and they extend to conduct well beyond the stereotypic stalker who is jealous, obsessively attached, or delusional about another person. Criminal prosecutions for stalking have been initiated in diverse situations, including where there is some ongoing and disharmonious contact, such as disputes between neighbours<sup>88</sup> or bullying by fellow school students.<sup>89</sup>

<sup>83</sup> See, eg, *Personal Safety Intervention Orders Act 2010* (Vic) ss 1–2.

<sup>84</sup> See, eg, *ibid* s 10; *Crimes Act 1958* (Vic) s 21A.

<sup>85</sup> The penalty for breach of a personal safety intervention order is up to two years' imprisonment: see, eg, *Personal Safety Intervention Orders Act 2010* (Vic) s 100(2). Criminal law imposes a maximum of 10 years' imprisonment for stalking: see, eg, *Crimes Act 1958* (Vic) s 21A(1).

<sup>86</sup> John Willis and Marilyn McMahon, 'Stalking: Intervention Orders' (Conference Paper, Stalking: Criminal Justice Responses Conference, 7–8 December 2000) 6.

<sup>87</sup> Specifically, there were 1,937 stalking charges: Sentencing Advisory Council (Vic), 'SACStat Magistrates' Court: Stalking', *SACStat: Sentencing Advisory Council Statistics Online* (Web Page, 2017) <[https://www.sentencingcouncil.vic.gov.au/sacstat/magistrates\\_court/6231\\_21A.html](https://www.sentencingcouncil.vic.gov.au/sacstat/magistrates_court/6231_21A.html)>, archived at <<https://perma.cc/E6MM-YATE>>.

<sup>88</sup> *DPP (UK) v Dunn* [2001] 1 Cr App R 352; Dilys Tausz, 'Harassment: Information Charging Harassment of Husband and Wife' [2001] (February) *Criminal Law Review* 130.

<sup>89</sup> *R v Barking Youth Court; Ex parte B* (England and Wales High Court, Rose LJ and Forbes J, 27 July 1999).

And, as described in more detail below, stalking laws require a relatively low threshold of harm (if at all), and the mental element of the offence can usually be imputed to an alleged offender when it can't be proven. Moreover, the offences do not generally contain, as many other offences do, the qualifying phrase 'without lawful excuse'.<sup>90</sup> In the following section, we engage in a more detailed analysis of the various stalking provisions, to delineate how each jurisdiction's unique provision could be used in the context of non-physical abuse against a current intimate partner.

### A *Interpreting Stalking Laws*

The stalking provisions in the nine jurisdictions can be usefully interpreted by applying three fundamental rules of statutory interpretation. The 'literal rule' requires courts to, first and foremost, ask what the language of a provision means 'in its ordinary and natural sense'.<sup>91</sup> That is, courts are obligated to 'obey that meaning, even if [they] think the result to be inconvenient or impolitic or improbable'.<sup>92</sup> The 'golden rule' then permits courts to ignore the ordinary and natural interpretation of the words if that 'would lead to some absurdity, or some repugnance or inconsistency ... in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther'.<sup>93</sup> The final rule is the 'mischief rule', which permits courts, in circumstances where there is an ambiguity or inconsistency, to have regard to the purposes or objects of the legislation in order to interpret the meaning of a provision.<sup>94</sup> In effect, the mischief rule is a last resort: the purpose of an Act is only relevant if the meaning of a provision cannot otherwise be discerned.<sup>95</sup> Otherwise, courts are bound to abide by the plain meaning of legislation, and can only refuse to do so if the result would be absurd or inconsistent.<sup>96</sup>

<sup>90</sup> For instance, in Victoria, s 21A(4) of the stalking provision only excludes a very limited number of persons and actions. Otherwise, the legislation does not provide any general defence of 'lawful excuse': *Crimes Act 1958* (Vic). See also *Personal Safety Intervention Orders Act 2010* (Vic) s 11.

<sup>91</sup> *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 161–2 (Higgins J).

<sup>92</sup> *Ibid* 162.

<sup>93</sup> *Grey v Pearson* (1857) 6 HL Cas 61.

<sup>94</sup> *Mills v Meeking* (1990) 169 CLR 214, 235 (Dawson J).

<sup>95</sup> See *ibid*.

<sup>96</sup> See *Grey v Pearson* (n 93) 1234 (Lord Wensleydale).



In order to first apply the literal rule to the stalking offence provisions, we analysed the various legislative instruments prohibiting stalking, to identify the mental elements (*mens rea*), behavioural elements (*actus reus*) and harm elements (*malum reus*) of each offence. Any behaviours constituting physical violence (including overt threats) were then excluded, as these are already prohibited in statutory assault and threat offences and are not the focus of this paper. The results of that analysis are summarised in Table 1.

*Table 1: Elements of Behaviours in Stalking Provisions in Australia and New Zealand That Most Resemble Non-Physical Abuse between Intimate Partners*

| Jurisdiction      | Behaviour of offender (A)   | <i>Mens rea</i> of offender (A)  | Harm to victim (B)  |
|-------------------|---|--|---|
| ACT <sup>97</sup> | Specified behaviours, especially: intimidating, harassing or molesting B                      | Subjective recklessness (knows mental harm, apprehension or fear likely)                               | None required   |
| NSW <sup>98</sup> | Any conduct   | Subjective recklessness (knows behaviour likely to cause other person to fear physical or mental harm) | Enumerated harms, especially: reasonable apprehension of injury, violence or damage to person or property |
| NT <sup>99</sup>  | Specified behaviours, especially: contacting B, or any behaviour reasonably expected to cause | Subjective recklessness (knows mental harm, apprehension or fear likely)                               | Mental harm, apprehension or fear   |

<sup>97</sup> *Crimes Act 1900* (ACT) s 35. The maximum penalty is normally two years' imprisonment, but increases to five years if the person was in breach of a court-ordered condition or in possession of an offensive weapon: at s 35(1).

<sup>98</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13. The maximum penalty is five years' imprisonment: at s 13(1).

<sup>99</sup> *Criminal Code Act 1983* (NT) sch 1 s 189. The maximum penalty is normally two years' imprisonment, but increases to five years if the person was in breach of a court-ordered condition or in possession of an offensive weapon: at s 189(2).

|                    |   |  |  |
|--------------------|---|--|--|
|                    | apprehension or fear  | Objective<br>recklessness (ought<br>to have known<br>mental harm,<br>apprehension or fear<br>likely)                       | Mental harm,<br>apprehension or fear   |
| NZ <sup>100</sup>  | Any behaviour   | Subjective<br>recklessness (knows<br>behaviour likely to<br>cause B to fear for<br>safety, including<br>mental well-being) | Not required   |
| QLD <sup>101</sup> | Specified behaviours,<br>especially:<br>intimidating,<br>harassing or<br>threatening act<br>against B   | Intentionally directed<br>at B   | Serious mental,<br>psychological or<br>emotional harm;<br>preventing B from<br>acting; compelling B<br>to act; apprehension<br>or fear |
| SA <sup>102</sup>  | Specified behaviours,<br>especially:<br>communicating with<br>B by any electronic<br>means of commun-<br>ication; or any<br>behaviour reasonably<br>expected to cause | Intention to cause<br>serious mental harm<br>or serious<br>apprehension or fear  | None required  |

<sup>100</sup> *Harassment Act 1997* (NZ) ss 2(1) (definitions of 'harassment', 'safety'), 3, 4. The prohibition against harassment is based on these definitions: at s 8. The maximum penalty is two years' imprisonment: at s 8(2).

<sup>101</sup> *Criminal Code Act 1899* (Qld) sch 1 ss 359A–359B. The maximum penalty is normally five years' imprisonment, but increases to seven years where an aggravating feature is present, such as the conduct being in contravention of an intervention order: at ss 359E(2)–(3).

<sup>102</sup> *Criminal Law Consolidation Act 1935* (SA) s 19AA(1). The maximum penalty is normally three years' imprisonment, but increases to five years where it is an 'aggravated offence' as defined in s 5AA: at s 19AA(2).

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|                    |  | apprehension or fear  |                                   |
|--------------------|--|---|-----------------------------------|
| TAS <sup>103</sup> | Specified behaviours, especially: contacting B by any means of communication; or any behaviour reasonably expected to cause apprehension or fear | Intent to cause mental harm or apprehension or fear                                     | None required                     |
|                    |  | Subjective recklessness (knows mental harm, apprehension or fear likely)                | Mental harm, apprehension or fear |
|                    |  | Objective recklessness (ought to have known mental harm or apprehension or fear likely) | Mental harm, apprehension or fear |
| VIC <sup>104</sup> | Specified behaviours, especially: any behaviour reasonably expected to cause mental harm or arouse apprehension or fear                          | Subjective recklessness (knows mental harm or apprehension or fear likely)              | None required                     |
|                    |  | Objective recklessness (ought to have known mental harm or apprehension or fear likely) | Mental harm, apprehension or fear |

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<sup>103</sup> *Criminal Code Act 1924* (Tas) sch 1 s 192. The maximum penalty for all crimes in Tasmania (except certain specified crimes such as murder) is 21 years' imprisonment: at s 389(3). The Tasmanian Sentencing Advisory Council's statistics database, however, indicates that no charge of stalking in the most recent five financial years has received a term of imprisonment longer than 18–24 months: Sentencing Advisory Council (Tas), 'Explore SAC Stats — Chart View', *Magistrates Court Sentencing Statistics* (Web Page) <<http://www.sentencingcouncil.tas.gov.au/statistics/magistratescourt>>, archived at <<https://perma.cc/5UPH-TPGH>>.

<sup>104</sup> *Crimes Act 1958* (Vic) s 21A. The maximum penalty is 10 years' imprisonment: at s 21(1).

|                   |  |   |   |
|-------------------|--|---|---|
| WA <sup>105</sup> | Specified behaviours, especially: repeated communications (direct or indirect) | Intention to intimidate (cause mental harm or apprehension or fear)                                 | None required   |
|                   |  | Objective recklessness (behaviour reasonably expected to cause mental harm or apprehension or fear) | Mental harm, apprehension or fear; preventing B from acting; or compelling B to act |

Having ascertained those elements, we then assessed whether the meanings of these provisions, if used in the context of a charge of non-physical intimate partner abuse (particularly where the parties were cohabitating at the time of the alleged offending), were both clear and not ‘absurd’.

To assess the clarity and sensibleness of the suggested use of these provisions, we provide an example of a sample charge against a hypothetical offender, based on the elements of the offences in Table 1 as they might appear on an indictment or charge-sheet.<sup>106</sup> We use the stalking offence in Victoria as an exemplar. Below is a sample wording of a charge that includes all the necessary elements that must be proven in prosecuting an offender for non-physical abuse against an intimate partner with whom they resided at the time of the alleged offending:

Between/On [date/s], [A] engaged in a course of conduct that would reasonably be expected to cause [B] mental harm, apprehension or fear, and [A] knew that conduct was likely to cause [B] mental harm, apprehension or fear.

The meaning of this charge (and its originating provision) seems fairly unambiguous. There must have been identifiable behaviours by a person, knowingly engaged in on more than one occasion (or on a protracted

<sup>105</sup> *Criminal Code Act Compilation Act 1913* (WA) app B sch ss 338D–338E. The maximum penalty ranges from 12 months to eight years’ imprisonment: at s 338E.

<sup>106</sup> Sample wordings of charges tend to be an indispensable aid to legal practitioners: see, eg, Ian Freckelton and Danielle Andrewartha, *Indictable Offences in Victoria* (Lawbook Co, 5<sup>th</sup> ed, 2010) 1096–101; Kyle McDonald, *Summary Offences in Victoria* (Lawbook Co, 2017) 31–338; *Criminal Practice Rules 1999* (Qld). See, eg, sample indictment forms: at sch 2.

occasion), that could reasonably be expected to cause the victim mental harm, apprehension or fear. Of course, clarity is not the end of the enquiry; the provision must not result in an absurdity. It is arguable that utilising any of the stalking provisions in the context of an ongoing relationship would, itself, be absurd. Commonly occurring behaviours between cohabitating partners include much conduct that might, in other relationships, clearly constitute stalking, but which are not the intended target of the stalking provisions. For instance, many behaviours that are easily identified as stalking when the perpetrator is a stranger (such as following the victim, telephoning, or contacting by email), are accepted (to some degree) components of intimate relationships. This is no simple issue to address and requires consideration of normative behaviour. On the one hand, the language of each of these provisions is clear, and there is no requirement that the person being 'stalked' be a stranger, acquaintance or ex-partner. But, as will be discussed in Part IV, there are entrenched reservations about describing the behaviour of someone within an ongoing relationship as stalking.

Setting aside that normative issue temporarily, it is important to note that each jurisdiction's stalking legislation is distinct. Although each jurisdiction's stalking laws are capable of applying in the context of non-physical abuse between current intimate partners, there are a number of key differences between them. This is particularly in relation to the behaviours that constitute stalking, the distinct *mens rea* requirements, whether the victim must have actually experienced harm, and what that harm must be.

### B *The Proscribed Behaviours*

Each jurisdiction's stalking provision includes a unique list of specified behaviours that can constitute stalking. In some jurisdictions, the list is relatively narrow; in others, the list of behaviours is not only extensive, but includes a catch-all provision that prohibits *any* behaviour that could reasonably be expected to cause mental harm or arouse apprehension or fear. This would easily capture psychologically abusive or coercive behaviours between cohabitants.

Turning first to the Victorian provision, and setting aside behaviours that would constitute physical or sexual assault, the list of stalking behaviours includes:

- repeated or unwanted contact or communication;
- sending offensive material to the person;
- interfering with the other person's property;

- following the other person;
- watching or loitering near a place where that other person frequents;
- tracing the other person's use of the internet;
- publishing about the person on the internet (or pretending to be them); and
- using offensive or abusive words or behaviour at, or in the presence of, the other person.<sup>107</sup>

Part of the reason for this extensive definition of 'stalking' in Victoria is that in 2011, the legislature enacted new anti-bullying laws and uncomfortably wedged the prohibited bullying behaviours into the stalking provision.<sup>108</sup> But more important than the list of specified behaviours, is the catch-all definition of stalking in Victoria, which includes 'acting in *any* other way' that could reasonably be expected to cause psychological harm to, or arouse apprehension or fear in, another person.<sup>109</sup> The applicability of this catch-all definition of stalking behaviour to non-physical abuse of current intimate partners is clear. There are countless behaviours by one partner against another — such as persistent humiliation, degradation, gaslighting, and verbal abuse — that courts would likely have no trouble classifying as being reasonably expected to cause psychological harm. Indeed, in the context of an intimate relationship history characterised by years of both physical and emotional abuse, the potential to cause such harm is magnified. Even certain 'gestures and eye contact' that the rest of the world would view as innocuous can be 'devastating to the person who is the target'.<sup>110</sup>

Of course, it could be argued that the *eiusdem generis* principle (which holds that 'words derive meaning from the context in which they appear') limits the ambit of that catch-all provision, because its reach should be contextualised and restricted by the preceding list of specific, prohibited behaviours.<sup>111</sup> That rule is, however, only applicable if there is a common or dominant thread, feature or genus that ties together the preceding list.<sup>112</sup> If no such thread or genus exists, the catch-all must be read broadly, as appears to

<sup>107</sup> *Crimes Act 1958* (Vic) s 21A(2).

<sup>108</sup> See *Crimes Amendment (Bullying) Act 2011* (Vic) s 3.

<sup>109</sup> *Crimes Act 1958* (Vic) s 21A(2)(g) (emphasis added).

<sup>110</sup> Scotland, *Parliamentary Debates*, 28 September 2017, col 92 (Christina McKelvie).

<sup>111</sup> Dennis C Pearce and Robert S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8<sup>th</sup> ed, 2014) 171.

<sup>112</sup> *R v Regos* (1947) 74 CLR 613, 624 (Latham CJ).

be the case here. Stalking researcher Emily Finch has pointed out that the very purpose of the catch-all provision in the similarly-worded definition of stalking in the *Protection from Harassment Act 1997* (UK) is to capture behaviours that could not have been predicted, and thereby future-proof the legislation.<sup>113</sup> Her research found that stalkers (whoever they may be) go out of their way to study the behaviours they are prohibited from engaging in, and try to find novel ways to lawfully harass their victims, such as by finding the geographic boundaries from which they are restricted and standing on the other side within view of the victim's drive to work.<sup>114</sup> The catch-all provision should therefore not be considered limited by the context of the preceding enumerated behaviours, because it is nearly impossible to discover a common thread between some behaviours (such as using offensive words at a person and following them surreptitiously), and the persistent stalker would no doubt otherwise devise ways to circumvent the legislation.

Similar to Victoria, a number of other jurisdictions also include catch-all definitions of proscribed stalking behaviours, including South Australia, Tasmania and the Northern Territory.<sup>115</sup> Unlike the Victorian provision, however, the catch-all definitions in those jurisdictions are limited to behaviours that could reasonably be expected to arouse apprehension or fear,<sup>116</sup> and do not include behaviours likely to cause psychological harm. In the criminal law, the words 'apprehension or fear' have generally been used exclusively in the context of apprehending or fearing imminent *physical* harm.<sup>117</sup> However, the South Australian Supreme Court has interpreted the words 'apprehension or fear' in the relevant provision broadly, and recently rejected an interpretation that would restrict the language to apprehension or fear of *physical* harm:

[T]he words 'apprehension or fear' in the definition of stalking ... include an apprehension or fear of any adverse consequence which is accompanied by

<sup>113</sup> Finch (n 68) 16.

<sup>114</sup> *Ibid* 15.

<sup>115</sup> *Criminal Code Act 1983* (NT) sch 1 s 189(1)(g); *Criminal Law Consolidation Act 1935* (SA) s 19AA(1)(a)(vi); *Criminal Code Act 1924* (Tas) sch 1 s 192(1)(j).

<sup>116</sup> In South Australia, for example, the requirement is that the accused intended to cause the victim *serious* apprehension or fear: *Criminal Law Consolidation Act 1935* (SA) s 19AA(1)(b)(ii) (emphasis added).

<sup>117</sup> It was found that an assault is constituted by fear or apprehension of physical violence: see, eg, *Barton v Armstrong* [1969] 2 NSW 451, 455 (Taylor J).

anxiety or emotional distress which interferes with a person's social, family or working life.<sup>118</sup>

One of the primary reasons the South Australian Court read the stalking provision broadly was because the legislature had elsewhere in that same Act qualified the words 'apprehension or fear' as apprehension or fear of 'personal injury or damage to property', and that qualification was not present in s 19AA.<sup>119</sup> As a result, in South Australia, it is likely that behaviours that would cause a person's partner to apprehend or fear any of the common adverse consequences of non-physical abuse — being controlled, mentally harmed, etc — would be effectively captured by this catch-all definition. Whether courts in Tasmania and the Northern Territory would also adopt a similarly broad definition of 'apprehension or fear' remains unclear.

In the remaining jurisdictions, there are no catch-all definitions of stalking. There are, however, a number of specified behaviours that could easily classify as non-physical partner abuse, such as: intimidating, harassing or molesting another person (Australian Capital Territory);<sup>120</sup> an intimidating, harassing or threatening act towards another person (Queensland);<sup>121</sup> contacting another person (Northern Territory and Tasmania);<sup>122</sup> communicating with another person electronically (South Australia);<sup>123</sup> and repeated communications, both direct and indirect, constituted by words or some other medium (Western Australia).<sup>124</sup> Indeed, the New South Wales offence of stalking coexists in the same provision as an offence titled 'intimidation',<sup>125</sup> and these offences are expressly intended to capture family violence behaviours.<sup>126</sup> 'Stalking' is exhaustively and relatively narrowly defined in that jurisdiction in a way that accords with traditional public conceptions of stalking behaviours (following a person, watching a person, or frequenting the vicinity of their residence, business, work, or place

<sup>118</sup> *Phillips v Police* (2016) 125 SASR 427, 428 [1] (Kourakis CJ).

<sup>119</sup> *Ibid* 435 [25]–[27] (Kourakis CJ).

<sup>120</sup> *Crimes Act 1900* (ACT) s 35(2)(j).

<sup>121</sup> *Criminal Code Act 1899* (Qld) sch 1 s 359B(c)(vi).

<sup>122</sup> *Criminal Code Act 1983* (NT) sch 1 s 189(1)(b); *Criminal Code Act 1924* (Tas) sch 1 s 192(1)(i).

<sup>123</sup> *Criminal Law Consolidation Act 1935* (SA) s 19AA(1)(a)(ivb).

<sup>124</sup> *Criminal Code Act Compilation Act 1913* (WA) app B sch s 338D(1) (definition of 'pursue').

<sup>125</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13(1).

<sup>126</sup> *Ibid* s 13(2).



they otherwise frequent).<sup>127</sup> ‘Intimidation,’ on the other hand, has slightly more prima facie overlap with family violence behaviours (harassment or molestation; approaching the other person — including via telephone or the internet — in a way that causes them to fear for their safety; and any conduct that causes a reasonable apprehension of violence, injury or damage to a person or their property).<sup>128</sup>

### C *The Harm Requirement*

In contemporary criminal law, one of the most difficult elements of any criminal offence that prosecutors are expected to prove is the experience of non-physical harm by a victim. There are a number of reasons for this difficulty. Establishing non-physical harms such as psychological, mental or emotional harm beyond reasonable doubt is an onerous task, given the ‘invisibility’ of such harms;<sup>129</sup> they are not as tangible as broken bones and bruises. Additionally, not only is it difficult to establish the presence of these harms, it is also just as difficult (if not more so) to establish beyond reasonable doubt that the offender *caused* that harm;<sup>130</sup> for instance, just because a victim suffered a condition such as anxiety disorder following the alleged behaviour, does not necessarily mean that a line of causation can easily be traced back to that behaviour. Finally, courts occasionally retain a certain level of scepticism about the reliability of psychological diagnoses, particularly where reasonable experts disagree about the appropriate label.<sup>131</sup>

Perhaps in light of these difficulties, stalking provisions in most jurisdictions provide for circumstances in which the prosecution is under no obligation to prove that the victim actually suffered any harm. In South Australia, New Zealand and the Australian Capital Territory, this is always the case: when prosecuting a stalking charge, it is not necessary for the prosecution to establish that the victim actually suffered any harm.

<sup>127</sup> Ibid s 8(1).

<sup>128</sup> Ibid s 7(1).

<sup>129</sup> Shaun Cassin, ‘Eggshell Minds and Invisible Injuries: Can Neuroscience Challenge Longstanding Treatment of Tort Injuries?’ (2013) 50(3) *Houston Law Review* 929, 931.

<sup>130</sup> See, eg, *Wodrow v Commonwealth* (1993) 45 FCR 52, 78 (Gallop and Ryan JJ).

<sup>131</sup> In England, the Court of Appeal refused to hold an offender accountable for manslaughter on the basis of having caused a psychiatric injury that led to death. This was because there was insufficient evidence that the victim had suffered a ‘recognisable psychiatric illness’: *R v D* [2006] EWCA Crim 1139, [31]–[33] (Henriques P and Fulford J).

In three other jurisdictions, the context will dictate whether the prosecution is required to prove actual harm. In Western Australia and Tasmania, the prosecution is only required to prove that the offender actually caused mental harm or apprehension or fear if the case is run (or resolved) on the basis that the offender was *reckless* about causing such harm.<sup>132</sup> There is no such obligation to prove actual mental harm if the case is conducted on the basis that the offender *intended* to cause such harm. Somewhat similarly in Victoria, the question of whether the prosecution is required to establish actual harm is predicated on whether the offender was subjectively reckless (*actually* knew harm was likely) or objectively reckless (*ought* to have known harm was likely). If the former, there is no harm element required. If the latter, the prosecution must prove actual harm.<sup>133</sup>

In the remaining jurisdictions — New South Wales, Queensland, and the Northern Territory — the prosecution is (almost)<sup>134</sup> always under an obligation to establish actual harm in order to prove the stalking offence. The Northern Territory requires the prosecution to establish either that the victim suffered mental harm, or that they experienced apprehension or fear.<sup>135</sup> In Queensland, the specified harms (referred to as ‘detriments’) are relatively broad, and include any of the following: ‘serious mental, psychological or emotional harm’, preventing the person from doing something they are lawfully entitled to do, compelling the other person to do something that they are lawfully entitled to not do, or arousing apprehension or fear.<sup>136</sup> New South Wales has perhaps the most limiting harm requirement, requiring a reasonable apprehension of injury, violence or damage to person or property.<sup>137</sup>

<sup>132</sup> *Criminal Code Act 1924* (Tas) sch 1 s 192(3); *Criminal Code Act Compilation Act 1913* (WA) app B sch ss 338D (definition of ‘intimidate’), 338E(2).

<sup>133</sup> *Crimes Act 1958* (Vic) s 21A(3)(a)–(b).

<sup>134</sup> New South Wales is included here because the most likely form of behaviour in the stalking and intimidation offences that could constitute stalking is ‘intimidation’, which requires that the prosecution prove actual harm. We cannot, however, exclude the possibility that the other behaviours defined as stalking and intimidation (which do not have a harm requirement) could also be used in that context: *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ss 7–8, 13.

<sup>135</sup> *Criminal Code Act 1983* (NT) sch 1 ss 189(1)–(1A).

<sup>136</sup> *Criminal Code Act 1899* (Qld) sch 1 s 359A (definition of ‘detriment’).

<sup>137</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 7(1)(c).

#### D Stalking in Current Relationships: A Case Example

To illustrate a possible context in which Australian and New Zealand stalking laws could be used to prosecute non-physical abuse between current intimate partners, consider the recent English case of *Paul Playle*.<sup>138</sup> Playle was convicted at Lewes Crown Court of stalking his wife (as well as controlling or coercive behaviour).<sup>139</sup> The relevant conduct took place over almost two years while they were living together with their children. Suspecting that his wife was being unfaithful, Playle established Facebook and email accounts in the name of a man who had been a boyfriend of his wife before she married Playle. While impersonating the ex-boyfriend through these accounts, Playle sent his wife messages telling her that she was being observed, insulted and humiliated her, and demonstrated detailed knowledge of her life and relationships. In a victim impact statement, Playle's wife stated that the conduct had made her reclusive and suicidal.<sup>140</sup>

If these events had occurred in Australia, Playle could have been prosecuted under existing stalking laws. For example, if prosecutors in Western Australia were to charge Playle with stalking, they would need to establish: (1) that he repeatedly communicated with his wife; (2) that he should reasonably have expected those communications to cause her mental harm, apprehension or fear; and (3) that those communications actually caused her mental harm, apprehension or fear.<sup>141</sup> Each of these seems apparent in Playle's case, theoretically rendering him criminally liable for stalking in circumstances where the victim was an intimate partner cohabitating with the offender at the time of the offending.

### III ARE STALKING LAWS ACTUALLY BEING USED TO PROSECUTE NON-PHYSICAL ABUSE BETWEEN INTIMATE PARTNERS?

Analysis of crime statistics published by police and government agencies, supplemented by data generously provided by the Crime Statistics Agency (Victoria) and the Bureau for Crime Statistics and Research (New South Wales), provides a snapshot of stalking prosecutions, including the

<sup>138</sup> *Paul Playle* (Lewes Crown Court, Judge Christine Ruth Henson, 24 January 2018).

<sup>139</sup> Damien Gayle, 'Man Jailed for Stalking Wife by Impersonating Ex-Boyfriend', *The Guardian* (online, 25 January 2018) <<https://www.theguardian.com/uk-news/2018/jan/24/paul-playle-jailed-for-stalking-wife-by-impersonating-ex-boyfriend>>, archived at <<https://perma.cc/E537-MNGW>>.

<sup>140</sup> *Ibid.*

<sup>141</sup> See *Criminal Code Act Compilation Act 1913* (WA) app B sch ss 338D–338E.

relationship between perpetrator and victim. We note, as a preliminary matter, that rates of stalking recorded by police vary significantly between the Australian jurisdictions, and this is likely due to differences both in the legislation and in police practices.<sup>142</sup> For instance, a number of jurisdictions expressly link family violence and stalking in the relevant statutory provisions, and this may encourage police to more readily identify stalking as family violence, and to more readily identify family violence as stalking as well.

In New South Wales, the stalking legislation expressly includes reference to domestic relationships<sup>143</sup> and specifies that, in determining whether a person's conduct amounts to stalking, courts may have regard to any previous domestic violence by the offender.<sup>144</sup> Overall, New South Wales Police recorded 30,108 incidents of stalking, intimidation and harassment in the 12 months to September 2017.<sup>145</sup> In 2015–16, 21% of reported stalking/intimidation offences involved intimate partners: 8% involved current partners and 13% involved ex-partners.<sup>146</sup>

A similar link between domestic/family violence exists in legislative definitions of family violence in Queensland,<sup>147</sup> the Northern Territory,<sup>148</sup> Tasmania<sup>149</sup> and South Australia.<sup>150</sup> Of these jurisdictions, data are only available for Queensland and South Australia. There are similar reporting rates of stalking by current and ex-partners in Queensland, with about 8% of all stalking cases recorded by police in 2015–16 (n=361) involving a current

<sup>142</sup> For instance, and noting that these statistics are almost two decades old, the rates of stalking reported to police in Australia in 1999 varied from 1.1 per 100,000 in Tasmania to 27.9 per 100,000 in South Australia: Emma Ogilvie, 'Stalking: Criminal Justice Responses in Australia' (Conference Paper, Criminal Justice Responses Conference, 7–8 December 2000) 4.

<sup>143</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13(2).

<sup>144</sup> *Ibid* s 8(2).

<sup>145</sup> Bureau of Crime Statistics and Research (NSW), *New South Wales Recorded Crime Statistics: Quarterly Update September 2017* (Report, September 2017) 5 <[http://www.bocsar.nsw.gov.au/Documents/RCS-Quarterly/NSW\\_Recorded\\_Crime\\_September\\_2017.pdf](http://www.bocsar.nsw.gov.au/Documents/RCS-Quarterly/NSW_Recorded_Crime_September_2017.pdf)>, archived at <<https://perma.cc/S6L2-Y7S2>>.

<sup>146</sup> Data provided by the Bureau of Crime Statistics and Research (NSW) to the authors.

<sup>147</sup> *Domestic and Family Violence Protection Act 2012* (Qld) s 8(2)(i).

<sup>148</sup> *Domestic and Family Violence Act 2007* (NT) s 5(d).

<sup>149</sup> *Family Violence Act 2004* (Tas) s 7(a)(iv).

<sup>150</sup> Although the definition of 'abuse' in s 8 of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) does not use the term 'stalking', the behaviour listed in ss 8(4)(e)–(k) (eg 'following the person') is behaviour that is typically included in definitions of stalking behaviour.

partner (3 victims were male, 27 were female), a figure just slightly lower than the proportion of cases involving an ex-partner (10.5%).<sup>151</sup> This accords with a survey of Queensland magistrates in 2000, which reported that magistrates believed that family violence and stalking legislation worked well together, and that they were comfortable making orders when harassment was non-physical.<sup>152</sup>

Older data from South Australia present a different picture. Analysis of criminal stalking incidents reported to police in South Australia from January 1995 to December 1999 reveals that stalking was most commonly perpetrated by ex-partners (44% of reports by female victims and 28% of reports by male victims), while only a small proportion involved current partners (4% of reports by female victims and 2% of reports by male victims).<sup>153</sup>

Data from Victoria, where there is no legislative linking of stalking and family violence, present a somewhat similar outcome to South Australia. In Victoria, from 1 July 2016 to 30 June 2017, 11% of reports of criminal stalking to police involved current partners, and one-third of reports involved previous partners.<sup>154</sup>

These data reveal considerable variation in the use of stalking laws to protect intimate partners from abuse, particularly those who were still in a relationship when the stalking occurred. With the exception of South Australia, it appears that jurisdictions that statutorily link family violence and stalking experience relatively similar rates of reporting of criminal stalking by current and ex-intimate partners. What is particularly concerning is the low rate of criminal prosecutions of stalking of current partners in Victoria (where no such link exists) and South Australia. This is unanticipated, given that research indicates that most men who stalk their ex-partners begin the stalking while the relationship is ongoing.<sup>155</sup> However, there could be a

<sup>151</sup> Queensland Police Service, *Annual Statistical Review 2015/16* (Report, 2016) 101 <<https://www.police.qld.gov.au/corporatedocs/reportsPublications/statisticalReview/2015-2016.htm>>, archived at <<https://perma.cc/DB4Y-M2WR>>.

<sup>152</sup> Susan Currie, 'Stalking and Domestic Violence: Views of Queensland Magistrates' (Conference Paper, Stalking: Criminal Justice Responses Conference, 7–8 December 2000) 4–5.

<sup>153</sup> Jayne Marshall, *Stalking in South Australia: The Criminal Justice Response* (Office of Crime Statistics, Information Bulletin No 25, August 2001) 7–8.

<sup>154</sup> Data provided by the Crime Statistics Agency (Victoria) to the authors on 14 February 2018.

<sup>155</sup> See Svenja Senkans, Troy E McEwan and James RP Ogloff, 'Assessing the Link between Intimate Partner Violence and Postrelationship Stalking: A Gender-Inclusive Study' [2017] *Journal of Interpersonal Violence*; Mary P Brewster, 'Power and Control Dynamics in Prestalking and Stalking Situations' (2003) 18(4) *Journal of Family Violence* 207, 209–16; Paul

number of explanations for this. It may be that victims are less likely to identify the behaviour as stalking while the relationship is ongoing. Additionally, victims may be more reluctant to report the behaviour if they hope to continue the relationship. Or, police might be more willing to charge the behaviour as a criminal offence, if the intimate relationship between the parties has ended (perhaps because it signifies a higher likelihood of a cooperative victim during the proceedings). It may also be that police do not identify non-physical abuse between intimate partners as stalking, unless it occurs through the use of GPS tracking, or surveillance or tracking via Find My iPhone. It is outside the scope of this paper, but a point that may warrant further investigation is identifying the *types* of behaviours that police identify as stalking when they record stalking behaviour as occurring between individuals in an intimate relationship; are the behaviours constituting the alleged stalking restricted to clearly non-normative acts such as the use of tracking and surveillance devices, or do the charges reflect the broader range of behaviours covered by the legislation? In any event, these statistics indicate that stalking offences are being used to prosecute some behaviours by current intimate partners. The next section of this article considers whether there might be irreconcilable issues in using stalking laws in that context.

#### IV SHOULD STALKING LAWS BE USED TO PROSECUTE NON-PHYSICAL ABUSE BETWEEN INTIMATE PARTNERS?

The potential for stalking laws to be used to prosecute non-physical abuse between current, and especially cohabitating, intimate partners, raises important and competing rule of law considerations. On the one hand, the criminal law (especially primary legislation) is deemed to be a knowable institution: to retain its legitimacy, it applies as equally to those aware of its contents as it does to those intentionally or inadvertently ignorant of them.<sup>156</sup> The High Court of Australia, for example, has held that

if a person is alleged to have committed an offence, it is both necessary and sufficient for the prosecution to prove the elements of the offence, and it is irrelevant to the question of guilt that the accused person was not aware that those elements constituted an offence.<sup>157</sup>

E Mullen, Michele Pathé and Rosemary Purcell, *Stalkers and Their Victims* (Cambridge University Press, 2<sup>nd</sup> ed, 2009) 27, 293.

<sup>156</sup> As the maxim goes, *ignorantia juris non excusat* (ignorance of the law is no excuse).

<sup>157</sup> *Ostrowski v Palmer* (2004) 218 CLR 493, 500 (Gleeson CJ and Kirby J).

From this perspective, all offenders are deemed to have constructive knowledge of the criminal law and can therefore be held accountable, even if they are caught unawares. This proposition is supported by what some have termed the ‘authoritarian’ and ‘thin ice’ principles, which are described in more detail below.

In contrast, just because the criminal law is deemed a knowable institution does not automatically make it so. Penal legislation may be drafted ambiguously, judicial activism can operate to functionally criminalise that which was not previously criminal, or there may be so much discord between the content of a criminal law and the public’s understanding of it, that its application would be incongruous. Ignorance of the law may not be an excuse, but perhaps justifiable confusion could be.<sup>158</sup> The criminal process is not simply a black-letter compilation of rules, regulations and judgments; it is also a ‘social practice’,<sup>159</sup> and as such must in appropriate circumstances bend to accommodate a level of normativity by reference to contemporary standards. From this perspective, offenders should only be deemed to have constructive knowledge of the criminal law if an ordinary person, fully aware of the substance of the law, could have (note the low bar of ‘could’ versus ‘would’) foreseen that they would be held accountable. This proposition is primarily supported by the principle of fair labelling.

#### *A Principles Supporting Criminal Liability*

The authoritarian principle ‘holds that a wide-reaching and flexible criminal law is justified, if it ensures that wrongdoing worthy of criminalization can more easily be brought within the scope of offences.’<sup>160</sup> It effectively demands that, where appropriate, offenders should expect the unexpected, and not casually assume that the criminal law is so rigid that it could not possibly adapt to their behaviour, particularly where the behaviour is clearly socially undesirable.<sup>161</sup> In 1954, for example, *Lynskey J* held that while previously the

<sup>158</sup> See, eg, Edwin R Keedy, ‘Ignorance and Mistake in the Criminal Law’ (1908) 22(2) *Harvard Law Review* 75, 90; Ronald A Cass, ‘Ignorance of the Law: A Maxim Reexamined’ (1976) 17(4) *William and Mary Law Review* 671, 694.

<sup>159</sup> Nicola Lacey, ‘Principles, Policies, and Politics of Criminal Law’ in Lucia Zedner and Julian V Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford University Press, 2012) 19, 26.

<sup>160</sup> Jeremy Horder, *Ashworth’s Principles of Criminal Law* (Oxford University Press, 8<sup>th</sup> ed 2016) 89.

<sup>161</sup> See *ibid* 90.

term ‘bodily harm’ did not include nervous shock, that was no longer true, thus (unexpectedly) rendering the defendant criminally liable for assault occasioning actual bodily harm for having caused his wife nervous shock.<sup>162</sup>

The related ‘thin ice’ principle then holds that ‘citizens who know that their conduct is on the borderline of illegality take the risk that their behaviour will be held to be criminal.’<sup>163</sup> That is, even a particularly astute offender who studies the law for technical loopholes in order to flout their continuing wrongdoing should recognise that a court may shift the boundaries of which behaviours are criminal and which are not. The High Court has previously indicated that the ‘thin ice’ principle would be unlikely to apply in Australia, because ‘if accepted, [it] could condone careless drafting practices.’<sup>164</sup> However, there is perhaps broader scope for its application in the present instance. Courts would not be engaging in the controversial task of ‘creating’ criminal liability where once it did not exist;<sup>165</sup> instead, the issue that courts would need to grapple with would be whether to actively stand in the way of this unanticipated (yet apparently already enforced) form of criminal liability, despite its patent application.

### B *Opposing Criminal Liability: The Principle of Fair Labelling*

A key principle that may militate *against* using stalking laws to prosecute non-physical abuse of an intimate partner when the parties are cohabitating is fair labelling. This principle posits that ‘the definition of an offence [should] *itself* give us an accurate moral grasp of what the defendant has done.’<sup>166</sup> The concept originated from Ashworth’s use of the term ‘representative labelling’, and was then reframed as ‘fair labelling’ by the late Glanville Williams.<sup>167</sup> The aim of the principle is to acknowledge that the criminal law has an important

<sup>162</sup> *R v Miller* [1954] 2 QB 282, 292 (Lynskey J).

<sup>163</sup> Horder, *Ashworth’s Principles of Criminal Law* (n 160) 89. See also *Knüller (Publishing, Printing and Promotions) Ltd v DPP (UK)* [1973] AC 435, 463–4 (Lord Morris).

<sup>164</sup> *R v Lavender* (2005) 222 CLR 67, 96 [91] (Kirby J).

<sup>165</sup> See, eg, *DPP (UK) v Withers* [1975] AC 842, 860 (Viscount Dilhorne); *R v Rogerson* (1992) 174 CLR 268, 304 (McHugh J).

<sup>166</sup> Jeremy Horder, ‘Rethinking Non-Fatal Offences against the Person’ (1994) 14(3) *Oxford Journal of Legal Studies* 335, 339 (emphasis in original).

<sup>167</sup> James Chalmers and Fiona Leverick, ‘Fair Labelling in Criminal Law’ (2008) 71(2) *Modern Law Review* 217, 218–19; Hilmi M Zawati, *Fair Labelling and the Dilemma of Prosecuting Gender-Based Crimes at the International Criminal Tribunals* (Oxford University Press, 2014) 25–6.



communicative function.<sup>168</sup> Labelling an offence with appropriate language lets would-be offenders know in advance that their behaviour would be wrong (and denounces it in the same language afterward),<sup>169</sup> allowing people to ‘plan their lives with confidence’ and ‘live autonomous lives.’<sup>170</sup> A fair label also lets would-be victims know in advance that they have a right not to be subjected to that particular behaviour (and validates their understanding of what has been done to them afterward).<sup>171</sup> It permits the community to engage in a unifying discourse about the behaviour, letting them gauge its seriousness at a glance, without the need to be a criminal lawyer or to navigate their way through a labyrinth of complex legislation.<sup>172</sup> At the same time, it also performs an educative function within the community, further entrenching society’s core values.<sup>173</sup> A proper label is particularly important in the context of describing an offence, because offence labels are often truncated descriptions (or ‘short-hand communicators’<sup>174</sup>) of complex behaviours that exist on a spectrum. Fair labels must be precise, meaningful, and ‘help us ... make moral sense of the world.’<sup>175</sup>

Conversely, labelling an offence with inappropriate language, or using vague or incomplete descriptions, can create false assumptions and speculations.<sup>176</sup> Moreover, attributing the wrong label to an offence can potentially undermine public confidence in the criminal law’s ability to identify and punish that behaviour.<sup>177</sup>

<sup>168</sup> Chalmers and Leverick (n 167) 238.

<sup>169</sup> That is, a fair label performs both an *ex ante* and *ex post* function: Simester and von Hirsch (n 24) 205.

<sup>170</sup> *Ibid* 225–6.

<sup>171</sup> Chalmers and Leverick (n 167) 235–7.

<sup>172</sup> Simester and von Hirsch (n 24) 203–5.

<sup>173</sup> Chalmers and Leverick (n 167) 226–9; Thomas Crofts, ‘Criminalisation and Young People: How Should the Law Respond to Sexting?’ in Thomas Crofts and Arlie Loughnan (eds), *Criminalisation and Criminal Responsibility in Australia* (Oxford University Press, 2015) 105, 120.

<sup>174</sup> Crofts (n 173) 119.

<sup>175</sup> William Wilson, ‘What’s Wrong with Murder?’ (2007) 1(2) *Criminal Law and Philosophy* 157, 162.

<sup>176</sup> Chalmers and Leverick (n 167) 227.

<sup>177</sup> For example, although most police have a good understanding of all dimensions of domestic abuse, some still have trouble identifying non-physical forms of family violence. If the police are unable to effectively enforce stalking behaviour, then the public is likely to lose confidence in their role: see Amanda L Robinson, Gillian M Pinchevsky and Jennifer A Guthrie, ‘Under the Radar: Policing Non-Violent Domestic Abuse in the US and UK’ (2016) 40(3) *International Journal of Comparative and Applied Criminal Justice* 195, 205–6. See

### C *Balancing Competing Principles: Understandings of Stalking*

Taking these competing considerations into account leads to the following dilemma. Should the courts prefer strict construction principles and hold perpetrators of non-physical abuse criminally liable, pursuant to what appears to be a relatively clear interpretation of stalking legislation? Or should they prefer the principle of fair labelling, and acknowledge that ordinary persons would not appreciate non-physical abuse against current and cohabitating intimate partners being classified as stalking? Balancing competing rule of law principles, particularly when they are in direct opposition to one another, is no simple task,<sup>178</sup> but it is our reluctant conclusion that the latter is the appropriate course, and that stalking laws should not be used in this manner.

The ability of the criminal law to perform its base functions — securing the conditions necessary for civil society via the promotion of deterrence, rehabilitation, retribution, denunciation and incapacitation — is critically dependent on its perceived legitimacy.<sup>179</sup> The community's perception of the criminal law as fair and legitimate is informed, at least in part, by its predictability.<sup>180</sup> Unpredictable applications, such as the use of stalking provisions to prosecute a form of behaviour no ordinary person would label as stalking, have the potential to weaken the perceived legitimacy of the criminal law. And in an age where there is oxymoronically both substantial evidence of overcriminalisation and excessive punitiveness,<sup>181</sup> as well as incessant media and political frenzies demanding more 'tough on crime' policies and legislative constraints to prevent judges from being 'too lenient', preserving the legitimacy of the criminal law is more important than ever.

generally Cassandra Wiener, 'Seeing What is "Invisible in Plain Sight": Policing Coercive Control' (2017) 56(4) *Howard Journal of Crime and Justice* 500, 503–5, 511–12.

<sup>178</sup> Lacey (n 159) 24–6. See generally Horder, *Ashworth's Principles of Criminal Law* (n 160) 65–70.

<sup>179</sup> Josh Bowers and Paul H Robinson, 'Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility' (2012) 47(2) *Wake Forest Law Review* 211.

<sup>180</sup> *Ibid* 222.

<sup>181</sup> For example, there is a growing global trend to refuse bail and keep accused persons in custody on remand pending trial: see, eg, Transform Justice, *Presumed Innocent but Behind Bars — Is Remand Overused in England and Wales?* (Report, March 2018) 5, 7–8, 29 <[http://www.transformjustice.org.uk/wp-content/uploads/2018/03/TJ\\_March2018report.pdf](http://www.transformjustice.org.uk/wp-content/uploads/2018/03/TJ_March2018report.pdf)>, archived at <<https://perma.cc/87P8-FCKY>>; Department of Justice and Regulation (Vic), 'Monthly Prisoner and Offender Statistics 2014–15 to 2018–19', *Corrections, Prisons & Parole* (Report, 2018) <<http://www.corrections.vic.gov.au/utility/publications+manuals+and+statistics/monthly+prisoner+and+offender+statistics>>, archived at <<https://perma.cc/A8RH-QAS4>>. See also Husak, 'The Criminal Law as Last Resort' (n 25).

The primary reason that we consider the use of stalking provisions to be under-utilised in the context of non-physical abuse by a current intimate partner is because — despite the peculiar manner in which the word ‘stalking’ has occasionally evolved in the last three decades<sup>182</sup> — labelling family violence between cohabitating intimate partners as stalking does not accord with ordinary or expert understandings of stalking. There is considerable resistance to accepting that current intimate partners might ‘stalk’ one another, both in expert socio-legal and psychological discourses, and in popular understandings of what constitutes stalking (including the understandings of victims themselves).<sup>183</sup>

### 1 *Fair Labelling and Understandings of Stalking*

It is now generally recognised that much stalking involves attempts to coercively control an ex-intimate partner, and that it is a crime predominantly perpetrated by men against women.<sup>184</sup> However, a review of community attitudes and professional discourses by criminologists and forensic psychiatrists and psychologists reveals a major limitation in this understanding. While stalking is linked to domestic violence, a sharp bifurcation is manifest: ‘family violence’ occurs in ongoing intimate relationships, while ‘stalking’ occurs in relationships that have ended.<sup>185</sup> Thus, commentators routinely state (or, more commonly, implicitly accept) that stalking occurs only after the ending of an intimate relationship.<sup>186</sup> The pervasive, unconscious, and taken for granted nature of this belief, shared by those who may be called upon to become jurors and those who may be called to appear as expert witnesses, makes it extremely powerful. Insofar as police, experts, and members of the community (including victims and jurors)

<sup>182</sup> It has been interpreted to include, for example, ‘conduct that unduly interfered with a parent’s post-separation freedom from having to deal with the other parent’: Douglas, ‘Do We Need a Specific Domestic Violence Offence?’ (n 35) 452, citing Patrick Parkinson, Judy Cashmore and Judi Single, ‘Post Separation Conflict and the Use of Family Violence Orders’ (2011) 33(1) *Sydney Law Review* 1, 22.

<sup>183</sup> Lorraine Sheridan, ‘The Course and Nature of Stalking: An In-Depth Victim Survey’ (2001) 1(3) *Journal of Threat Assessment* 61, 65, 67.

<sup>184</sup> See Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, 2007) 256.

<sup>185</sup> See the emphasis on ongoing intimate relationships in consideration of family violence issues: Parkinson, Cashmore and Single (n 182) 3. Cf the emphasis on post-relationship stalking: at 22.

<sup>186</sup> See, eg, Terry Goldsworthy and Matthew Raj, ‘Stopping the Stalker: Victim Responses to Stalking’ (2014) 2(1) *Griffith Journal of Law & Human Dignity* 174, 185.

accept this bifurcation, it is likely to significantly underpin a reluctance to apply stalking laws to non-physical abuse that occurs between intimate partners who are living together at the time of the alleged offending.

## 2 *Expert Discourses on Stalking*

Expert discourses on stalking comprise the complexes of signs and practices that organise and reproduce understandings of stalking. These dominant ways of understanding the phenomenon are most clearly manifest in taxonomies of stalkers and stalking behaviours. These classification schemes originate from two principal sources: forensic psychiatric studies<sup>187</sup> and criminal justice reports.<sup>188</sup> Despite the wide variety of definitions of ‘stalking’ employed in the studies, features shared by many taxonomies are the use of the *previous* relationship between stalker and victim as a key discriminating variable,<sup>189</sup> and the identification of stalking by a *previous* intimate partner as the most violent form of stalking.<sup>190</sup> The possibility of stalking occurring between current intimate partners is almost entirely absent from this research.<sup>191</sup>

Forensic psychiatric studies repeatedly note that a significant proportion of stalkers have previously been in an intimate relationship with their victim. For instance, in a comprehensive and well-regarded series of studies, Paul Mullen and colleagues identified five types of stalkers primarily by their relationship to their victims. The ‘rejected’ group was the largest single group and was composed primarily of those who had a *previous* intimate relationship with their victim<sup>192</sup> (in other publications, Mullen and Pathé

<sup>187</sup> See, eg, Paul E Mullen et al, ‘Study of Stalkers’ (1999) 156(8) *American Journal of Psychiatry* 1244, 1248–9.

<sup>188</sup> James A Wright et al, ‘A Typology of Interpersonal Stalking’ (1996) 11(4) *Journal of Interpersonal Violence* 487, 489, 492–3.

<sup>189</sup> Kris Mohandie et al, ‘The RECON Typology of Stalking: Reliability and Validity based upon a Large Sample of North American Stalkers’ (2006) 51(1) *Journal of Forensic Sciences* 147, 147.

<sup>190</sup> Ibid 150–1; Michele Pathé and Paul E Mullen, ‘The Impact of Stalkers on Their Victims’ (1997) 170(1) *British Journal of Psychiatry* 12, 13, 15.

<sup>191</sup> While several studies refer to stalking by ‘partners and ex-partners’ (thereby suggesting that stalking by current partners is acknowledged), close examination of the accompanying commentary typically reveals that the discussion exclusively addresses the issue of stalking by a previous intimate partner. Current partners are factored into the results, but the resulting typological discussion around categories of stalkers does not consider current partners: see, eg, Mullen et al (n 187) 1247–8.

<sup>192</sup> Ibid 1248. Elsewhere, Mullen and Pathé identify six categories of stalkers; however, the extra category is simply a refinement that distinguishes celebrity stalking from stranger stalking:

describe this group as responding to the *end* of a close relationship).<sup>193</sup> Motivated by a 'complex mixture of desire for both reconciliation and revenge',<sup>194</sup> this group was most likely to assault their victims,<sup>195</sup> and more likely to have a personality disorder than to be diagnosed with a major psychiatric disorder.<sup>196</sup> But nowhere in this extensive body of research is there any detailed discussion of the stalking of *current* intimate partners.

Studies of stalking by criminal justice researchers adopt a similar approach, with the relationship between stalker and victim being a key factor in the classification of stalking.<sup>197</sup> Stalking by ex-intimate partners is identified as the predominant and most dangerous form of stalking.<sup>198</sup> These stalkers are less likely than other stalking offenders to have major psychiatric disorders and more likely to violently assault their victims,<sup>199</sup> with the risk of violence increasing if there is physical proximity between victim and perpetrator.<sup>200</sup> This group of stalkers is 'also more likely to reoffend ... and to do so more quickly'.<sup>201</sup> Offenders who stalk previous intimate partners have been described as the most 'malignant' perpetrators.<sup>202</sup>

Significantly, research with police in Australia and the United Kingdom has suggested that they are more likely to perceive behaviour as stalking when perpetrated by a stranger (rather than a former partner);<sup>203</sup> are less likely to charge an offender with stalking when the victim is an ex-intimate partner; and are more likely to recommend that the victim obtain a family violence intervention order rather than commence a criminal prosecution for stalking.<sup>204</sup>

Paul E Mullen and Michele Pathé, 'Stalking' (2002) 29 *Crime and Justice: A Review of Research* 273, 290–4.

<sup>193</sup> Mullen and Pathé, 'Stalking' (n 192) 290.

<sup>194</sup> Mullen et al (n 187) 1246.

<sup>195</sup> Ibid 1249; Pathé and Mullen, 'The Impact of Stalkers on Their Victims' (n 190) 13.

<sup>196</sup> Mullen et al (n 187) 1246.

<sup>197</sup> Mohandie et al (n 189) 147–8.

<sup>198</sup> Ibid 150–1; Brian H Spitzberg, 'The Tactical Topography of Stalking Victimization and Management' (2002) 3(4) *Trauma, Violence, & Abuse* 261, 278.

<sup>199</sup> Wright et al (n 188) 495, 499; Mohandie et al (n 189) 151.

<sup>200</sup> Mohandie et al (n 189) 154. See, eg, J Reid Meloy, 'When Stalkers Become Violent: The Threat to Public Figures and Private Lives' (2003) 33(10) *Psychiatric Annals* 658, 661.

<sup>201</sup> Mohandie et al (n 189) 151.

<sup>202</sup> Ibid 153.

<sup>203</sup> Weller, Hope and Sheridan (n 60) 331.

<sup>204</sup> Pearce and Eastale (n 59) 167.

What is inherent (but not expressly identified) in most professional discourses on stalking is shared even by researchers who have specifically researched both stalking and domestic violence. That research has confirmed a link between non-physical abuse by current partners and stalking,<sup>205</sup> and identified that many women who are stalked by an ex-partner were subjected to non-physical abuse while the relationship was ongoing.<sup>206</sup> For instance, Mohandie and colleagues reported that, in nearly one-third of the stalking cases they investigated, there was a history of domestic violence between the victim and offender before the stalking began.<sup>207</sup> Thus, a history of abuse while the parties were in a relationship and cohabitating is frequently noted as part of the background to stalking.<sup>208</sup> Links between the two phenomena are also established through common behaviours and shared characteristics of perpetrators. For instance, Sev'er noted multiple characteristics shared by perpetrators of family violence and stalking,<sup>209</sup> while other researchers have noted that high levels of verbal and physical abuse during a relationship are a prelude to post-separation stalking.<sup>210</sup> Moreover, when renowned psychologist Lenore Walker discussed the relationship between battering and stalking, she suggested that '[s]talking is the name given to a combination of activities that batterers do to keep the connection between themselves and their partners from being severed'.<sup>211</sup> After noting the types of monitoring and

<sup>205</sup> Patricia Tjaden and Nancy Thoennes, 'Stalking in America: Findings from the National Violence against Women Survey' (Report, April 1998) 8; Mindy B Mechanic, Terri L Weaver and Patricia A Resick, 'Intimate Partner Violence and Stalking Behavior: Exploration of Patterns and Correlates in a Sample of Acutely Battered Women' (2000) 15(1) *Violence and Victims* 55, 57, 69 ('Intimate Partner Violence and Stalking Behavior'); Mohandie et al (n 189) 152.

<sup>206</sup> Mullen, Pathé and Purcell (n 155) 27; Brewster, 'Power and Control Dynamics in Prestalking and Stalking Situations' (n 155) 215.

<sup>207</sup> Mohandie et al (n 189) 149.

<sup>208</sup> Mechanic, Weaver and Resick, 'Intimate Partner Violence and Stalking Behavior' (n 205) 68; Mary P Brewster, 'Stalking by Former Intimates: Verbal Threats and Other Predictors of Physical Violence' (2000) 15(1) *Violence and Victims* 41, 46, 49. Note that in Wright et al (n 188), many victims reported 'a sense of being "smothered" in the prior relationship': at 499.

<sup>209</sup> Sev'er suggests that violence by an ex-partner takes much the same form, and has many of the same dynamics, as violence by a current partner: Aysan Sev'er, 'Recent or Imminent Separation and Intimate Violence against Women: A Conceptual Overview and Some Canadian Examples' (1997) 3(6) *Violence against Women* 566, 581.

<sup>210</sup> See, eg, Lenore E Walker and J Reid Meloy, 'Stalking and Domestic Violence' in J Reid Meloy (ed), *The Psychology of Stalking: Clinical and Forensic Perspectives* (Academic Press, 1998) 139, 142, 144, 156–8.

<sup>211</sup> *Ibid* 142 (emphasis omitted).

control that exist in abusive relationships where the parties are cohabitating, she observed that stalking is an extreme end-point of these behaviours: '[W]hen it reaches the point of monitoring, surveillance, and overpossessiveness, and induces fear, it approaches stalking.'<sup>212</sup>

These specialised studies simultaneously confirm a clear link between non-physical abuse between cohabitating couples and subsequent post-separation stalking, yet persist in labelling many of the shared behaviours separately and distinctively as family violence (pre-separation) and stalking (post-separation). Nearly all research has implicitly accepted this bifurcation between domestic violence in ongoing relationships and stalking in terminated relationships. This distinction is so entrenched that it seems to be natural and unquestioned; it also permeates popular understandings of stalking.

### 3 Community Perceptions of Stalking

Community perceptions of stalking and stalkers have been extensively investigated.<sup>213</sup> A growing body of research presents various scenarios to respondents and asks them which involve stalking. Variables are systematically manipulated and often include the prior relationship between the parties (strangers, acquaintances, or *former* intimate partners), level of physical violence, type of behaviour (following, emailing, etc), gender of the parties, etc.<sup>214</sup> It is a feature of this research that it almost uniformly excludes the possibility of stalking occurring in an *ongoing* relationship; stalking is depicted as occurring only *after* the termination of an intimate relationship.

Findings from this line of research in Australia<sup>215</sup> and the United Kingdom<sup>216</sup> consistently indicate that there is a hierarchy of harms with

<sup>212</sup> Ibid 140 (emphasis omitted).

<sup>213</sup> See, eg, Susan Dennison and Donald M Thomson, 'Community Perceptions of Stalking: What Are the Fundamental Concerns?' (2000) 7(2) *Psychiatry, Psychology and Law* 159; Weller, Hope and Sheridan (n 60); Adrian J Scott et al, 'International Perceptions of Relational Stalking: The Influence of Prior Relationship, Perpetrator Sex, Target Sex, and Participant Sex' (2015) 30(18) *Journal of Interpersonal Violence* 3308 ('International Perceptions of Relational Stalking: The Influence of Prior Relationship').

<sup>214</sup> See, eg, ibid 3312–13; Dennison and Thomson (n 213) 163–4.

<sup>215</sup> Australian studies on community perception highlight community misconceptions towards stranger type stalking: Dennison and Thomson (n 213) 167; Scott et al, 'International Perceptions of Relational Stalking' (n 213) 3317. General studies on stalking typology in Australia carry an implication that stalking involving physical harm is more serious: see, eg, Mullen et al (n 187) 1249.

<sup>216</sup> Studies from the United Kingdom on public perception highlight community misconceptions towards stranger-type stalking: see, eg, Adrian J Scott, Rebecca Lloyd and

stalking that involves physical injury to the victim being regarded as more serious,<sup>217</sup> as well as the pervasive and continuing impact of the ‘stranger danger’ myth. The impact of the latter is reflected in the finding that stalking is most readily identified when there was no prior relationship between the parties (ie the stalker was a stranger).<sup>218</sup> Curiously, and contrary to actual risk, members of the community are likely to view a stalker as less dangerous, are less likely to involve police, and will attribute more responsibility to the victim, when stalking is by a former intimate partner, rather than a stranger.<sup>219</sup> The research is troubling, indicating that stalking is less likely to be identified in current intimate relationships, and generally failing to even consider the possibility of stalking in those relationships.

In essence, constructions of stalking by criminological and forensic mental health experts, as well as by members of the community, most readily identify a perpetrator as a stalker when the relevant behaviour occurs *after* an intimate relationship has ended. The implications of this distinction are significant: psychologically abusive behaviours (such as putting a victim under surveillance or following her) that occur after a relationship has ended are recognised as stalking (and may thereby constitute a criminal offence), whereas when those same behaviours occur in an ongoing relationship, they are more likely to be labelled as family violence, and therefore not directly criminalised (unless they occur in Tasmania). This entrenched, taken for granted, view is a major impediment to persuading jurors, lawyers, judges, victims and members of the community that stalking occurs in ongoing intimate relationships. Perhaps it occurs because of difficulties in distinguishing stalking (that takes place while a couple are cohabitating) from

Jeff Gavin, ‘The Influence of Prior Relationship on Perceptions of Stalking in the United Kingdom and Australia’ (2010) 37(11) *Criminal Justice and Behavior* 1185, 1191; Weller, Hope and Sheridan (n 60) 327–8, 331–4. Public perception studies from the United Kingdom also suggest that stalking involving physical harm is more serious: Lorraine Sheridan and Adrian J Scott, ‘Perceptions of Harm: Verbal versus Physical Abuse in Stalking Scenarios’ (2010) 37(4) *Criminal Justice and Behavior* 400, 412–13.

<sup>217</sup> Sheridan and Scott (n 216) 412–13.

<sup>218</sup> See Lorraine Phillips et al, ‘Is it Stalking? Perceptions of Stalking among College Undergraduates’ (2004) 31(1) *Criminal Justice and Behavior* 73, 90.

<sup>219</sup> Adrian J Scott et al, ‘International Perceptions of Stalking and Responsibility: The Influence of Prior Relationship and Severity of Behavior’ (2014) 41(2) *Criminal Justice and Behavior* 220, 231–2; Lorraine Sheridan et al, ‘“There’s No Smoke without Fire”: Are Male Ex-Partners Perceived as More “Entitled” to Stalk than Acquaintance or Stranger Stalkers?’ (2003) 94(1) *British Journal of Psychology* 87, 96; Adelman M Hills and Jacqueline L Taplin, ‘Anticipated Responses to Stalking: Effect of Threat and Target-Stalker Relationship’ (1998) 5(1) *Psychiatry, Psychology and Law* 139, 144–5.



normative patterns of behaviour.<sup>220</sup> Some common stalking behaviours — approaching the person, telephoning them — are part of everyday social intercourse between partners.<sup>221</sup> In the context of an ongoing domestic relationship where the parties cohabit, these difficulties loom large.

In our view, these findings undermine the use of stalking laws to protect victims from non-physical abuse by their current intimate partners. It might be argued that stalking statistics from some jurisdictions (particularly those that link stalking and family violence) appear to demonstrate that this limitation can be overcome by direct legislative linking of stalking and family violence or a strong public education campaign around the adapted meaning of stalking in a criminal sense. But even these strategies are likely to be insufficient to address the problem. For the reasons previously identified, stalking of a current intimate partner is under-recognised and consequently is very likely to be under-prosecuted. Additionally, stalking laws do not capture the full ambit of non-physical abuse; for instance, they do not include economic abuse. Consequently, a new offence criminalising non-physical abuse that occurs between current intimate partners is warranted.

## V CONCLUSION

Various types of non-physical abuse are defined as family violence in most Australian jurisdictions, as well as in New Zealand, but almost universally without directly constituting a criminal offence. In this study, we have identified that, under existing stalking laws in Australia and New Zealand, perpetrators engaging in non-physical forms of abuse of intimate partners can be, and are being, prosecuted for stalking. However, given that: (1) stalking of current intimate partners appears to be under-reported (and perhaps under-policed); (2) the broad legislative ambit of stalking provisions in Australia and New Zealand is incompatible with expert and community understandings of stalking; and (3) stalking laws do not prohibit significant types of non-physical abuse (such as economic or social abuse), we argue that stalking laws are not only very likely to be under-utilised in this context, but are inappropriate as the sole mechanism by which non-physical abuse is directly

<sup>220</sup> TK Logan and Robert Walker, 'Partner Stalking: Psychological Dominance or "Business as Usual"?' (2009) 10(3) *Trauma, Violence, & Abuse* 247, 257, 263.

<sup>221</sup> Some commentators note that '[n]ormal interpersonal behaviour may well involve a degree of "stalking" during romantic pursuits and after relationship break-ups': Hills and Taplin (n 219) 146.

criminalised. The criminal justice system should no longer tolerate stalking laws being ‘used as mental harm’s catch-all provision in the criminal law.’<sup>222</sup>

So how should we move forward? Although there appears to be concern that a specific family violence offence would be inappropriate in the Australian context,<sup>223</sup> we fail to see how the ongoing humiliation, isolation and control of a current intimate partner could never warrant a criminal justice response. At the moment, victims’ legal protection from this form of abuse is relegated to the questionable dual response — a civil–criminal hybrid of intervention orders. There are, of course, legitimate concerns: the criminal law is not a panacea, and it would be a travesty indeed if a new offence were misused against *victims* of coercive and controlling behaviour, as opposed to perpetrators. We therefore suggest that the most appropriate response to this legal lacuna is to review the legislative models adopted in Tasmania, England and Wales, and Scotland (and now Ireland), to conduct empirical research on their effects, and to then adapt and adopt the appropriate features of those models in the Australian and New Zealand context to directly and specifically criminalise non-physical abuse between intimate partners.

<sup>222</sup> Marilyn McMahon and Paul McGorrery, ‘Criminalising Controlling and Coercive Behaviour: The Next Step in the Prosecution of Family Violence?’ (2016) 41(2) *Alternative Law Journal* 98, 101. See also Renata Alexander, ‘Women and Domestic Violence’ in Patricia Eastal (ed), *Women and the Law in Australia* (LexisNexis Butterworths, 2010) 152, 163–4: ‘Domestic violence can include stalking but, in general, stalking is not between family members and is dealt with separately’.

<sup>223</sup> See, eg, Walklate, Fitz-Gibbon and McCulloch (n 8).