

AN ASSESSMENT OF LEGAL AND SOCIETAL RESPONSES TO REPRODUCTIVE
COERCION IN AUSTRALIA

By

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A thesis submitted in partial fulfillment of
the requirements for the degree of

MASTER OF RESEARCH

WESTERN SYDNEY UNIVERSITY
SCHOOL OF LAW

JANUARY 2022

DEDICATION

To my Father. Everything flows from You and to You. Thank You for inspiring me to write this thesis, and for Your unwavering support.

ACKNOWLEDGEMENTS

Anyone who has undertaken a research project during the COVID-19 pandemic would be familiar with the unforeseen challenges posed by the last couple of years. This thesis would not have been possible without the support, guidance, and encouragement of several people whom I would like to acknowledge.

To my Supervisor, Dr Amira Aftab, working with you during this research process has been a blessing. You have given me all the support I did not know I needed, and it has transcended my academic life. I appreciate your guidance, suggestions, advice, corrections, patience, and faith in me. I hope I have made you proud.

To my initial Supervisor, Dr Hadeel Al-Aloosi who took an indefinite leave just as I commenced in February 2020; thank you for getting excited about my research project when you read the proposal. It is because of your acceptance that I could make it to this stage. If you ever read this thesis, I hope you feel convinced that you made the right decision.

Special thanks to Dr Jack Tsonis who literally stepped in as my supervisor for an entire semester. Your detailed and positive feedback boosted my confidence.

To Professor Sonia Allan, thank you for sharing your insights into my research topic with me, and for your assistance in streamlining its focus. You not only helped to make my work easier, but your advice gave my thesis more depth.

To Associate Professor Anna Cody and Dr Caroline Compton, thank you for your warmth, acceptance, and support. I am also grateful to the staff and HDR students at the School of Law for accepting me as one of their own.

To my exceptional mother who made sure I felt her presence while we were 13,000 km apart, thank you for your prayers that held me up. I am also grateful to my boss whose empathy and

constant accommodation of my requests for time off, properly positioned me to complete this MRes program.

STATEMENT OF AUTHENTICATION

The work presented in this thesis is, to the best of my knowledge and belief, original except as acknowledged in the text. I hereby declare that I have not submitted this material, either in full or in part, for a degree at this or any other institution.

Signed: Olive Opeyemi Olubusola Otedola-Olusanya
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Abstract

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January 2022

Recently, various forms of domestic violence have commanded heightened public awareness and sparked legislative reforms. Nonetheless, one form of domestic violence that has gained very little attention is reproductive coercion. Reproductive coercion is any behaviour that interferes with the independent decision-making of a person regarding their reproductive health. Although it is not a new phenomenon, reproductive coercion was only recognised as a distinct form of domestic violence in a scientific study published in 2010. The scarcity of subsequent studies means that stakeholders, such as victims, health practitioners, policymakers and law enforcement officers are ill-equipped to understand and properly respond to reproductive coercion-related behaviour. Using legal research methodologies, this thesis will assess reproductive coercion within the broader legislative and societal framework of domestic violence.

This thesis aims to address pertinent questions, such as whether the current policy and legislative environment within Australian jurisdictions adequately supports women's reproductive autonomy, and whether the existing health and societal responses are sufficient to effectively address reproductive coercion. In doing so, this thesis offers a comparative analysis of United Kingdom legislation and societal mechanisms to consider what lessons can be learnt for future legislative, policy and societal reform in Australia.

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INTRODUCTION

In recent times, various forms of domestic violence ('DV') have commanded heightened public awareness and sparked legislative reforms.¹ Despite this, one form of DV that has gained little attention is reproductive coercion ('RC').² In simple terms, RC is any behaviour that interferes with the independent decision making of a person regarding their reproductive health.³ RC is not a new phenomenon. In academic literature, it had been recognised in association with reproductive rights and state policy, but it was only categorised as a form of DV in 2010.⁴ To date, only a handful of studies have focused on RC, while describing it as an under-researched subject and highlighting areas for future research.⁵ The scarcity of subsequent research into the occurrence of RC, alongside existing legal and societal responses, means stakeholders are unable to understand and properly respond.⁶ Victims struggle to categorise its occurrence as abuse, and health practitioners positioned as first-responders remain ill-equipped, due to an absence of policies and guidelines on RC.⁷ Legislators and policy-makers remain unsure of its scope and prevalence,

¹ Nicola Lacey, 'Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law' (1997) 8(2) *Women: A Cultural Review* 143-157, 146.

² Abby Alexander, 'Why We Need To Talk About Reproductive Coercion', *10daily* (online at 10 October 2020) <<https://10daily.com.au/views/a180717olc/why-we-need-to-talk-about-reproductive-coercion-20180718>>;

Laura Tarzia et al, 'A Huge, Hidden Problem: Australian Health Practitioners' Views and Understandings of Reproductive Coercion' (2019) 29(10) *Qualitative Health Research* 1395-1407 doi:10.1177/1049732318819839.

³ Marie Stopes Australia, 'Hidden Forces: Shining A Light on Reproductive Coercion' (White Paper, Marie Stopes Australia, 26 November 2018) 7 ('Hidden Forces').

⁴ Elizabeth Miller et al, 'Pregnancy coercion, intimate partner violence and unintended pregnancy' (2010) 81(4) *Contraception* 316-322 doi: 10.1016/j.contraception.2009.12.004.; Alena Heitlinger, 'Women's Equality, Demography & Public Policies: Review' (1995) 20(2) *Canadian Journal of Sociology* 275-7; Rachael Pine, 'Rachel Pine Comments on the Conference on the Interventional Protection of Reproductive Rights: Civil & Political Rights and the Right to Non-discrimination' (1995) 44(4) *American University Law Review* 1311-13; Christine Gudorf 'Our increasing prospects for reproductive coercion' (1999) 53(3) *Union Seminary Quarterly Review* 187-203.

⁵ Tarzia (n 2).

⁶ Hilary Freeman, 'Reproductive coercion is abuse. But many women don't even know it', *The Guardian* (online at 29 January 2022) <<https://www.theguardian.com/commentisfree/2019/jan/09/reproductive-coercion-abuse-women-control-choices>>; Heather Douglas, 'Policing domestic and family violence' (2019) 8(2) *International Journal for Crime Justice and Social Democracy* 31-49 doi.org/10.5204/ijcjsd.v8i2.1122.

⁷ Hilary Freeman (n 6); Ruth Fleury-Steiner and Susan Miller, 'Reproductive Coercion and Perceptions of Future Violence' (2020) 26 (10) *Violence Against Women* 1228-1241 doi.org/10.1177%2F1077801219856107.

delaying legislative reform, and cultural perceptions and myths continue to hamper its recognition as abhorrent behaviour.⁸ Using legal research methodologies, this thesis aims to conduct an assessment of RC within the broader legislative and societal framework of DV in Australia, to contribute to the body of knowledge on RC and propose recommendations in response to legal and societal gaps.

DV is so prevalent that it has been aptly described as a public health issue.⁹ Some definitions restrict DV to violence between intimate partners, but it extends to violence which affects children, siblings and elder abuse.¹⁰ Such violence can take the form of physical, sexual, emotional or financial abuse.¹¹ The most common form of DV is intimate partner violence which is characterised by physical aggression, sexual coercion and controlling behaviour (involving a perpetrator's exercise of power and control over the victim, now regarded as coercive control).¹² Through a pattern of domination, perpetrators use manipulation, surveillance and isolation to determine the victims' everyday lives.¹³ One of such forms of DV which may interfere with the victim's everyday life is RC.

⁸ Australian Capital Territory, *Parliamentary Debates*, Legislative Council, 27 November 2018, 4845 (Ms Berry, Minister for the Prevention of Domestic and Family Violence); New South Wales, *Parliamentary Debates*, Legislative Council, 7 June 2018, 23 (Ms Jodie Harrison, Member for Charlestown); New South Wales, *Parliamentary Debates*, Legislative Council, 7 June 2018, 23 (Ms. Trish Doyle, Teller); Jenny Proudfoot, 'The internet has turned against Pete Davidson after his controversial comments about Ariana Grande's birth control' *Marie Claire* (online at 20 January 2020) <<https://www.marieclaire.co.uk/entertainment/people/pete-davidson-birth-control-619160>>; Rape Crisis, 'Myths about rape and other forms of sexual violence', *Rape Crisis England & Wales* (Web Page) <<https://rapecrisis.org.uk/get-informed/about-sexual-violence/myths-vs-realities/>>; Jacob Stolworthy, 'Nikki Reed and Ian Somerhalder apologise for controversial birth control remarks' *Independent* (online at 20 October 2020) <<https://www.independent.co.uk/arts-entertainment/tv/news/nikki-reed-ian-somerhalder-threw-away-birth-control-pregnant-planned-parenthood-controversy-a7965806.html>>.

⁹ Richard Davis, *Domestic Violence: Intervention, Prevention, Policies, and Solutions* (Routledge, 1st ed, 2008).

¹⁰ United Nations, 'What is Domestic Abuse?', *United Nations* (Web Page) <<https://www.un.org/en/coronavirus/what-is-domestic-abuse>>.

¹¹ Donald Dutton, *Rethinking Domestic Violence* (UBC Press, 1st ed, 2006).

¹² World Health Organisation, 'Violence Against Women' *World Health Organisation* (Web Page, 9 March 2021) <<https://www.who.int/news-room/fact-sheets/detail/violence-against-women>>; *National Domestic and Family Violence Bench Book* (online at 10 January 2022) <<https://dfvbenchbook.aija.org.au/dynamics-of-domestic-and-family-violence/>> ('*DFV Bench Book*').

¹³ *DFV Bench Book* (n 12) <<https://dfvbenchbook.aija.org.au/terminology/coercive-control/>>.

What is Reproductive Coercion?

RC is a set of behaviours or actions that interfere with the independent decision making of a person regarding their reproductive health.¹⁴ Four forms of RC exist: contraceptive sabotage, which includes removing or damaging a contraceptive device or interfering with oral contraceptives; pregnancy coercion/pressure, which involves behaviour intended to pressurise an individual to conceive despite an expressed wish to the contrary; pregnancy outcome control, which engages the use of pressure to realise the abuser's wishes regarding the outcome of the pregnancy; and, coerced sterilisation, which is sterilisation in the absence of the free and informed consent of the individual concerned e.g., the forced sterilisation of girls and women with disabilities.¹⁵ These acts interfere with reproductive decision-making, resulting in the exploitation of the individual's fertility as a tactic of power and control.¹⁶ This highlights RC's essence as a form of violence hinged on the deprivation of voluntarism and informed consent in relation to family planning.¹⁷

The absence of definitive terminology and conceptual clarity around RC contributes to the general lack of awareness of its occurrence, a poor understanding of its risk factors, and difficulties in

¹⁴ Hidden Forces (n 3).

¹⁵ Hidden Forces (n 3) 7; Elizabeth Miller et al, 'Reproductive Coercion: Connecting the Dots between Partner Violence and Unintended Pregnancy' (2010) 81(6) *Contraception* 457-459 doi:10.1016/j.contraception.2010.02.023; Women With Disabilities Australia, Submission No. 142, *Senate Inquiry into the Involuntary or Coerced Sterilisation of People with Disabilities in Australia* (March 2013) 8.

¹⁶ Heather Douglas and Katherine Kerr, 'Domestic and Family Violence, Reproductive Coercion and the Role for Law' (2018) 26(2) *Journal of Law and Medicine* 341-355, 353; Ciara Laverty and Dieneke de Vos, 'Reproductive Violence as a Category of Analysis: Disentangling the Relationship between 'the Sexual' and 'the Reproductive' in Transitional Justice' (2021) 00(1-20) *International Journal of Transitional Justice* doi.org/10.1093/ijtj/ijab022; ijab022, <https://doi.org/10.1093/ijtj/ijab022>; Laura Tarzia and Kelsey Hegarty, 'A Conceptual Re-evaluation of Reproductive Coercion: Centring Intent, Fear and Control' (2021) 18(87) *Reproductive Health* doi.org/10.1186/s12978-021-01143-6; Molly Wellington, Kelsey Hegarty and Laura Tarzia, 'Barriers to Responding to Reproductive Coercion and Abuse among Women Presenting to Australian Primary Care' (2021) 21(424) *BMC Health Services Research* doi.org/10.1186/s12913-021-06420-5; Shane Trawick, 'Birth Control Sabotage as Domestic Violence: A Legal Response' (2012) 100 (721) *California Law Review* 721-60; Rachel Camp, 'Coercing Pregnancy' (2015) 21(1) *Women and Mary Journal of Women and the Law* 275-318.

¹⁷ Patricia Hayes, 'Reproductive coercion and the Australian State: A New Chapter?' (2016) 28(1) *The Australian Community Psychologist* 90-100.

demonstrating the effectiveness of interventions in health settings.¹⁸ For some, it is termed ‘reproductive abuse’, as it captures the misuse of power.¹⁹ Other terms used include: reproductive violence; reproductive abuse; birth control sabotage or coercing pregnancy; and, reproductive coercion and abuse.²⁰ Fundamentally, the complex nature of RC contributes to the inconsistency in terminology; RC can exist independently as a form of violence against women, or alongside other forms of DV. For example, it may serve as the catalyst for other forms of DV, as a proportion of women start to experience DV during pregnancy; it could be prompted by other forms of DV like sexual violence; or it could occur as an isolated but intentional incident, as with certain cases of contraceptive sabotage.²¹ This often makes it difficult for victims to identify its occurrence as the effects of RC and other forms of DV often overlap.²²

This thesis will consider the gendered dimension of RC. The focus will be on the experiences and impact of RC on women. While it is acknowledged that RC may be perpetrated by both men and women, as with other forms of DV, the majority of victims are women.²³ It is important to recognise that men may also be victims, as evidenced in an American survey that revealed approximately 8.7% of the US male population had experienced female-perpetrated RC.²⁴

¹⁸ Tarzia and Hegarty (n 16).

¹⁹ WomensLaw.org, ‘Reproductive Abuse and Coercion’ *National Network to End Domestic Violence, Inc.* (Web Page, 13 January 2020) <<https://www.womenslaw.org/about-abuse/forms-abuse/reproductive-abuse-and-coercion>>.

²⁰ Tarzia and Hegarty (n 16).

²¹ Elizabeth Price et al, ‘Experiences of Reproductive Coercion in Queensland Women’ (2019) 00(0) *Journal of Interpersonal Violence* 1–21, 2 doi:10.1177/0886260519846851; Family Planning New South Wales, ‘Reproductive Coercion Policy 2018’ *Family Planning New South Wales: Reproductive and Sexual Health* (Web Page, 2018) <https://www.fpnsw.org.au/sites/default/files/assets/Reproductive-Coercion-Policy_2018.pdf>; Miller et al (n 4) 316.

²² Hidden Forces (n 3) 22.

²³ Michael Johnson, ‘Domestic Violence: It’s Not about Gender: Or Is It?’ (2005) 67(5) *Journal of Marriage and Family* 1126–30; Ellie Advice, ‘How Birth Control Sabotage Affects Men: Ellie’, *The Star: Toronto Star* (Web page, 17 October 2017) <<https://www.thestar.com/life/2017/10/17/how-birth-control-sabotage-affects-men-ellie.html>>.

²⁴ National Center for Injury Prevention and Control Division of Violence Prevention, ‘Intimate Partner Violence in the United States — 2010’ *Centers for Disease Control and Prevention* (Web Page, February 2014) <https://www.cdc.gov/violenceprevention/pdf/cdc_nisvs_ipv_report_2013_v17_single_a.pdf>. Note that while the findings of this study indicate that rates of RC were higher among men than women (8.7% of men, as opposed to 4.8% of women), a higher percentage of women experienced contraceptive sabotage. Furthermore, this survey was conducted prior to more recent findings on the prevalence of RC among female victims of DV. See also, Jonel Thaller,

Research also shows that certain behaviours associated with RC, like non-consensual condom removal, are prevalent in male-male sexual relationships.²⁵ However, the focus of this thesis will be on the occurrence of RC as it affects women, based on the gendered pattern of DV.²⁶

RC poses a myriad of risks to female victims. Other than the deprivation of autonomy, RC can result in poor health outcomes such as STDs, substance abuse, mental-health issues and also impair maternal and foetal health where it results in pregnancy.²⁷ The health risks highlight the importance of developing adequate responses.²⁸ DV, including RC, causes more illnesses, disability and deaths than any other risk factor for women aged 15-44, while costing the Australian economy \$22 billion annually in law enforcement, healthcare, housing and lost wages.²⁹

As a relatively new concept, limited legal-focused scholarship is available on RC's occurrence within Australia and internationally.³⁰ In 2018, authors Katherine Kerr and Professor Heather Douglas published the only Australian article which concisely highlights the role of law in curbing

'Gendered Discourses and Articulations of Power in an Exploratory Study of Male- and Female-Perpetrated Reproductive Coercion' (PhD Thesis, Arizona State University, 2014). There have also been incidents of female-perpetrated RC in Australia; see for example, the recent case of Josh Reynolds whose girlfriend allegedly faked three pregnancies to keep him in a relationship: Tom Rabe and Neil Breen, 'Josh Reynolds' Life Unravels Amid Catfishing Claims' *Sydney Morning Herald* (Web page, 9 February 2020) <<https://www.smh.com.au/national/nsw/josh-reynolds-life-unravels-amid-catfishing-claims-20200208-p53z0b.html>>.

²⁵This practice, more commonly known as 'stealth-breeding', increases the risk of the transmission of HIV and other sexually transmitted diseases. See Joseph Brennan, 'Stealth breeding: bareback without consent' (2017) 8 (4) *Psychology & Sexuality* 318-333.

²⁶ While female-perpetrated RC may be prevalent, it usually occurs outside of DV relationships and is perceived by scholars as more of an economic issue with some legal ramifications (for example, contraceptive fraud or breach of contract) than a public health issue – see Trawick (n 16); Thaller (n 24).

²⁷ Michelle Black, 'Intimate Partner Violence and Adverse Health Consequences: Implications for Clinicians' (2011) 5(1) *American Journal of Lifestyle Medicine* 428-439, 428 doi:10.1177/1559827611410265.

²⁸ Sharon Phillips et al., 'Reproductive coercion: an under-recognized challenge for primary care patients' (2016) 33 (3) *Family Practice* 286-289 doi.org/10.1093/fampra/cmww020.

²⁹ KPMG, 'The cost of violence against women and their children in Australia' *KPMG Final Report* (Report, May 2016)

<https://www.dss.gov.au/sites/default/files/documents/08_2016/the_cost_of_violence_against_women_and_their_children_in_australia_-_summary_report_may_2016.pdf>; Ravneet Kaur and Suneela Garg, 'Addressing Domestic Violence against Women: An Unfinished Agenda' (2008) 33(2) *Indian Journal of Community Medicine* 73-6 doi:10.4103/0970-0218.40871.

³⁰ Steiner and Miller (n 7).

RC.³¹ While the authors argue there may be room for legal redress in existing family and domestic violence ('FDV') legislation, their research is limited to the efficacy of civil protection orders.³² The article does not deal with the criminal aspects of RC nor does it properly address issues of consent, sexual agency, bodily integrity or reproductive autonomy. Dr Brianna Chesser and April Zahra examine the interaction of stealthing (which can sometimes be used to perpetrate RC) with consent provisions in Australian sexual offences legislation.³³ Although the paper is not focused on RC, their examination of Australian law reveals that stealthing remains a legal grey area.³⁴

Other scholarly research on legal issues associated with RC are predominantly focused on the American context. Authors, like Alexandra Brodsky, explore existing legal remedies for contraceptive sabotage (described as 'rape-adjacent').³⁵ The paper generated awareness, particularly in the United States of America where California has become the first state to stealthing a civil wrong.³⁶ Outside of these few legal discussions, the bulk of research has been conducted by psychologists and sociologists who address the prevalence of RC, the experiences and perceptions of victims, the adverse health consequences and the responses of healthcare providers.³⁷

³¹ Douglas and Kerr (n 16).

³² Ibid.

³³ Stealthing is defined as non-consensual condom removal.

³⁴ Brianna Chesser and April Zahra, 'Stealthing: a criminal offence?' (2019) 31(2) *Current Issues in Criminal Justice* 217-35.

³⁵ Alexandra Brodsky, "'Rape-Adjacent': Imagining Legal Responses to Non-consensual Condom Removal' (2017) 32(2) *Columbia Journal of Gender and Law* 183-210; Rape-adjacent in this instance, meaning, 'similar to rape'. See also Trawick (n 16).

³⁶ Don Thomson, 'New state law makes it illegal to remove a condom without consent' *Los Angeles Times* (online at 8 October 2021) <<https://www.latimes.com/california/story/2021-10-08/california-illegal-remove-condom-without-consent-stealthing>>.

³⁷ Tarzia (n 2); Hidden Forces (n 3); Steiner and Miller (n 7); Black (n 27); Phillips (n 28); Jay Silverman and Anita Raj, 'Intimate Partner Violence and Reproductive Coercion: Global Barriers to Women's Reproductive Control' (2014) 11(9) *PLoS Medicine* doi.org/10.1371/journal.pmed.1001723; Kimberly Randell, 'Cyber Adolescent Relationship Abuse and Reproductive Coercion: Victimization and Perpetration among Adolescents Utilizing a Pediatric Emergency Department' (2016) 58(2) *Journal of Adolescent Health* S75-S76; Nickeitta Leung, 'Education Not Handcuffs: A Response to Proposals for the Criminalization of Birth Control Sabotage' (2015) 15 (1) *University*

This thesis aims to address pertinent research questions, such as: ‘does the current policy and legislative environment within Australian jurisdictions adequately supports women’s reproductive autonomy’?, ‘what lessons can Australia learn from a cross-jurisdictional analysis of the United Kingdom (‘UK’) regarding future legislative reforms’?; and ‘are the existing health and societal mechanisms in Australia are sufficient to address RC’? Otherwise,’ what mechanisms are required to properly safeguard women’s reproductive autonomy’? Following an examination of the current legal and societal landscape relating to RC in Australia, and a comparison of the UK’s responses, this thesis will highlight proposed recommendations for legal and societal reform.

Methodology

Three legal research methods are used in this thesis: the doctrinal research method, comparative law, and the socio-legal method. The doctrinal research method is used to examine legislation and judicial decisions. Using this method, the thesis explores the provisions of DV and sexual offences legislation applicable in Australia and the UK, together with case law, to determine whether there is any prohibition of RC. Comparative law is used to analyse Australian legislation in light of relevant UK law. These jurisdictions have been selected because of the similarities in legal history and common law systems. A comparative analysis of Australian and UK legislation can help determine whether the jurisdictions adopt any common approaches in addressing coercive control and contraceptive sabotage; which jurisdiction has more comprehensive legal provisions; and, ultimately, whether Australia can learn from the UK approach. This research method will help highlight differences to determine which approach is more effective. Finally, the thesis draws on

of Maryland Law Journal of Race, Religion, Gender and Class 146-169; Kerry Peterson, ‘Wrongful Conception and Birth - The Loss of Reproductive Freedom and Medical Irresponsibility’ (1996) 18 (4) *Sydney Law Review* 503-522; and, Price et al (n 21), to mention but a few.

socio-legal research methodology to analyse societal responses. This will involve an examination of the dynamics between existing laws and the occurrence of RC; structural drivers of RC; and societal responses with a focus on health practitioners and police officers. This method will consider existing sociological and psychological research (including surveys measuring community attitudes and responses of health practitioners) to determine where gaps exist in societal mechanisms. Furthermore, drawing on concepts of consent, sexual agency, reproductive autonomy and bodily integrity will aid the assessment of societal responses through religious, cultural and educational lenses.

Sociological concepts linked to RC

Consent and Sexual Agency

One of the forms of RC is contraceptive sabotage. This involves damaging, removing, or interfering with a contraceptive device, arrangement, or medication with the aim of altering its efficacy. This can occur by tampering with oral contraceptives, forcefully removing implanted contraceptive devices, non-consensual condom removal (stealthing), poking holes in the condom, or failing to use the agreed-upon withdrawal method.³⁸

The ability to decide whether to engage in sex and outline the parameters of any sexual act which may follow is the exercise of sexual agency.³⁹ Consent is central to sexual agency, and its absence determines the illegality of contraceptive sabotage, as this is capable of transforming the act from

³⁸ Athena Katsampes, 'A Rape by any Other Name? The Problem of Defining Acts of Protection Deception and the University as a Solution' (2018) 24(3) *Virginia Journal of Social Policy & the Law* 157–194.

³⁹ Deborah Tuerkheimer, 'Sex Without Consent' (2013) 123 *Yale Law Journal Online* 335, 338-9.

consensual sex to rape/sexual assault.⁴⁰ To establish contraceptive sabotage as a wrongful act, it is important to explore the definition and understanding of consent as it will be used in this thesis.

Consent is the free and voluntary agreement by parties as to the sexual act which occurs between them.⁴¹ Emerging concepts of affirmative and conditional consent show that rape/sexual assault is not voided by mere acquiescence or the absence of coercion, force, or intimidation.⁴² Affirmative consent is characterised by a willingness to participate in sexual activity, indicated by consent which is intentionally sought and effectively communicated.⁴³ This shifts the standard of consent from the expectation that ‘no’ is a clear indication of refusal, to the requirement that affirmation is required as proof of consensual sex at every stage of the act.⁴⁴ In the English case of *R v Olugboja*, Dunn LJ foreshadowed the evolution of affirmative consent by highlighting the difference between ‘consent’ and ‘mere submission’ when he held that ‘every consent involves a submission, but it by no means follows that a mere submission involves consent’.⁴⁵ Any requirement of affirmative consent in Australian law would require the accused to prove that the complainant actively

⁴⁰ Brendon Murphy, ‘Constructing consent in the Australian Capital Territory’ (2020) 17(1) *Canberra Law Review* 23 – 42; see the sexual offences legislation of Australian states and territories which define consent: *Crimes Act 1900* (NSW) s 61HE(2); *Criminal Code Act 1983* (NT) s 192(1); *Criminal Code Act 1899* (Qld) s 348(1); *Criminal Law Consolidation Act 1935* (SA) s 46(2); *Criminal Code Act 1924* (Tas) s 2A; *Crimes Act 1958* (Vic) s 36(1); and *Criminal Code 1913* (WA) s 319(2)(a) except for the Australian Capital Territory where there is no express definition of consent – see *Crimes Act 1900* (ACT) s 67.

⁴¹ Murphy (n 40) 30.

⁴² Question of Law Reserved on Acquittal Pursuant to Section 350(1a) Criminal Law Consolidation Act (No 1 of 1993) (1993) 59 *SASR* 214, 220.

⁴³ Rachael Burgin, ‘Persistent Narratives of Force and Resistance: Affirmative Consent as Law Reform’ (2019) 59(2) *The British Journal of Criminology* 296–314, 302 doi.org/10.1093/bjc/azy043.

⁴⁴ *Ibid.*

⁴⁵ *R v Olugboja* [1982] QB 320; Nora Selina, “‘I Have the Freedom and Capacity to... Or Do I?’” Challenging the Definition of ‘Consent’ under the *Sexual Offences Act 2003*’ (Conference Paper, 2015 LSE Conference on Gender and Sexuality) <<https://www.lse.ac.uk/gender/assets/documents/research/graduate-working-papers/I-have-the-freedom-and-capacity-to.pdf>>; Dunn LJ, citing Coleridge J in *R v Day* (1841) 9 C & P 722 at 724.

demonstrated their willingness to engage in the sexual act.⁴⁶ With conditional consent, the sexual act undertaken is predicated upon the existence of specific predetermined conditions.⁴⁷

Both concepts of conditional and affirmative consent are central to the occurrence of RC (noting that an intent to cause pregnancy determines whether an act of contraceptive sabotage is RC). Conditional consent is important; as part of the exercise of a woman's sexual agency, she may wish to have sex within certain boundaries put in place. Where conditional consent exists, affirmative consent should be obtained before stepping outside those predetermined conditions. Ideally, both forms of consent should be part of every sexual interaction.⁴⁸ An individual consents, believing that the other individual will comply with the predetermined conditions. This is part of the exercise of sexual agency, based on an understanding of the power dynamics around sexual relations and for the prevention of subordination.⁴⁹ Dr Brianna Chesser and April Zahra write that stealthing (which is contraceptive sabotage) transforms the act of sex into one with risks inherent and could persuasively influence the individual's decision.⁵⁰ Contraceptive sabotage effectively seizes the premise upon which the individual's consent is given, and creates a new set of circumstances.⁵¹ These new circumstances constitute a 'break in transmission' where the individual's initial consent is vitiated without their agreement. Therefore, affirmative consent is important because new consent must be given to continue sex on a consensual basis.⁵² Should sex

⁴⁶Burgin (n 43); Avinash Singh, 'Australia: Affirmative Consent to be introduced in NSW' *Mondaq* (Blog Post, 21 July 2021) <<https://www.mondaq.com/australia/crime/1093734/affirmative-consent-to-be-introduced-in-nsw?type=popular>>.

⁴⁷ Karamvir Chadha, 'Conditional Consent' (2021) 40(1) *Law and Philosophy* 335–359, 337 doi.org/10.1007/s10982-020-09400-8.

⁴⁸ Chesser and Zahra (n 35).

⁴⁹ Tuerkheimer (n 39) 339.

⁵⁰ Chesser and Zahra (n 35) 220.

⁵¹ *Ibid.*

⁵² Brodsky (n 35) 183; Brianna Chesser and April Zahra, 'Stealthing: Is removing a condom whilst having sex considered rape?' *LY Lawyers* (Blog Post, 6 November 2017) <<https://lylawyers.com.au/stealthing-removing-condom-whilst-sex-considered-rape/>>.

continue outside of the woman's expressed choice, she would be deprived of her ability to self-direct, in violation of her sexual agency.⁵³

This thesis argues that the transformation of the sexual encounter from protected to unprotected sex changes the nature of the act, and its purpose/quality where the intent is to cause pregnancy. The intentional misrepresentation or deception which occurs is fraudulent.⁵⁴ Regrettably, both the Australian and English Courts are inclined to adopt the common law interpretation of consent which restricts fraud as to nature or purpose/quality primarily to medical cases and impersonation. In the Australian case of *The Queen v Papadimitropoulos*, the Court drew a distinction between consent based on deception as to nature, and consent induced by deception regarding matters antecedent to the consent.⁵⁵ To that effect, consent vitiated based on deception as to the nature/quality is limited to medical treatment and impersonation while matters antecedent fell under the category of the alleged offender's status. The High Court emphasised that, in making an indictment for rape, consent to penetration demands a perception as to the act which will occur, the man's identity and the character of the act.⁵⁶ If the woman understands and consents to these elements, no other inducing factors can vitiate her consent.⁵⁷ The Court's insistence on a narrow definition of consent was to pre-empt a flood of litigation.⁵⁸ Professor Jed Rubenfeld expounds

⁵³ Tuerkheimer (n 39) 346.

⁵⁴ Trawick (n 16).

⁵⁵ *The Queen v Papadimitropoulos* [1957] 98 CLR 249; J.K. Connor, PAPANIMITROPOULOS v. THE QUEEN Criminal Law-Rape-Consent Induced by Fraud-Misrepresentation as to Marriage <http://classic.austlii.edu.au/au/journals/MelbULawRw/1958/23.pdf>

⁵⁶ *Ibid* per Dixon C.J., McTiernan, Webb, Kitto and Taylor JJ at 260-[261].

⁵⁷ In the more recent case of *R v Winchester* [2011] QCA 374, the Court considered misrepresentations as only going to the 'motive' of whether intercourse will occur, and such misrepresentations were thereby 'indirectly relevant' to consent (See *R v Winchester* at [116]) – will cite properly.

⁵⁸ JK Connor, 'Criminal Law-Rape-Consent Induced by Fraud-Misrepresentation as to Marriage' <http://classic.austlii.edu.au/au/journals/MelbULawRw/1958/23.pdf>, 546.

that this interpretation draws a line between fraud in the *factum* (medical and impersonation cases) and fraud in the inducement where inducement cannot vitiate fraud.⁵⁹

The same position applies in the UK. In *R v Linekar*, a woman had sex with the defendant on the belief that she would be paid.⁶⁰ The allegation that she was raped when the defendant refused to pay was dismissed. The Court relied on the strict definition of rape as sexual intercourse without consent. The Court distinguished the instant case from ‘medical cases’ such as *R v Flattery*, where the victim thought, she was consenting to a medical procedure, and *R v Williams*, where the victim agreed to a treatment to improve her singing.⁶¹

As this thesis explores sexual offences legislation in relation to contraceptive sabotage, it may become obvious that the continued reliance on the common law position by Australian and English Courts disregards women’s sexual agency and bodily integrity. The Court’s holding that consent cannot be vitiated if the complainant is aware that she is consenting to sexual intercourse is restrictive and does not adequately consider that sex against a person’s will is the antithesis of sexual agency.⁶² This does not bode well for victims of contraceptive sabotage, as they are naturally consenting to sexual intercourse, preconditions notwithstanding.

Reproductive Autonomy and Bodily Integrity

For this thesis, reproductive autonomy is understood as the power to exercise one’s reproductive rights and make decisions regarding their reproductive health, such as contraceptive use,

⁵⁹ Jed Rubenfeld, ‘The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy’ (2013) 122 *Yale Law Journal* 1372-1443, 1398.

⁶⁰ *R v Linekar* [1995] 3 All ER 69 73.

⁶¹ *R v Flattery* (1877) 2 QBD 410 and *R v Williams* [1923] 1 KB 340.

⁶² Tuerkheimer (n 39) 342.

pregnancy, and childbearing.⁶³ Ideally, unrestricted reproductive autonomy would encompass considerations such as whether and when to become pregnant, whether and when to use contraception, which method to use, and whether and when to continue a pregnancy.⁶⁴ It is acknowledged that men also have reproductive rights, but since this thesis examines RC as a gendered occurrence, the focus will be on women's reproductive rights. Reproductive autonomy is important because control over reproductive choices is central to an individual's identity and ability to live life on their own terms.⁶⁵ The social value placed on reproductive freedom explains why its denial or infringement is experienced as a great loss.⁶⁶ When women are subjected to RC, their reproductive autonomy is impacted.⁶⁷

Bodily integrity is closely associated with reproductive autonomy because of the role the body plays in reproduction. In simple terms, it sums up an individual's ownership of their body and their right to self-determination⁶⁸ One of the implications of RC is the exploitation of women's fertility as a tool of control. This stems from the idea that women's bodies are only valuable for their utility to those who require it for the fulfillment of their parental goals or sexual desires.⁶⁹ Professor Nicola Lacey argues that female bodies should be associated with the corporeal rather than the material; women have the right to claim full legal privileges associated with a rational choosing

⁶³ Nghia Nguyen et al, 'Reproductive Autonomy and Contraceptive Use among Women in Hanoi, Vietnam' (2019) 1:100011 *Contraception*: doi: 10.1016/j.conx.2019.100011.

⁶⁴ Bixby Center for Global Reproductive Health, 'Measuring Women's Reproductive Autonomy' *University of California, San Francisco* (Blog Post, 17 March 2014) <<https://bixbycenter.ucsf.edu/news/measuring-women%E2%80%99s-reproductive-autonomy>>.

⁶⁵ John Robertson, 'Children of Choice: Freedom and the New Reproductive Technologies' (1995) 96(1) *Jurimetrics* 115-119.

⁶⁶ Ruth Chadwick, 'Reproductive Autonomy' (2007) 21(6) *Bioethics* ii-ii doi.org/10.1111/j.1467-8519.2007.00557.x.

⁶⁷ *Ibid.*

⁶⁸ Lisa Blackman, 'Bodily integrity' (2010) 16 (3) *Body & Society* 1-9, 3.

⁶⁹ Dawn Szymanski, Lauren Moffitt and Erika Carr, 'Sexual Objectification of Women: Advances to Theory and Research' (2011) 39(1) *The Counseling Psychologist* 6-38, 8 doi: 10.1177/0011000010378402.

individual, especially as they bear greater burdens in the reproductive process.⁷⁰ Where a woman does not consent to pregnancy, carrying a foetus may constitute a harm that infringes on her bodily integrity. Conversely, insisting on an abortion will result in an interference with her bodily integrity.⁷¹ In addition, RC is an experience that transcends the body into mind; emotional damage from unwanted sexual and reproductive experiences can result in the frustration of psychological needs which prevent the individual from pursuing life goals.⁷²

Structure of Thesis

The thesis begins with Chapter One which sets the scene to cultivate an understanding of RC. The chapter establishes a clear background into the association between RC and coercive control, while discussing the harmful nature of coercive control. This association will explain why there is a focus on the criminal recognition of coercive control as one of the means through which RC can be combatted in later chapters. It will also establish the background on social attitudes which aid the occurrence of RC, to emphasise the importance of legal and social mechanisms in the prevention of its continued occurrence.

Chapter Two examines legal responses to RC in Australia, looking at the current legal regime under which victims may seek recourse for acts of RC. This involves a look at the federal framework and DV legislation in Australian states and territories. This examination considers whether coercive control is embedded in the definition of FDV in states and territories, and whether acts of RC have been recognised in judicial decisions, albeit indirectly. The chapter will examine whether any such judicial recognition is sufficient to combat RC as a subset of coercive control.

⁷⁰ Lacey (n 1).

⁷¹ Leah Plunkett, 'Contraceptive Sabotage' (2014) 28(1) *Columbia Journal of Gender and Law* 97 – 143, 118-19.

⁷² Abraham Maslow, *Motivation and Personality* (Longman Press, 2nd ed, 1987), 17.

Chapter Two will also explore current legislative provisions on contraceptive sabotage, noting that the criminalisation of stealthing is at the forefront of legal reform in some Australian jurisdictions.

Chapter Three explores legal responses to RC in the UK. In this thesis, the UK refers to England and Wales, and Scotland. Since this thesis involves a comparative analysis, this chapter assesses the legal regime in relation to RC in the UK. Firstly, there is an examination of the *Serious Crime Act* (England and Wales) and the *Domestic Abuse (Scotland) Act* which criminalise coercive control. Afterwards, there will be an examination of the *Sexual Offences Act (England and Wales)* to determine whether it prohibits contraceptive sabotage. Chapter Four will recognise gaps in English consent law, while applauding advancements.

Chapter Four involves a comparative analysis of the legislative regime in Australia and the UK. Emphasis will be placed on the application and efficacy of existing legislation, the gaps which exist, and areas for improvement.

Finally, Chapter Five will explore societal responses to RC in Australia and the UK via a comparative analysis of policy, and the healthcare and education sectors. Following the assessment of legal and societal responses in the UK, the thesis will conclude with recommendations for Australia's education and healthcare sector, alongside legislative and policy reforms.

Conclusion

Although in Australia, up to one in three women can experience RC, the lack of awareness of its occurrence makes it difficult for victims and service providers to address.⁷³ As a hidden form of DV, incidents slip through the gaps in legal and societal responses. The threats which RC poses to

⁷³ Hidden Forces (n 3).

women in the form of health risks; exposure to other forms of DV; the infringement of sexual agency, bodily integrity, and reproductive autonomy; and associated social and economic implications, means that it is important to explore existing legal and social mechanisms to address or prevent its continued occurrence. This thesis aims to contribute to the sparse research on RC by assessing the legal and social landscape, while mapping out a path for the improvement of the existing responses. It is fervently hoped that this contribution to scholarship will aid the promotion of awareness regarding RC, and that it will serve as platform for future research and the exploration of legal processes relating to RC.

CHAPTER ONE

SETTING THE SCENE: UNDERSTANDING REPRODUCTIVE COERCION

In 2020, a survey of 15,000 women conducted by the Australian Institute of Criminology found that one in 10 Australian women in a relationship had experienced DV during the coronavirus crisis.⁷⁴ In light of data published by the Australian Bureau of Statistics showing that 12.6 million Australians in 2020 were women, approximately 1,260,000 women experienced DV that year.⁷⁵ A breakdown of those figures shows that 58 died from violence-related incidents while 4.6% were victims of physical or sexual violence. It is possible to infer from these statistics that less than 5% of DV incidents result in physical injury, of which, less than 0.0005% result in homicide.⁷⁶ This highlights the number of DV incidents which result in little or no injury. Reflecting on these numbers, the obvious question is, how are the other 94.99% of DV incidents categorised? The survey showed that a total of 18% experienced a range of coercive and controlling behaviours demonstrating its prevalence as the avenue through which the majority of DV incidents occur. A portion of the 77% DV incidents unaccounted for may also fall within this category. Two recent DV homicide cases in Australia illustrate how DV progresses from subtle acts of coercion to escalated violence.

⁷⁴ Australian Institute of Criminology, *The prevalence of domestic violence among women during the COVID-19 pandemic* (Statistical Bulletin 28, July 2020) 1, 5.

⁷⁵ Australian Institute of Health and Welfare, 'The Health of Australia's Females' *Australian Institute of Health and Welfare* (Web Page, 10 December 2019) <<https://www.aihw.gov.au/reports/men-women/female-health/contents/who-are>>.

⁷⁶Ibid; Australian Bureau of Statistics, *Recorded Crimes – Victims* (Report, 24 June 2021)

Australia Institute of Health and Welfare, 'Family, Domestic and Sexual Violence' *Australia Institute of Health and Welfare* (Blog Post, 16 September 2021) <<https://www.aihw.gov.au/reports/australias-welfare/family-domestic-and-sexual-violence>>.

The first example is that of Hannah Clarke, a young mother who was stalked and murdered along with her three children by her estranged husband, Rowan Baxter. Following their horrific deaths, Hannah's family and close friends alleged that Baxter controlled Hannah by constantly monitoring her activities, telephone communication, clothing choices, issuing threats and isolating her. Under Baxter's control, Hannah was forced to have sex daily and regularly belittled. Hannah's parents also believe Baxter tracked her movements.⁷⁷ It is assumed that Rowan's final and fatal act of violence was an attempt to regain control and determine their fates after Hannah left him. It is impossible to tell, but it might be worth speculating that RC could have been a tactic employed by Baxter to keep Hannah under his control.⁷⁸ If Hannah was really forced to have sexual relations with him daily, she may have had little control over her reproductive autonomy.

The second case is that of Preethi Reddy, a young dentist brutally murdered by her ex-boyfriend in 2019. Preethi had ended her relationship with Narde a year before, but he refused to accept that the relationship was over. Following a meeting where Preethi attempted to give Narde some closure, he murdered her. After her death, Preethi's sister observed that if the relationship had involved a form of coercive control, it might explain why the situation escalated to a murder-suicide.⁷⁹

⁷⁷ Sarah Malik, 'Coercive control legislation could have saved Hannah's life: Sue and Lloyd Clarke', *SBS* (online at 5 May 2021) <<https://www.sbs.com.au/topics/voices/relationships/article/2021/04/27/coercive-control-legislation-could-have-saved-hannahs-life-sue-and-lloyd-clarke>>.

⁷⁸ Paula Doneman and Warren Barnsley, 'Rowan Baxter Subject to Domestic Violence Order before Allegedly Killing Hannah Clarke And Three Children' *7News* (Web Page, 21 February 2020) <<https://7news.com.au/news/qld/rowan-baxter-subject-to-domestic-violence-order-before-allegedly-killing-hannah-clarke-and-three-children-c-708040>>; Paula Doneman and Warren Barnsley, 'Rowan Baxter Subject to Domestic Violence Order before Allegedly Killing Hannah Clarke And Three Children' *7News* (Web Page, 21 February 2020) <<https://7news.com.au/news/qld/rowan-baxter-subject-to-domestic-violence-order-before-allegedly-killing-hannah-clarke-and-three-children-c-708040>>; and Laura Richards, 'Criminalise Coercive Control in Australia' *Change.org* (Web Page) <https://www.change.org/p/criminalise-coercive-control-in-australia?source_location=topic_page>.

⁷⁹ Doneman and Barnsley (n 78).

The above scenarios highlight the nature of coercive control as conduct which is aimed at dominating and determining the fate of another. Its subtle nature makes it easy to understand why victims are often oblivious to their abuse, as coercive control attacks their autonomy through non-physical and/or physical tactics. The physical violence which accompanies coercive control is usually minor, until a major incident occurs. In 2020, the NSW Domestic Violence Death Review Team reported that several homicides lacked physical violence but involved several elements of coercive control.⁸⁰ There is no doubt that coercive control covers a wide range of abusive behaviour which exposes victims to extreme danger.⁸¹ This thesis merits a brief examination of coercive control as a form of DV.

Coercive Control as a form of DV

Coercive control is the use of non-violent tactics, such as controlling and manipulative behaviours (isolation, harassment, surveillance, psychological abuse and financial restrictions) against another person over a period of time for the purpose of establishing and maintaining control and dominance.⁸² Perpetrators provoke feelings of fear and intimidation to exert power over the victim and undermine their independence.⁸³ Coercive control has the effect of subordinating the victim, resulting in ‘perspecticide’; the gradual erosion of the individual’s sense of self and perspectives.⁸⁴

⁸⁰ Australia’s National Research Organisation for Women’s Safety, *Defining and responding to coercive control: Policy brief* (ANROWS Insights, 2021), 1-2.

⁸¹ Sandra Walkate and Kate Fitz-Gibbon, ‘The criminalisation of coercive control: The power of law?’ (2019) 8(4) *International Journal for Crime, Justice and Social Democracy* 94-108, 95 doi.org/10.5204/ijejsd.v8i4.1205.

⁸² Evan Stark *Coercive Control, How Men Entrap Women in Personal Life* (Oxford University Press USA, 1st ed, 2009) 267.

⁸³ Emma Williamson, ‘Living in the World of the Domestic Violence Perpetrator: Negotiating the Unreality of Coercive Control’ *Violence Against Women* (2010) 16(12) 1412–1423, 1413.

<<https://doi.org/10.1177/1077801210389162>>; Hayley Gleeson, ‘Coercive control: The ‘worst part’ of domestic abuse is not a crime in Australia. But should it be?’ *ABS News* (online at 20 January 2021)

<<https://www.abc.net.au/news/2019-11-19/coercive-control-domestic-abuse-australia-criminalise/11703442>>.

⁸⁴ Evan Stark, ‘“Coercive Control Framework’: Making Law Work for Women’ in Marilyn McMahon and Paul McGorry (eds), *Criminalising Coercive Control Family Violence and the Criminal Law: Family Violence and the Criminal Law* (Springer, 1st ed, 2020) 33-49, 35 10.1007/978-981-15-0653-6_2.

According to Stark, psychological abuse falls within the tactics used to control a partner who is simultaneously afraid to resist, refuse or escape demands because of threats and/or coercion.⁸⁵

Ordinary relationships dynamics require some level of compromise which may make it difficult to identify acts of coercive control.⁸⁶ This is particularly so, as coercive control functions in a continuum and the level of commitment expected in relationships may mirror a certain degree of control. One party may be influenced by their partner's wishes and opinions, even where it is unintentional. The influenced party may make decisions they would be less obliged to otherwise. However, a thin line exists between healthy relationship expectations and those which are controlling and harmful in the long run.⁸⁷ This may occur where the perpetrator begins to use threats or intimidation to ensure the other remains compliant to their wishes.⁸⁸

Understanding RC as a form of Coercive Control

One major reason why RC is difficult to identify is because it is predominantly cloaked in acts of coercive control, which is described as 'invisible in plain sight'.⁸⁹ Since RC is described as an attempt to control or determine a woman's reproductive choices using force, intimidation or manipulation, RC functions as a form of coercive control. The categories of RC, that is, pregnancy pressure; pregnancy outcome control; or contraceptive sabotage may occur through sexual assault with intent to cause pregnancy; interference with effective contraceptive use; manipulating the

⁸⁵ Ibid.

⁸⁶ Kimberly A. Crossman and Jennifer L. Hardesty, 'Placing Coercive Control at the Center: What Are the Processes of Coercive Control and What Makes Control Coercive?' (2018) 8(2) *Psychology of Violence* 196–206 <http://dx.doi.org/10.1037/vio0000094>; Cassandra Wiener, 'Seeing What is 'Invisible in Plain Sight': Policing Coercive Control' (2017) 56(4) *The Howard Journal* 500–515 doi: 10.1111/hojo.12227.

⁸⁷ Crossman and Hardesty (n 85).

⁸⁸ Kimberly Crossman, Jennifer Hardesty and Marcela Raffaelli, "He Could Scare Me Without Laying a Hand on Me": Mothers' Experiences of Nonviolent Coercive Control During Marriage and After Separation" (2016) 22(4) *Violence Against Women* 454–473 doi: 10.1177/1077801215604744.

⁸⁹ Wiener (n 85).

victim to abandon contraceptive use; and financial control to constrain independent reproductive choices.⁹⁰

The essence of RC is to deprive the woman of her reproductive autonomy and control the reproductive outcome. In most instances, the perpetrator uses RC to maintain control over the relationship. Although RC can occur overtly through physical violence, it is often subtle, and involves non-physical force, falling within coercive control. This would encompass situations where the victim is not considered capable of exercising her sexual agency.⁹¹ Most victims who experience RC are not aware of the form of DV they are being subjected to, while others think it is normal for such violence to occur because of their social or cultural orientation.⁹² This is partially because individuals are generally influenced by societal attitudes which aid the occurrence of RC.

How Community Attitudes Contribute Towards RC

RC is a complex form of DV unconsciously entrenched and reinforced in society through a broad range of actions. These are aided by religious and cultural drivers, and most especially through the media. Various forms of RC have been normalised and taken-for-granted in everyday life.

RC in the Media

The internet provides indications of predisposed attitudes towards RC. The general assumption is that all women desire motherhood, and that even where a woman is adamant about not having children, she will eventually reconsider. This promotes the idea that women are incapable of

⁹⁰ Lizzie Cernik, 'The truth about reproductive coercion: It's an increasingly common form of abuse, but what does reproductive control really mean?', *Cosmopolitan* (Web Page, 28 November 2019) <<https://www.cosmopolitan.com/uk/reports/a29867671/reproductive-coercion-abuse/>>.

⁹¹ Stark (n 84).

⁹² Australia's National Research Organisation for Women's Safety (n 80) 2.

decisively exercising their reproductive autonomy.⁹³ Discussions on social media platforms may influence a partner whose desire for parenthood conflicts with his female partner's desire.⁹⁴ He may be tempted to follow the plethora of examples available on how to realise his desires by surreptitiously impregnating his partner. There are jaw-dropping stories of 'sperm theft', 'motherhood by theft', 'baby trapping', 'splurging', and 'sperm burglary'.⁹⁵ The stories, as lived experiences, range from 'predatory' women who sleep with athletes and retain used condoms for artificial insemination for entrapment or extortion to accounts of people who have a breeding or pregnancy-risk fetish.⁹⁶ For people in the latter category, the pregnancy-risk fetish is an exciting way to test the limits of unprotected sex even though there is no desire for pregnancy, while men with the breeding fetish deliberately try to get the woman pregnant.⁹⁷ References have been made to RC by celebrities who joke about flushing their partners' contraceptive pills or switching them with vitamins to get them pregnant.⁹⁸ Explicit videos on the internet are easily available to educate

⁹³ Kellie Scott, 'More women are choosing not to have kids, and society can't cope' *ABC News* (online at 28 January 2022) <<https://www.abc.net.au/everyday/more-women-are-choosing-not-to-have-kids-and-society-cannot-cope/11160788>>; ABC News Breakfast, 'Why are women still being told they will change their minds about children?' *ABC News* (online at 28 January 2021) <<https://www.abc.net.au/news/2019-06-03/women-having-fewer-children-but-still-being-questioned/11173104>>.

⁹⁴ Nasreen Rajani, 'Reproductive coercion, stealthing, and social media'

ALiGN: Alternative Global Network Media Lab (Web Page, 5 December 2017) <<https://carleton.ca/align/?p=880>>.

⁹⁵ Sophia Money-Coutts, 'Motherhood by theft?', *Mail Online* (Web Page, 11 August 2019) <<https://www.dailymail.co.uk/home/you/article-7309777/Motherhood-theft-investigate-disturbing-rise-splurging-sperm-burgling.html>>.

⁹⁶ Robert Silverman, 'Turkey Baster Babies: Inside the NBA's Sexist Sex Ed Program' *Medium* (Web Page, 15 February 2017) <<https://medium.com/@vocativ/turkey-baster-babies-inside-the-nbas-sexist-sex-ed-program-1e02064b894d>>.

⁹⁷ Quora, 'Why would a man be so eager to impregnate a woman even though they just met and haven't known each other long?' (Quora, 1 November 2016) <<https://www.quora.com/Why-would-a-man-be-so-eager-to-impregnate-a-woman-even-though-they-just-met-and-havent-known-each-other-long>>; Sophie Saint Thomas, 'Seeds of Love: When Risking Pregnancy Is Your Biggest Turn-On', *Vice* (Web Page, 2 December 2016) <<https://www.vice.com/en/article/wnwvyz/seeds-of-love-when-risking-pregnancy-is-your-biggest-turn-on>>; Trish Murphy, 'A woman tricked me to become pregnant and I am devastated' *The Irish Times* (online at 22 January 2022) <<https://www.irishtimes.com/life-and-style/health-family/a-woman-tricked-me-to-become-pregnant-and-i-am-devastated-1.3348395>>; Steve Almasy, 'Mother loses appeal in turkey baster pregnancy case' *CNN* (online 30 January 2022) <<https://edition.cnn.com/2015/04/21/us/turkey-baster-pregnancy-legal-ruling/index.html>>.

⁹⁸ Stolworthy (n 8).

anyone seeking to ‘impregnate to trap’.⁹⁹ Social media plays a huge role in promoting ideas around RC because of the permanence, universality and anonymity afforded by the forums where these discussions take place.¹⁰⁰ Although there are conversations on social media which shed light on RC and its risks, the harmful narratives currently outnumber the preventive ones, further exacerbating the occurrence of RC.¹⁰¹

Cultural and Religious Perceptions of RC

Cultural and religious climates are also breeding grounds for unhealthy ideas regarding women’s role in reproduction. Certain interpretations of religious texts contribute towards RC, but it should be noted that they do not necessarily encourage RC. Instead, the pressure comes from religious leaders who endorse it by misunderstanding and/or misinterpreting such texts. For example, while the Bible does not expressly forbid contraception, Pope Paul VI, who wielded remarkable influence over the Catholic community, published the *Humanae Vitae* in 1968, effectively prohibiting the use of artificial contraception among Catholics.¹⁰² To date, some still abide by those rules.¹⁰³ In Islam, there is no express prohibition against birth control, but the religion is strongly pro-family and conservative Islamic leaders openly campaign against the use of birth control methods.¹⁰⁴ In a publication by Marie Stopes, an example was cited of an ultra-orthodox Jewish community where instructions regarding conjugal relations, pregnancy, birth control and childbirth, which interfere with reproductive autonomy and encourage procreation are given by

⁹⁹ Brodsky (n 35) 183-5.

¹⁰⁰ Rajani (n 93).

¹⁰¹ Ibid.

¹⁰² Lisa McClain, ‘How the Catholic Church came to oppose birth control’ *The Conversation* (Web Page, 9 July 2018) <<https://theconversation.com/how-the-catholic-church-came-to-oppose-birth-control-95694>>.

¹⁰³ Harriet Sherwood, ‘Fifty years on, and Catholics are still in turmoil over contraception’ *The Guardian* (online at 22 January 2022) <<https://www.theguardian.com/society/2018/jul/22/humanae-vitae-catholic-birth-control-ban-fifty-years>>.

¹⁰⁴ Jonna Arousell and Aje Carlbom, ‘Culture and religious beliefs in relation to reproductive health’ (2016) 32(1) *Best Practice & Research Clinical Obstetrics and Gynaecology* 77-87, 78-79.

the Rabbi.¹⁰⁵ Other religious/cultural scenarios celebrate patriarchal attitudes and reinforce male dominance over female structures.¹⁰⁶

Police Responses to RC

The police play a vital role as gatekeepers to the justice system in cases of DV.¹⁰⁷ Police culture may determine responses to DV incidents which in turn, impact women's safety.¹⁰⁸ This can aid the prevention of RC by encouraging victims to seek help where they are confident in the efficacy of police responses. Conversely, lack of confidence can foster a culture of silence among victims where reporting seems pointless.¹⁰⁹ Unfortunately, research has been critical of police responses, with surveys highlighting problems associated with prevailing police culture. One survey showed that victims of DV were less likely to report incidents because absence of proactive responses and/or a lack of understanding of the forms of DV and appropriate processes and procedures for each case.¹¹⁰ The most worrisome responses are victim-blaming or alignment with the male perpetrators of DV.¹¹¹ In some instances, victims are outrightly told that their cases would not be investigated, leaving them with the perception that they are unworthy or timewasters.¹¹² In addition to these criticisms, police preoccupation with physical violence obscures their responses to cases involving coercive control where there is no physical evidence of harm.¹¹³ Furthermore, reports of

¹⁰⁵ Hidden Forces (n 3) 48-49; see also J JG Schenker, 'Women's Reproductive Health: Monotheistic Religious Perspectives' (2000) 70(1) *International Journal of Gynecology and Obstetrics* 77-86.

¹⁰⁶ Hidden Forces (n 3).

¹⁰⁷ Australia's National Research Organisation for Women's Safety (n 80) 2; Isabella Voce and Hayley Boxall, 'Who reports domestic violence to police? A review of the evidence' *Trends & issues in crime and criminal justice, Australian Institute of Criminology* (No. 559, September 2018) 13.

¹⁰⁸ Silke Meyer, 'Seeking Help for Intimate Partner Violence: Victims' Experiences When Approaching the Criminal Justice System for IPV-Related Support and Protection in an Australian Jurisdiction' (2011) 6(4) *Feminist Criminology* 268-90, 260.

¹⁰⁹ Douglas (n 6).

¹¹⁰ NSW Bureau of Crime Statistics and Research, *Reporting Violence to Police: A survey of victims attending domestic violence services* (Issue paper no. 91, October 2013) 1.

¹¹¹ Meyer (n 108) 271; Douglas (n 6).

¹¹² Meyer (n 108) 271.

¹¹³ Walklate and Fitz-Gibbon (n 81) 103.

police officers also perpetrate DV and are not held accountable undermines community confidence and fuel a culture of impunity in law enforcement agencies.¹¹⁴ As unpalatable as this may be, both victims and perpetrators are watching. As these responses and attitudes impact victim reporting, it may also fuel perpetrator nonchalance about the possibility of being brought to justice.¹¹⁵

The Effect of Cultural Responses to RC

The effect of patriarchal attitudes on the occurrence of RC is worth exploring. The above examples illustrate the systematic subordination of women in private and public spheres of society. Within family settings, various cultural prescriptions support female powerlessness and encourage male dominance. This has endured for centuries and have been deeply internalized by women in general, such that the status of ‘helpless dependency’ is difficult to abandon.¹¹⁶ This is more pronounced, when a common patriarchal value is the protection of women. It is ironic that the same structure which offers to provide protection also carries an element of risk and abuse.¹¹⁷ A few examples of such prescriptions include the belief that men have the right to control the lives of women while women are responsible for the well-being of familial relationships. The devaluation and sexualisation of the young girls has been so widespread in society, it is viewed as the norm.¹¹⁸

¹¹⁴ Hayley Gleeson, ‘More NSW Police officers charged with domestic violence as victims face ongoing problems getting help’ *ABC News* (online at 10 May 2021) <<https://www.abc.net.au/news/2021-05-10/nsw-police-officers-charged-with-domestic-violence-2020-victims/100114114>>; Hayley Gleeson, ‘Victoria's 'staggering' record: 82 cops charged with family violence in five years, but only one found guilty’ *ABC News* (online at 22 January 2022) <<https://www.abc.net.au/news/2020-10-21/dozens-of-victoria-police-officers-charged-with-family-violence/12757988>>.

¹¹⁵ Hayley Gleeson, ‘Abusers in the ranks’ *ABC News* (online at 30 January 2022) <<https://www.abc.net.au/news/2020-10-19/police-in-australia-are-failing-to-take-action-against-domestic/12757914?nw=0&r=HtmlFragment>>.

¹¹⁶ Preeti Rawat, ‘Patriarchal Beliefs, Women’s Empowerment, and General Well-being’ (2014) 39(2) *Vikalpa* 43 - 55, 46.

¹¹⁷ Barbara Rowland-Serdar and Peregrine Schwartz-Shea, ‘Empowering Women: Self, Autonomy and Responsibility’ (1991) 44(3) *The Western Political Quarterly*, 605-624 doi:10.1177/106591299104400307; see also Gwen Hunnicutt, ‘Varieties of Patriarchy and Violence Against Women Resurrecting “Patriarchy” as a Theoretical Tool’ (2009) 15(5) *Violence Against Women* 553-573 doi:10.1177/1077801208331246.

¹¹⁸ *Ibid.*

Hence, theorists like Nicola Lacey and Deborah Tuerkheimer opine that society does not view women as bodies capable of exercising sexual agency or suffering from damage caused by harm to their bodily integrity.¹¹⁹ In a society where women are not regarded as independent bodies capable of making decisions for their pleasure, this may interfere with their reproductive autonomy.

Conclusion

A woman's determination of when or how she experiences motherhood in the exercise of her reproductive autonomy, is a freedom she should enjoy independently.¹²⁰ Abortion, pregnancy and motherhood are profound experiences and no one should coerce her down those paths.¹²¹ As discussed earlier, RC, occurs in different forms and frequencies according to existing degrees of patriarchy.¹²² Social structures serve to condition and aid men's individual behaviour such that, 'the victimisation, coercion and repression of women is more a function of the status of males than of females'.¹²³ It is impossible to address RC by pretending it does not exist. For this reason, it is important to explore and analyse the current legal and societal landscape to identify gaps which exist and point towards potential solutions.

¹¹⁹ Tuerkheimer (n 39); Lacey (n 1).

¹²⁰ L Purdy, 'Women's reproductive autonomy: medicalisation and beyond' (2006) 32(5) *Journal of Medicine and Ethics* 287-291 doi:10.1136/jme.2004.013193.

¹²¹ Diana Meyers, 'The Rush to Motherhood: Pronatalist Discourse and Women's Autonomy' (2001) 26(3) *Signs* 735-73, 735.

¹²² Laura Tarzia, Heather Douglas and Nicola Sheeran, 'Reproductive coercion and abuse against women from minority ethnic backgrounds: views of service providers in Australia' (2021) *Culture, Health & Sexuality* 1-28, 2-3 doi: 10.1080/13691058.2020.1859617.

¹²³ Hunnicutt (117).

CHAPTER TWO

LEGAL RESPONSES TO REPRODUCTIVE COERCION IN AUSTRALIA

Chapter One discusses RC as a form of DV, and more broadly, violence against women, which is prevalent in Australian society. In reiterating that RC is under researched, there is no surprise that existing DV and sexual offences legislation do not outrightly prohibit its occurrence. Not only is RC capable of causing physical, sexual and psychological harm to the victim, it is also a threat to the victim's sexual agency, bodily integrity and reproductive autonomy. Whether it occurs through coercive control (discussed in Chapter One), or it occurs as contraceptive sabotage (addressed through discussions on consent in the Introduction), it is worth addressing from a legal standpoint, to effectively safeguard the rights of existing and potential victims.

The aim of this chapter is to examine existing DV and sexual offences legislation to identify provisions which may be capable of eliciting a judicial interpretation that prohibits RC. Although it is arguable that some acts fall within the purview of these legislative instruments, it is unclear whether these laws can appropriately respond to all instances of RC, mainly because RC was not in contemplation when the legislative provisions were drafted. This chapter will examine the legal responses to RC as it occurs via coercive control and contraceptive sabotage. Legislative provisions in Australian states and territories will be examined via the comparative analysis method to highlight the gaps in each jurisdiction and in Australia as a whole.

Legal Responses to Coercive Control

DV protection in Australia is a hybrid of civil and criminal responses, where the breach of a protection order transforms the case from civil to criminal.¹²⁴ Coercive control has not been expressly criminalised in Australian legislation, except for legal provisions outlawing emotional and financial abuse in Tasmania.¹²⁵ The legal provisions in the *Family Violence Act 2004* (Tas) (*'Family Violence Act'*) embody the elements of coercive control, and in a country where there is an intense debate regarding the criminalisation of coercive control, these provisions have been described as being ahead of their time.¹²⁶ For this reason, this thesis will spotlight the provisions of the *Family Violence Act* in this chapter, as well as Chapter Four, where a comparative analysis with UK DV legislation is conducted. Nevertheless, an examination of the DV legislation and some case law that reference coercive control suggests that RC may be prohibited. This chapter explores DV legislation around civil protection orders, which are most often the main means of recourse.¹²⁷

Family Law Act 1975 (Cth)

The *Family Law Act 1975* (Cth) s 4AB defines family violence ('FV') as violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member) or causes the family member to be fearful.¹²⁸ Examples of FV include: assault; repeated derogatory taunts; denial of financial autonomy or financial support; or the unlawful deprivation

¹²⁴ Australia's National Research Organisation for Women's Safety (n 80) 2.

¹²⁵ *Family Violence Act 2004* (Tas) ss 8, 9.

¹²⁶ *Family Violence Act 2004* (Tas) (*'Family Violence Act'*); see Kerryne Barwick, Paul McGorrery and Marilyn McMahon, 'Ahead of Their Time? The Offences of Economic and Emotional Abuse in Tasmania, Australia' in Marilyn McMahon and Paul McGorrery (eds), *Criminalising Coercive Control Family Violence and the Criminal Law: Family Violence and the Criminal Law* (Springer, 1st ed, 2020) 135 10.1007/978-981-15-0653-6_2.

¹²⁷ Douglas and Kerr (n 16).

¹²⁸ *Family Law Act 1975* (Cth) s 4AB.

of liberty.¹²⁹ These behaviours can be categorised as coercive control where they occur in a pattern. Ss 68B and 114 respectively permit the grant of injunctions for the protection of the parent of a child (this may apply to a victim of RC who already has a child with the perpetrator), or the personal protection of a party to the marriage. In *Kemsley v Kemsley*, the Court defined ‘personal protection’ as the spouse’s physical protection, including the protection of her right to lead her own life without undue interference from her husband.¹³⁰ In *Ahmed v Jeret*, a man had discovered his girlfriend was pregnant after stalking her. His insistence that she undergo an abortion or he would ‘punch her in the stomach’ was found by Rees J to constitute FV, and evidence was accepted from the child’s therapist showing that the father had exercised coercive control over the complainant during their relationship.¹³¹ Given these judicial interpretations, it can be posited that various aspects of RC can be recognised by the Family Law Courts in Australia, even if those acts are yet to be legislatively labelled as RC.

Civil Protection Orders

In states and territories, protection orders can be made by the Courts upon proof of DV and its possible recurrence.¹³² In this manner, a person may be able to seek protection from acts intended to interfere with their reproductive autonomy, provided it falls within legislation.¹³³ It is worth examining the civil protection legislation of each jurisdiction to discover the scope of protection available.

¹²⁹ *Family Law Act 1975* (Cth) s 4AB(2).

¹³⁰ *Kemsley v Kemsley* [1984] FLC 91-567.

¹³¹ *Ahmed v Jeret* [2016] FamCA 442, [35]-[100], [249], [187], [193], [206] (Rees J) (*‘Ahmed’*).

¹³² Rose-Marie Stambe, Silke Meyer, ‘Police and Duty Lawyer Perceptions of Domestic Violence Protection Order Proceedings Involving Parents: Towards Greater System Accountability and Family-Centred Decision-Making’ *Journal of Family Violence* (2022) <<https://doi.org/10.1007/s10896-022-00449-8>>; Geoff Wilson and Nastassia Tognini, ‘Two Beds and a Coffee Machine: Australia’s approach to domestic violence: focus on coercive control’ *Hop Good Ganim* <https://www.hopgoodganim.com.au/icms_docs/285627_australia%E2%80%99s-approach-to-domestic-violence-focus-on-coercive-control.pdf>.

¹³³ *DFV Bench Book* (n 12) <<https://dfvbenchbook.ajja.org.au/protection-orders/purpose/>>.

Family Violence Act 2004 (Tasmania)

In 2004, Tasmania undertook a comprehensive review of its DV system which partly resulted in the enactment of the *Family Violence Act*. The *Family Violence Act* was the first attempt to explicitly recognise acts which can now be categorised as coercive control, in recognition that DV encompasses emotional and economic harm, as well as physical harm. S 7 provides an expansive definition of FV which includes: assault, threats, coercion, intimidation or verbal abuse, abduction, stalking, economic abuse, emotional abuse, or intimidation, contravening a family violence order and property damage. Two specific offences were created: economic abuse and emotional abuse or intimidation.¹³⁴

S 8 prohibits a person from engaging in a course of conduct with the intent to unreasonably control or intimidate or cause their spouse or partner mental harm, apprehension, or fear.¹³⁵ Viewed through the lens of RC, these acts may include behaviour calculated to bend the victim to the offender's will regarding their reproductive choices. This could occur by preventing the spouse or partner from accessing joint financial assets, withholding, or threatening to withhold financial support in an attempt to sabotage the person's access to reproductive health clinics until the pregnancy is too advanced.¹³⁶

S 9 creates the offence of emotional abuse or intimidation by prohibiting a person from pursuing a course of conduct which he knows, or ought to know, is likely to have the effect of unreasonably

¹³⁴ *Family Violence Act* ss 8, 9.

¹³⁵ *Family Violence Act* s 8.

¹³⁶ Ann Moore, Lori Frohwirth and Elizabeth Miller, 'Male Reproductive Control of Women Who Have Experienced Intimate Partner Violence in the United States' (2010) 70(11) *Social Science and Medicine* 1737- 1738 doi: 10.1016/j.socscimed.2010.02.009.

controlling, intimidating, causing mental harm, apprehension or fear, in his spouse or partner.¹³⁷ Although the subsequent case occurred in NSW, the scenario paints a good illustration of how emotional abuse or intimidation may take place under s 9. The NSW case of *Ahmed v Jeret*, the defendant attempted to compel the victim to terminate her pregnancy using threats and intimidation.¹³⁸ The victim's impact statement described her distress at the turn of events, stating that she felt unsafe.¹³⁹ Incidents like that could fall within the category of emotional abuse or intimidation.

As laudable as these Tasmanian offences may be the statutory limitation which requires that the alleged offender is charged within 12 months from the last occurrence of the abuse is a major downside.¹⁴⁰ The limitation lacks a holistic understanding of individual and administrative considerations involved in lodging a complaint. First, the victim who may still be grappling with the abuse and its consequences must promptly lodge a complaint, and then the police must commence investigations into these forms of abuse (which usually have evidentiary challenges) in record time, so that a charge can be laid against the alleged offender. Most victims remain unaware or struggle to label the violation of their rights for several months post-abuse. The 12-month limitation conflicts with an offence hinged on a 'course of conduct' and takes away from the merits of the legislation.¹⁴¹

Another shortcoming is that the offence of economic abuse does not give any indication of what course of conduct would be reasonable. The *mens rea* required is, 'intent to unreasonably control or intimidate...or cause mental harm, apprehension or fear'. It may however be argued that this

¹³⁷ *Family Violence Act* s 8.

¹³⁸ *Ahmed* (n 131) [45] (Rees J).

¹³⁹ *Ibid.*

¹⁴⁰ *Family Violence Act* s 9A.

¹⁴¹ Barwick, McGorry and McMahon (n 126) 141.

references the reasonable person test, where the course of conduct pursued by the alleged offender would be conduct which a reasonable man would deem as likely to unreasonably control or intimidate the spouse or partner.¹⁴² S 9 does not require specific intent, but rather, allows for a broader ambit of conduct and less restrictive evidentiary requirements. It is uncertain why the Tasmanian legislature drew a distinction between the mental elements for both offences.

It is interesting to note that of the numerous charges brought under the new offences created by the *Family Violence Act*, there has been no legal challenge to or denial of the mental element of the offences.¹⁴³ It might be worth speculating that grounding a conviction of RC under the Act may be possible, given the *mens rea*. What may be more challenging would be the submission of adequate evidence of the *actus reus*.

Another laudable feature of the offences is that the ‘course of conduct’ pursued by the alleged offender is not restricted to a certain number of events. Under s 9, a ‘course of conduct’ is defined as including the limitation of the freedom of movement of a person's spouse or partner by means of threats or intimidation.¹⁴⁴ In some cases, the charge has been successfully applied to discrete incidents, where the course of conduct only covers minutes or hours rather than years of abuse.¹⁴⁵ This widens the scope of culpability under the Act. In *McLean v Rundle*, for example, the offender’s abuse lasted several minutes yet the Court was satisfied that his threats, emotional

¹⁴² Marilyn McMahon and Paul McGorrery, ‘Criminalising Emotional abuse, intimidation and economic abuse in the context of family violence: The Tasmanian experience’ (2016) 35(2) *Tasmanian Law Review* 1-23, 8; Heather Douglas, ‘Do we need an offence of coercive control?’ (2018) *Precedent AULA* 6 <<http://classic.austlii.edu.au/au/journals/PrecedentAULA/2018/6.html>>.

¹⁴³ Lucy MacDonald, ‘Travis James Ray sentenced to 12 years' prison for “coercive, controlling” family violence’ *ABC News* (online at 20 September 2021) <<https://www.abc.net.au/news/2021-07-22/travis-james-ray-sentenced-for-persistent-family-violence/100310566>>.

¹⁴⁴ *Family Violence Act* s 9(2).

¹⁴⁵ *McLean v Rundle* [2011] TASMC (unreported, 4 November 2011); *Thomas v Stewart* [2017] TASMC (unreported, 4 September 2017).

outbursts and disruption constituted a ‘course of conduct’ as envisaged by s 9.¹⁴⁶ In *Thomas v Stewart*, the Court took a holistic view of the circumstances of the case and the offender’s conduct in determining that he had indeed pursued a course of conduct which included emotional outbursts, threats, damage to property and unruly behaviour.¹⁴⁷ Applying this element of the offence to possible RC scenarios, it may not be difficult to prove its occurrence, as a minimum of two separate, but not necessarily isolated acts may amount to a ‘course of conduct’.

Other Australian Jurisdictions

In other jurisdictions, except for New South Wales (‘NSW’) and the Northern Territory (‘NT’), coercive control is not carved out as a specific offence, but rather, as part of the definition of FDV. This may be by reference to behaviour that is ‘coercive’ or ‘dominates’,¹⁴⁸ or behaviour which constitutes an unreasonable and non-consensual denial of financial, social or personal autonomy.¹⁴⁹ Economic abuse, and emotional and psychological violence also fall within these definitions, and these definitions may aid with the prosecution of RC.¹⁵⁰ In NT, the *Domestic And Family Violence Act 2007* defines DV as including conduct causing harm, damaging property, intimidation, stalking and economic abuse.¹⁵¹ The legislation allows consideration to be given to a pattern of conduct, which means there is a scope for acts of coercive control, and consequently, RC, to be categorised as DV.¹⁵² In NSW *Crimes (Domestic And Personal Violence) Act 2007* s

¹⁴⁶ *McLean v Rundle* [2011] TASMC (unreported, 4 November 2011).

¹⁴⁷ *Thomas v Stewart* [2017] TASMC (unreported, 4 September 2017).

¹⁴⁸ *Domestic and Family Violence Protection Act 2012* (Qld) ss 8(1)(e)-(f); *Family Violence Protection Act 2008* (Vic) s 5(1)(v); *Restraining Orders Act 1997* (WA) s 5A(1)(b); and *Family Violence Act 2016* (ACT) s 8(1)(a)(vi).

¹⁴⁹ *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8(2)(c); reproductive autonomy is no doubt, a subset of personal autonomy.

¹⁵⁰ *Restraining Orders Act 1997* (WA) s 5A(2)(d); *Family Violence Protection Act 2008* (Vic) ss 5(1)(ii), 7; *Domestic and Family Violence Protection Act 2012* (Qld) ss 8(1)(b), 11; *Family Violence Act 2016* (ACT) s 8(1)(a)(iii); *Family Violence Act 2004* (Tas) s 7; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8(4)(a).

¹⁵¹ *Domestic and Family Violence Act 2007* (NT) s 5.

¹⁵² Janet Taylor and Julianna Marshall, ‘Criminalisation of coercive control’ (2021) (4(20) *Central Australian Women's Legal Service: Law Society NT Balance Edition* 29-35, 31).

11(1)(c) defines DV as an offence which is intended to coerce or control the person against whom it is committed or to cause that person to be intimidated or fearful.¹⁵³ It was acknowledged in s 9 (3)(d) that DV, ‘extends beyond physical violence and may involve the exploitation of power imbalances and patterns of abuse over many years’.¹⁵⁴

There are no reported cases which expressly call out RC via the application of civil protection order legislation in Australia, however, case law indicates that Courts are beginning to recognise coercive control as a form of DV. Furthermore, evidence of coercive control can be adduced in DV cases. Such evidence may be relevant to the character of the offender, or even the offender’s motive. In *R v Smith*, the ACT Supreme Court recognised the pattern of demeaning and controlling behaviour by the offender as an important part of the context in which objective seriousness of the offence of sexual intercourse could be measured.¹⁵⁵ In *R v Brown*, evidence of the emotional and psychological trauma suffered by the offender as a consequence of coercive control was adduced to secure a non-conviction order for the offence of perjury in a case of assault.¹⁵⁶

The foregoing legal provisions and cases indicate that there is room for the recognition of coercive control under DV legislation. The problem with legislation which merely references coercive control, rather than properly establishing it as a context for DV, is that it paves the way for misidentification of the persons most in need of police intervention.¹⁵⁷ This highlights the need to thoroughly assess the mounting pressure for the criminalisation of coercive control. While an improved justice system response to coercive control is important, the right question to ask may

¹⁵³ *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 11(1)(c).

¹⁵⁴ *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9 (3)(d).

¹⁵⁵ *R v Smith* [2021] ACTSC 114 (3 June 2021) [25] (Mossop J); see also *Baker (a pseudonym) v The Queen* [2021] VSCA 158 (9 June 2021) where the offender’s coercive behaviour was an aggravating feature.

¹⁵⁶ *R v Brown* [2015] ACTSC 65 (5 March 2015).

¹⁵⁷ Australia’s National Research Organisation for Women’s Safety (n 80) 3.

not be whether coercive control should be criminalised, but how best to maximise the efficacy of coercive control as part of the definition of DV in Australia. In a recent review conducted by Victoria's Royal Commission into Family Violence, the gap identified in Victoria's justice system was not the inability of existing laws to respond to coercive control, but the absence of a shared understanding of FV as coercive control.¹⁵⁸ In NSW, while recommending the criminalisation of coercive control, the Joint Select Committee on Coercive Control emphasised that the criminalisation should occur in line with a considerable prior program of education, training and consultation with police, stakeholders and the frontline sector.¹⁵⁹ As advocated by several DV groups, focus should be on an overall improvement of the response to coercive control, through education, training and embedding best practice and FDV expertise in the courts.¹⁶⁰

Legal Responses to Contraceptive Sabotage as a Form of RC

One of the forms of RC is contraceptive sabotage. This can occur in numerous ways; non-consensual condom removal ('stealthing'); poking holes in condoms; tampering with contraceptive pills; intentionally using expired/weakened condoms; forcefully removing contraceptive devices; and failing to use the withdrawal method.¹⁶¹

In 2018, the first global study into the prevalence of stealthing was conducted by the Melbourne Sexual Health Centre and Monash University ('Melbourne Study').¹⁶² The results revealed that one in three women, and one in five men who have sex with men ('MSM') have been victims of

¹⁵⁸ *Royal Commission into Family Violence* (Final Report, March 2016) Summary and Recommendations 27.

¹⁵⁹ Joint Select Committee on Coercive Control, Parliament of New South Wales, *Coercive Control in Domestic Relationships* (Parliamentary Paper No 132, June 2021), Recommendation 1.

¹⁶⁰ Women's Legal Service Victoria, *Policy Brief: Justice system response to coercive control* (Women's Legal Service Victoria, September 2020), 3-4.

¹⁶¹ Hidden Forces (n 3).

¹⁶² RL Latimer et al, 'Non-consensual condom removal in a sexually transmitted infection clinic population' (2019), 14(2) *PLOS ONE*, doi:10.1371/journal.pone.0209779 ('Melbourne Study').

stealthingly.¹⁶³ A smaller survey revealed that most of the women who were victims of stealthingly experienced it in the context of a casual encounter, or a new or short-term relationship.¹⁶⁴ Despite the clear articulation of their desire to use protection, they were subjected to a violation of their sexual agency.¹⁶⁵

The practice of stealthingly is not new, but this new terminology has been promoted on social media, first in the context of ‘gift-giving’ among MSM, where HIV is passed ‘gifted’.¹⁶⁶ More recently, attention has been drawn to stealthingly following Alexandra Brodsky’s paper where she described the act as ‘rape-adjacent’.¹⁶⁷ The case of *Assange v Swedish Prosecution Authority* (‘*Assange*’) drew more attention to the practice.¹⁶⁸ In *Assange*, the Court held that where one party provides consent to sexual intercourse on the basis that the other party will use a condom, consent would be vitiated if the other party subsequently took it off.¹⁶⁹

Various motivations exist for stealthingly including physical pleasure, the need to express masculinity and dominance, the misogynistic thrill of degradation, ‘gift-giving’ and RC.¹⁷⁰ Whatever the motivation, the constant theme is the deprivation of the victim’s sexual agency and

¹⁶³ Anne Crawford, ‘Study suggests ‘stealthingly’ – non-consensual condom removal – a common practice’ *Monash University, Medicine, Nursing And Health Sciences* (Web Page, 7 March 2019) <<https://www.monash.edu/medicine/news/latest/2019-articles/study-suggests-stealthingly-non-consensual-condom-removal-a-common-practice>>.

¹⁶⁴ Laura Tarzia et al, ‘Exploring the gray areas between “stealthingly” and reproductive coercion and abuse’ (2020) 60(10) *Women & Health* 1174-1184 doi:10.1080/03630242.2020.1804517.

¹⁶⁵ *Ibid.*

¹⁶⁶ Marwa Ahmad et al, “‘You Do It without Their Knowledge’: Assessing Knowledge and Perception of Stealthingly among College Students’ (2010) 17 (10) *International Journal of Environmental Research and Public Health* 3527 doi.org/10.3390/ijerph17103527.

¹⁶⁷ Brodsky (n 35). Other scholars like Katsampes and Clough have described stealthingly as ‘protection deception’ and ‘purposeful deception’. See Athena Katsampes, ‘A Rape by Any Other Name: The Problem of Defining Acts of Protection Deception and the University as a Solution’ (2017) 24(3) *Virginia Journal of Social Policy & the Law* 157; and Clough, Amanda. “Conditional Consent and Purposeful Deception.” (2018) 82(2) *The Journal of Criminal Law* 178–90. <https://doi.org/10.1177/0022018318761687>.

¹⁶⁸ *Assange v Swedish Prosecution Authority* (2011) EWHC 2849 (‘*Assange*’).

¹⁶⁹ *Ibid.*

¹⁷⁰ Money-Coutts (n 95).

bodily integrity because the perpetrator purposefully violates the agreed terms of sexual consent.¹⁷¹ Autonomy during sexual relations is, and should always be, non-negotiable.¹⁷²

Although stealthing may affect anyone, in its manifestation as a form of RC, women are significantly at a greater risk of stealthing than men.¹⁷³ Along with the risk of contracting STDs, there is the possibility of unintended pregnancy.¹⁷⁴ It is acknowledged that an unintended pregnancy may occur from consensual sex between parties due to a failure of contraception. Contraception is not a 100% guarantee that there will be no resulting pregnancy, or that STDs will not be contracted, it is simply a preventive measure.¹⁷⁵ There is a discussion as to whether stealthing should be categorised as RC since ‘control with intent’ is a core element of RC.¹⁷⁶ This is true, as RC is a deliberate attempt to control a woman’s reproductive autonomy. In this case, where stealthing is coupled with reproductive intent it will fall into the category of RC.¹⁷⁷

The Law on Stealthing in Australian states and territories

The new paradigms of sexual consent recognise consent as a fluid process which cannot be implied or assumed especially in relation to pertinent matters.¹⁷⁸ Therefore, the responsibility lies with the person removing the condom to take reasonable steps to ascertain that the other party is first willing to consent to condom removal, and whether they in fact, consent to it.¹⁷⁹

¹⁷¹ Lacey (n 1); Tuerkheimer (n 39).

¹⁷² Ibid.

¹⁷³ Allira Boadle, Catherine Gierer and Simone Buzwell, ‘Young Women Subjected to Nonconsensual Condom Removal: Prevalence, Risk Factors, and Sexual Self-Perceptions’ (2018) 27(10) *Violence Against Women* 1696–1715 doi:10.1177/1077801220947165.

¹⁷⁴ Ibid.

¹⁷⁵ M Vessey et al, ‘Outcome of pregnancy in women using different methods of contraception’ (1976) 86 (7) *BJOG: An International Journal of Obstetrics & Gynaecology* 548-556, 548.

¹⁷⁶ Tarzia et al (n 163) 7.

¹⁷⁷ Camp (n 16).

¹⁷⁸ Boadle, Gierer and Buzwell (n 173); Chesser and Zahra (n 35).

¹⁷⁹ Chesser and Zahra (n 35).

In view of recent developments, it is fitting to look at the new law on stealthing in the Australian Capital Territory ('ACT'). The Bill was drafted based on the Melbourne Study and prompted by the impracticality of awaiting judicial decisions specifically outlawing stealthing.¹⁸⁰ The *Crimes (Stealthing) Amendment Act 2021* (ACT) amends *Crimes Act 1900* (ACT) s 5 by inserting a new s 67(1)(ga) which provides that consent to sexual intercourse is negated if caused by an intentional misrepresentation about the use of a condom.¹⁸¹ This provision implies that stealthing would require new consent to be obtained before intercourse can continue on a consensual basis after the condom has been removed.¹⁸² One of the aims of the amendment is to remove any doubt as to the illegality of stealthing.¹⁸³

The Parliament of South Australia ('SA') has also proposed a Bill to amend the *Criminal Law Consolidation Act 1935* (SA). Like the ACT amendment, the *Criminal Law Consolidation (Stealthing) Amendment Bill 2021* (SA) seeks to amend *Criminal Law Consolidation Act 1935* (SA) s 46 by modifying the requirement for consent to sexual activity. If passed, consent would be vitiated if it was given based on a misrepresentation about the use of a condom.

By contrast, the NSW's *Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021* is the most extensive revision. The Bill incorporates recommendations made by the NSW Reform Commission ('NSWLRC') following a comprehensive review of consent law in NSW. The Bill

¹⁸⁰ In Australia, there is a dearth of judicial decisions on stealthing. The Melbourne Study (n 162) revealed that only 1% of victims of stealthing ever reported to the police or filed a suit in court. See Ellen Ransley, 'ACT criminalises stealthing – non consensual removal of a condom' *The Weekend Australia* (online at 8 October 2021) <<https://www.theaustralian.com.au/breaking-news/act-criminalises-stealthing-non-consensual-removal-of-a-condom-in-australia-first/news-story/4417967a0106b3cea79dfa36427da9f2>>; see also Brianna Chesser, 'Case in Victoria could Set New Legal Precedent for Stealthing' *The Conversation* (Blog Post, 16 August 2019) <<https://theconversation.com/case-in-victoria-could-set-new-legal-precedent-for-stealthing-or-removing-condom-during-sex-118343>>.

¹⁸¹ *Crimes Act 1900* (ACT) s 67 (1)(ga); Explanatory Statement, *Crimes (Stealthing) Amendment Bill 2021* (ACT).

¹⁸² *Crimes Act 1900* (ACT) s 67 (1)(ga).

¹⁸³ Explanatory Statement, *Crimes (Stealthing) Amendment Bill 2021* (ACT).

has been passed, bringing NSW's consent laws closer to reflecting the modern ideas of consent, including affirmative consent. Read in conjunction, cls 61HI (4) and 61HJ (1)(a) establish affirmative consent as a requirement for lawful intercourse. Lack of physical or verbal resistance will not be regarded as consent.¹⁸⁴ Most importantly, regarding non-consensual condom removal, cls 61HI (5) provides that consent to a particular sexual activity is not, by itself, taken to be consent to other sexual activities.¹⁸⁵ Given the courts' penchant for interpreting consent provisions narrowly, Parliament inserted an explanatory note which specifically references stealthing, noting: 'A person who consents to a sexual activity using a condom is not, by reason only of that fact, to be taken to consent to a sexual activity without using a condom'.¹⁸⁶ Perhaps the most important feature of this provision is that, as suggested throughout this thesis, sexual intercourse with a condom is entirely different without a condom.

Although the provisions requiring affirmative consent may be read separately from the stealthing provision, they are likely to bolster its criminalisation because affirmative consent places the onus on the alleged offender to seek and obtain - and prove that he sought and obtained - the consent of the complainant. Regarding the knowledge of the alleged offender, his belief that the complainant consented to the sexual activity would not be deemed reasonable if he did not say or do anything to find out whether the complainant consented.¹⁸⁷

It is too soon to tell how effective the stealthing provisions in the ACT, SA and NSW will be, but the provisions are solid enough to provide an appropriate response to stealthing in those jurisdictions. Other than these jurisdictions, Singapore is the only jurisdiction in the world to

¹⁸⁴ Explanatory Notes, Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021 (NSW) cls 61HJ (1)(a) and 61HI (4).

¹⁸⁵ Explanatory Notes (n 183) cl 61HI(5).

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

explicitly criminalise stealthing.¹⁸⁸ Singapore's *Criminal Law Reform Act 2019* amended the *Singapore Penal Code* (Singapore, cap 224, 2008 rev ed) by introducing s 376H, which criminalises stealthing.¹⁸⁹ The crime is described as the 'procurement of sexual activity by deception or false representation', and s 376H(a)-(c) provides that A shall be guilty of an offence if they intentionally touch B sexually and B's consent was fraudulently obtained by means of deception or false representation for that purpose.¹⁹⁰ Ss 376H(d)(i) and (e) refer to the deception or false representation as relating to the use or manner of use of any sexually protective measure where A knows or has reason to believe that the consent was given in consequence of such deception or false representation.¹⁹¹ The ACT amendment and SA Bill are similar to the Singaporean provision, in the sense that fraudulently obtained consent is void. However, the Singaporean Act is broader in application because it refers to the use of 'any sexually protective measure'.¹⁹² Australian reforms are designed to specifically address stealthing, as that is the identified societal problem with respect to the removal of 'sexually protective measures'.¹⁹³ Time will reveal whether there would be the need to further broaden the ambit of these legislative provisions. From a RC standpoint, it would be more beneficial to broaden the scope to include 'sexually protective measures' apart from condoms.

No express provision specifically outlaws stealthing in the rest of Australia.¹⁹⁴ There is the possibility that stealthing may fall within existing sexual offences legislation in the other States

¹⁸⁸ Daryl Loy Guo Wei and Joel Soon Jian Wei, 'Fraudulent Sex Criminalisation in Singapore, An Accidental Success': A Report on a Research Seminar by Associate Professor Chen Jianlin of the Melbourne Law School, *Smu Lexicon Blog* (Blog Post, 13 March 2020) <<https://smulexicon.com/2020/03/13/fraudulent-sex-criminalisation-in-singapore-an-accidental-success/>>.

¹⁸⁹ *Criminal Law Reform Act 2019* (Singapore).

¹⁹⁰ *Criminal Law Reform Act 2019* (Singapore) ss 376H(a)-(c).

¹⁹¹ *Criminal Law Reform Act 2019* (Singapore) ss 376H(d)(i), (e).

¹⁹² *Criminal Law Reform Act 2019* (Singapore) s 376H(d)(i).

¹⁹³ Melbourne Study (n 162).

¹⁹⁴ Chesser and Zahra (n 35) 219.

and the NT.¹⁹⁵ The element of consent is at the crux of stealthing, so an examination of the definition of consent and the factors negating consent in those relevant jurisdictions is necessary.

In Queensland, *Criminal Code 1899 (Qld)* s 348 defines consent as ‘consent freely and voluntarily given by a person with the cognitive capacity to give the consent’.¹⁹⁶ Focus is placed on the terms, ‘freely’ and ‘voluntarily’. In *R v Makary*, Sofronoff P described consent as having two elements; the first being the individual’s state of mind, that is, whether the complainant actually consents to the relevant act.¹⁹⁷ The second element is that consent must be ‘given’, that is, the making of a representation demonstrating a willingness to engage in the act.¹⁹⁸ Applying the provision of s 348 to stealthing, it means that since it occurs without the knowledge of the victim, consent cannot be construed as ‘given’. WA’s definition of consent is strikingly similar to the Queensland definition, with the express inclusion of negating factors: ‘force, threat, intimidation, deceit, or any fraudulent means’.¹⁹⁹ In the NT, the *Criminal Code Act 1983 (NT)* defines consent as ‘free and voluntary agreement’.²⁰⁰ In Tasmania and Victoria, the *Criminal Code Act 1924 (Tas)* and *Crimes Act 1958 (Vic)* provide that ‘consent means free agreement’.²⁰¹ These laws do not require active resistance; rather, consent connotes a positive state of mind, and ‘free’ and ‘voluntary’ means that active engagement in sexual activity constitutes operative consent.²⁰² It should be noted that both Tasmania and Victoria have adopted a model of affirmative consent which requires something to be said or done to indicate consent.²⁰³ This ensures that consent is evaluated according to standards

¹⁹⁵ Ibid.

¹⁹⁶ *Criminal Code 1899 (Qld)* s 348.

¹⁹⁷ *R v Makary* [2018] QCA 258, [49]–[50] (Sofronoff P).

¹⁹⁸ Ibid; see also Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact Consultation Paper* (WP No 7, December 2019) 20.

¹⁹⁹ See *Criminal Code Act Compilation Act 1913 (WA)* s 319(2).

²⁰⁰ *Criminal Code Act 1983 (NT)* s 192(1).

²⁰¹ *Criminal Code Act 1924 (Tas)* s 2A(1), sch 1; *Crimes Act 1958 (Vic)* s 36(1).

²⁰² Chesser and Zahra (n 35) 221.

²⁰³ *Criminal Code Act 1924 (Tas)* s 2A(2)(a); *Crimes Act 1958 (Vic)* s 36(2)(1).

of mutuality and reciprocity and, proof that the complainant did not communicate consent is sufficient to establish absence of consent.²⁰⁴

Contraceptive Sabotage and Fraud

While the sexual offences legislation in these Australian jurisdictions make no express reference to stealthing, it can be argued that it is already criminalised under existing provisions to the effect that a person's consent to an act is not freely and voluntarily given if it is obtained 'by fraudulent representations about the nature or purpose of the act'.²⁰⁵ The major challenge would be how the Courts choose to interpret these sections; it may be possible to identify stealthing as one of the fraudulent acts which vitiate consent under the legislative provisions of these jurisdictions. As discussed in the Introduction, this thesis proposes that the change in circumstances from protected sex to skin-to-skin contact with risks-inherent may influence an individual's desire to continue with sexual relations. In the sexual offences legislation applicable in Australian states and territories, consent is negated by false and/or fraudulent representations about the nature or purpose of the act.²⁰⁶ Where a complainant provides clear evidence that the alleged offender's ulterior motive behind the sexual act was to use stealthing to perpetrate RC, perhaps this may suffice to ground a conviction.²⁰⁷ The foregoing interpretation may stand, assuming the Courts give a broad interpretation to those sections. In Victoria, a surgeon was charged with rape and sexual assault

²⁰⁴ It also appears that the *Criminal Code 1899* (Qld) s 348(3) recognises affirmative consent, albeit indirectly. The section provides, 'A person is not to be taken to give consent to an act only because the person does not, before or at the time the act is done, say or do anything to communicate that the person does not consent to the act'.

²⁰⁵ See for example, *Criminal Code 1899* (Qld) s 348(2)(e).

²⁰⁶ See *Criminal Code 1899* (Qld) s 348(2)(e); *Crimes Act 1900* (NSW) s 61HE(6)(d); *Crimes Act 1958* (Vic) s 36(f)-(h); *Criminal Code* (Tas) s 2A(2)(g); *Crimes Act* (SA) s 46(3)(g); *Criminal Code Act Compilation Act 1913* (WA) s 319(2)(a); and *Criminal Code Act 1983* (NT) s 192(2)(g).

²⁰⁷ Such evidence may include other acts of RC, for example, convincing the complainant to stop using contraceptive pills or preventing the partner from access to emergency contraceptives, making statements which induce pregnancy pressure, etc.

against a male doctor for stealthing.²⁰⁸ Many have been waiting with bated breath to see how the Victorian Courts will determine whether stealthing amounts to the offence of rape or sexual assault under *Crimes Act* (Vic) s 36.²⁰⁹

Barring the possibility of Australian Courts outlawing stealthing based on fraud as to the nature and quality of the act, it may be possible to rely on broader provisions which relate to the offence of procuring sexual relations based on fraud. These broad conditions treat any material misrepresentation as a negation of consent to sexual relations. *Criminal Law Consolidation Act 1935* (SA) s 60 makes procuring sexual intercourse by false pretences, false representations or other fraudulent means punishable by imprisonment.²¹⁰ In Tasmania, *Criminal Code* s 2A(f) vitiates consent induced by any fraud of the accused while s 129 makes it an offence to procure a person for unlawful sexual intercourse through false pretence or false representation.²¹¹ Similar provisions exist in *Criminal Code Act Compilation Act 1913* (WA) ss 319(2)(a) and 192.²¹²

In Victoria, *Crimes Act 1958* (Vic) s 45 explicitly outlaws the procurement of sexual acts by fraud. The recent application of *Crimes Act 1958* (Vic) s 45 in a recent case of stealthing raises optimism that existing legal provisions may serve as an effective placeholder, providing clarity on the legal grey area around stealthing.²¹³ In the Victorian case, *DPP v Diren*, the accused was convicted for removing his condom during sexual intercourse without the complainant's knowledge or consent,

²⁰⁸ Chesser (n 180).

²⁰⁹ In the meantime, the surgeon has been awarded a prestigious Order of Australia medal. Although every individual charged with a crime is presumed innocent until proven guilty, this is perhaps a testament to societal attitudes towards sexual offences. See Melissa Cunningham, 'Stealth-rape accused doctor awarded Order of Australia' *Sydney Morning Herald* (online at 3 June 2021) <<https://www.smh.com.au/national/stealth-rape-accused-doctor-awarded-order-of-australia-20200203-p53x8y.html>>.

²¹⁰ *Criminal Law Consolidation Act 1935* (SA) s 60.

²¹¹ *Criminal Code (Tas)* s 2A (f).

²¹² *Criminal Code Act Compilation Act 1913* (WA) ss 319(2)(a), 192.

²¹³ Interestingly the *Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021* (NSW) s 61HJ(k) provides that fraudulently inducing a person to participate in a sexual activity negates consent.

despite the earlier agreement regarding the use of a condom.²¹⁴ The complainant discovered he had taken his condom off post-ejaculation. The accused admitted to the act.²¹⁵ His Honour Judge Wraight held that the accused had given a false representation and changed the rules without any consideration for the complainant's wishes.²¹⁶ The Court's interpretation of *Crimes Act (Vic) s 45* is laudable, especially in light of the Judge's statement that:

In the context of consensual sexual activity including intercourse, circumstances may change and as was the case here, your conduct created an entirely different circumstance where the complainant undoubtedly would have not agreed to you continuing if she had known that you removed the condom. Thus the message is that in circumstances such as this, individuals may face serious criminal sanctions if they choose to engage in similar conduct.²¹⁷

It is conceded that the facts of this case were straight-forward, and a fortuitous combination of factors facilitated the Court's decision. In particular, the complainant had reported the matter to the police within hours of the incident. She had also been referred to a police officer whose response to the incident was not marred by the prevailing police culture discussed in Chapter One.²¹⁸ Furthermore, the accused lacked the guile possessed by most individuals who engage in stealthing and made several admissions to the offence in a recorded 'pretext call'.²¹⁹ Not every reported case of stealthing will have its parts fit together perfectly like a jigsaw puzzle. Pending proper legal reform, time will tell whether these four jurisdictions can effectively apply their laws to stealthing.

²¹⁴ *DPP v Diren* [2020] VCC 61 (7 February 2020) ('*Diren*').

²¹⁵ *Ibid*, [6]-[11] (Wraight J).

²¹⁶ *Diren* (n 214) [19]; [27]-[29] (Wraight J).

²¹⁷ *Diren* (n 214) [26] (Wraight J).

²¹⁸ *Douglas* (n 6).

²¹⁹ *Diren* (n 214) [6]-[11] (Wraight J).

Conclusion

The above examination of legal provisions relating to RC in Australia focusing on coercive control and contraceptive sabotage (mainly stealthing), carries with it, several rays of hope regarding protection and recourse for victims. While coercive control is not expressly prohibited or criminalised, it is posited that legislation and case law within Australian jurisdictions, particularly Tasmania, are broad enough to encourage complainants to approaching the Courts. The caveat would be that any complaint must be couched using the language in relevant legislation, rather than alleging RC, until legal reform properly labels it so. For victims of stealthing, very strong grounds exist for seeking legal recourse, in light of the ongoing legal reform in the ACT, SA and NSW. Where no stealthing provision exists, victims may seek to rely on fraud as to the nature or purpose of the act, but, given the history of decided cases, it may be more effective to rely on the offence of procuring sex by fraud.

CHAPTER THREE

LEGAL RESPONSES TO REPRODUCTIVE COERCION IN THE UK

As with Australia, DV is a major issue in the UK, with reports stating that there were approximately 369,000 DV incidents between March 2020 and March 2021.²²⁰ Statistics paint a grim picture of RC in the UK. In 2019, a study showed that 14% of the women in the UK had either felt pressured into pregnancy or forced to have an abortion.²²¹ This excludes the number of women who experience contraceptive sabotage. There is a profound lack of awareness of RC globally, but the heightened awareness of coercive control within the UK has led to extensive legal reform means that legislative provisions can address acts of RC. In addition to DV legislation reforms, sexual offences legislation has undergone reform that is more favourable to victims of contraceptive sabotage. While the UK's legislative landscape does not expressly recognise and criminalise RC, the criminalisation of coercive control and the advanced definition of consent in the sexual offences legislation may mean that the UK is better placed to address RC. This chapter examines the legislative provisions relevant to RC in the UK, namely, *Serious Crime Act (E&W) 2015* ('*Serious Crime Act*') and *Domestic Abuse (Scotland) Act 2018* ('*Domestic Abuse Act*'), with respect to coercive control. This chapter will also assess the provisions of *Sexual Offences Act*

²²⁰ Charli Ross, 'Reproductive coercion sees women forced to terminate pregnancies, wear contraception, and have their bodies controlled by another – so why is this abuse so rarely spoken about?' *Glamour* (Blog, 13 October 2021) 2021

<<https://www.glamourmagazine.co.uk/article/reproductive-coercion-expert-guide>>; D Clark, 'Domestic violence in England and Wales 2001-2021'

Statista (Web Page, 10 January 2022) <<https://www.statista.com/statistics/288325/domestic-violence-in-england-and-wales-y-on-y/>>.

²²¹ Maya Oppenheim, 'One in seven UK women forced to have either a baby or an abortion, study shows' *Independent* (online at 23 March 2019) <<https://www.independent.co.uk/news/uk/home-news/pregnancy-coercion-reproduction-abortion-a8834306.html>>.

2003 (E&W) (*'Sexual Offences Act'*) in relation to its possible application to contraceptive sabotage.²²²

Coercive Control Legislation in the UK

Serious Crime Act

Serious Crime Act s 76 forms part of a suite of reforms to the DV legislation in the UK. In recognition of the harms of DV, the *Offences Against the Person Act 1861* (E&W) and associated common law offences such as stalking and harassment under the *Protection from Harassment Act 1997* were created.²²³ The regime was focused on incident-based violations occurring within a specific timeframe. This meant that these offences excluded ongoing abuse. In addition, the judiciary was reluctant to apply the provisions of the *Protection from Harassment Act 1997* to intimate relationships, because the object of the Act did not cover DV.²²⁴ Until Stark developed the concept, there was no recognition that DV could involve a series of continuous abuse. Simultaneously, media awareness drew attention to stalking as part of the DV paradigm.²²⁵ This influenced the English Courts, and they were willing to extend the operation of the *Protection from Harassment Act 1997* from non-relational stalking to relational stalking post-relationship.²²⁶

²²² *Serious Crime Act (E&W) 2015* (*'Serious Crime Act'*); *Domestic Abuse (Scotland) Act 2018* (*'Domestic Abuse Act'*); and *Sexual Offences Act 2003* (E&W) (*'Sexual Offences Act'*).

²²³ Marilyn McMahon and Paul McGorrery, 'Criminalising Coercive Control : An Introduction' in Marilyn McMahon and Paul McGorrery (eds), *Criminalising Coercive Control Family Violence and the Criminal Law: Family Violence and the Criminal Law* (Springer, 1st ed, 2020) 3-32, 8 10.1007/978-981-15-0653-6_2.

²²⁴ *Ibid.*

²²⁵ Stark (n 84) 38.

²²⁶ Cassandra Weiner, 'From Social Construct to Legal Innovation: The Offence of Controlling or Coercive Behaviour in England and Wales' in Marilyn McMahon and Paul McGorrery (eds), *Criminalising Coercive Control Family Violence and the Criminal Law: Family Violence and the Criminal Law* (Springer, 1st ed, 2020) 159-76, 163 8 10.1007/978-981-15-0653-6_2.

Despite this progress, there was still no protection for those experiencing abuse in ongoing relationships. In a bid to close these gaps, there was a reform of DV legislation.

To criminalise coercive control, s 76 (1) introduces an offence where a person repeatedly or continuously engages in behaviour towards another person that is controlling or coercive. Controlling behaviour captures a range of acts designed to make a person subordinate and/or dependent by: isolation; exploitation; deprivation of independence; and regulation of their daily activities.²²⁷ Coercive behaviour is a continuing act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse used to harm, punish or frighten the victim.²²⁸ These behaviours are calculated to curtail the victim's liberty and regulate their everyday life.²²⁹ At the time of such behaviour, both parties must be personally connected, and the behaviour must have a serious effect on the victim which the perpetrator knew or ought to have envisaged.²³⁰ The Act uses the 'reasonable person' test as the standard for determining culpability.²³¹

This definition thus extends the scope of the offence to former partners so long as the parties were cohabiting at the relevant time.²³² Serious effect means the victim feared that violence will be used against them on at least two occasions or the behaviour must have had a substantial adverse effect on their daily activities.²³³ The length of abuse does not matter, rather, the point of inquiry for the courts is whether a pattern of coercive and controlling behaviour sustained to have a serious effect

²²⁷ United Kingdom, *Controlling or Coercive Behaviour in an Intimate or Family Relationship Statutory Guidance Framework*, (Home Office) <<https://www.gov.uk/government/publications/statutory-guidance-framework-controlling-or-coercive-behaviour-in-an-intimate-or-family-relationship>>.

²²⁸ Lara McCaffrey 'Controlling or coercive behaviour in an intimate or family relationship' – Section 76 of the Serious Crime Act 2015' (Web Page, 20th December 2015) <https://www.25bedfordrow.com/cms/document/Section_76_Serious_Crime_Act_2015.pdf>.

²²⁹ Walkate and Fitz-Gibbon (n 81).

²³⁰ *Serious Crime Act* ss 76(1)(b) - (c).

²³¹ *Serious Crime Act* s 76(5).

²³² *Serious Crime Act* s 76(2).

²³³ *Serious Crime Act* s 76(4).

on the victim can be established. In Paul Playle's case, he was convicted for a series of acts spanning two years.²³⁴ Conversely, Lee Coleman was convicted for behaviour which spanned one week, during which he subjected his partner to a combination of physical violence and psychological manipulation.²³⁵

While case law on RC exists, abusive partners have been convicted for a broad range of behaviour described in the Statutory Guidance which share similar elements with RC. These convictions include cases causing the family to live in fear by constantly sharing conspiracy videos on the Coronavirus pandemic; inflicting physical, verbal and psychological abuse on their partners; stalking partners on social media and forcing them to lie to medical staff; and vandalising their partner's family home.²³⁶ These cases indicate a strong likelihood for the potential recognition of RC.

²³⁴ The Statutory Guidance provides that behaviour under s 76 must be capable as being described as a 'pattern', that is, it must go beyond one or two isolated incidents. However, each case is individually considered and evidence which shows that the behaviour is repetitive or continuous will suffice to indicate a 'pattern'. See Statutory Guidance Framework, *Controlling or Coercive Behaviour in an Intimate or Family Relationship Statutory Guidance Framework* (Home Office, December 2015)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/482528/Controlling_or_coercive_behaviour_-_statutory_guidance.pdf>; BBC News, 'Paul Playle jailed for stalking wife for two years', *BBC* (online at 20 January 2019) <<https://www.bbc.com/news/uk-england-sussex-42805203>>.

²³⁵ Wilts and Gloucestershire Standard, 'Controlling South Cerney man who threatened to smother partner to death is jailed for three years', *Wilts and Gloucestershire Standard* (online at 10 March 2018) <<https://www.wiltsglosstandard.co.uk/news/14633717.controlling-south-cerney-man-who-threatened-to-smother-partner-to-death-is-jailed-for-three-years/>>.

²³⁶ Bedfordshire Police, 'Man jailed for controlling and abusive behaviour', *Bedfordshire Police* (online at 30 June 2021) <<https://www.bedfordshire.police.uk/news-and-appeals/jailed-coercive-rathore-may21#dbe11529>>.

²³⁶ <https://www.bournemouthcho.co.uk/news/19256390.misogynist-jailed-coercive-controlling-behaviour/>. In some instances, the Court will take into account the criminal record of the accused.²³⁶ <https://www.bournemouthcho.co.uk/news/19256390.misogynist-jailed-coercive-controlling-behaviour/>. In some instances, the Court will take into account the criminal record of the accused.

²³⁶ Jason Lewis, 'Misogynist' jailed for coercive and controlling behaviour', *Daily Echo* (online at 20 June 2021) <<https://www.bournemouthcho.co.uk/news/19256390.misogynist-jailed-coercive-controlling-behaviour/>>.

²³⁶ Ann Healy, 'Man sentenced to three years in prison for coercive control of his family', *Irish Times* (online at 30 October 2021) <<https://www.irishtimes.com/news/crime-and-law/man-sentenced-to-three-years-in-prison-for-coercive-control-of-his-family-1.4596246>>.

²³⁶ ITV News, 'Man jailed for controlling behaviour under new law', *ITV* (online at 21 October 2021) <<https://www.itv.com/news/central/2016-10-14/man-jailed-for-controlling-behaviour-under-new-law>>.

The Efficacy of Serious Crime Act s 76

It is too soon to determine the efficacy of s 76, however, a few challenges surround its drafting and implementation. Prior to 2021, the requirement for parties to be personally connected in s 76 (1)(b) and (2) posed a challenge, as it meant that the offence applied where parties were in an intimate personal relationship or where they live together and they have previously been in an intimate personal relationship with each other.²³⁷ This failed to recognise incidents of abuse where the parties were no longer in a relationship or cohabiting. If a similar provision were applied in Australia, this gap would exculpate the murderers of Preethi Reddy and Hannah Clarke who were not cohabiting with their ex-partners at the time of their murders. The most vulnerable period for victims of DV is when they leave their abusers.²³⁸ Following a review of the *Serious Crime Act*, ss 2 and 68 of the *Domestic Abuse Act 2021* (E&W) amended ss 76 (1)(b) and (2) to cover a broad range of relationships. This includes parties who are or were married, engaged, civil partners, in an intimate relationship, and relatives. This new provision ensures that post-separation abuse is addressed.²³⁹

Another challenge is that, while s 76(1)(c) provides that the victim must prove that the abuse had a serious effect, s 76 (1)(d) provides that the perpetrator must know or ought to know that the behaviour would have a serious effect on the victim.²⁴⁰ The requirement is assessed from subjective and objective standpoints and may pose evidentiary or interpretive issues.²⁴¹ Adding

²³⁷ *Serious Crime Act* s 76 (1)(b), (2).

²³⁸ Statutory Guidance Framework (n 233).

²³⁹ United Kingdom, *Policy Paper: Amendment to the Controlling or Coercive Behaviour Offence* (Home Office, 22 November 2021); *Domestic Abuse Act 2021* (E&W) ss 2 and 68.

²⁴⁰ S 76 (5) SCA provides that the requirement that the alleged offender 'ought to know' would be determined by the reasonable person test.

²⁴¹ Jane Wangmann, 'Coercive Control as the Context for Intimate Partner Violence: The Challenge for the Legal System' in Marilyn McMahon and Paul McGorrey (eds), *Criminalising Coercive Control Family Violence and the Criminal Law: Family Violence and the Criminal Law* (Springer, 1st ed, 2020) 219-242, 233-234 10.1007/978-981-15-0653-6_2.

the reasonable person test in s 76(1)(c) as an element of the offence raises the question whether both standards of proof can co-exist to guarantee the efficient application of s 76. In Paul Measor's case, he was acquitted after being charged for verbally abusing his partner and spitting in her face.²⁴² These were acts which he knew would have a serious effect on his partner, but the judge formed the opinion that the victim was too strong and capable to be affected by such behaviour'. Evidently, this case proves the highlights the interpretive challenges posed by the serious effect requirement.

S 76 is not a panacea to coercive control. The conviction rate stands at over 50% of prosecuted cases, which is laudable, but there is a wider gap between prosecutions and complaints/investigations, which questions victims' and police officers' understanding of the offence.²⁴³ This highlights the importance of taking a whole-of-system approach to the criminalisation of coercive control.²⁴⁴ The major concern regarding police responses in the UK is the ability to identify coercive control.²⁴⁵ In *F v M*, the Judge acknowledged the elusive nature of coercive control.²⁴⁶ Notably, the Judge clarified the requirement for allegations of controlling behaviour or coercive behaviour to include a "pattern" of behaviour, stating that the significance of individual acts may only be properly understood within the context of the wider behaviour.²⁴⁷ In this regard, the perpetrator's behaviour, and not the repetition of individual acts, is what reveals

²⁴² Jeremy Armstrong, 'Violent boyfriend cleared after judge says partner is 'too strong' to be victim', *Mirror* (online at 14 November 2021) <<https://www.mirror.co.uk/news/uk-news/violent-boyfriend-cleared-after-judge-13629612>>.

²⁴³ The House Standing Committee on Social Policy and Legal Affairs will inquire and report on family, domestic and sexual violence, Parliament of Australia, *Inquiry into Family, Domestic and Sexual Violence* <https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/Familyviolence/Report/section?id=committees%2Freportrep%2F024577%2F75463>.

²⁴⁴ Walkate and Fitz-Gibbon (n 81) 99, 101.

²⁴⁵ *Ibid.*

²⁴⁶ *F v M* [2021] EWFC 4 [4] (Hayden J) (*'F v M'*).

²⁴⁷ *Ibid.*

the true motive of the perpetrator.²⁴⁸ These lapses in the prosecution of cases indicate that even in the UK, more training is required for the police to better understand the scope and ambit of coercive control as involving a pattern of acts which may encompass assault, intimidation, and threats, and which must be assessed cumulatively rather than in isolation.²⁴⁹

The Domestic Abuse Act

Just like the *Serious Crime Act*, the *Domestic Abuse Act* was enacted to create a specific offence of DV in Scotland. In creating the offence, the Parliament's objective was to reflect the holistic experience of the victim and respond to the broad range of behaviours which fall within coercive control.²⁵⁰ *Domestic Abuse Act* is also rooted in Stark's development of the concept of coercive control. Other factors which led to the overhaul of Scotland's approach to DV was the recognition of structural gender inequalities in society.²⁵¹ Prior to *Domestic Abuse Act*, the law regulating DV was decentralised. Physical and sexual violence fell under existing criminal law for assault, threatening and abusive behaviour, and sexual offences, while psychological and emotional abuse were not criminalised.²⁵²

Bill Walker's case highlighted the huge gaps in the Scottish criminal justice system.²⁵³ Walker, a member of the Scottish Parliament, was convicted and sentenced to 1-year imprisonment for breach of the peace and 23 assaults following complaints by three former wives and a stepdaughter.

²⁴⁸ Shameela Ahmed, 'An understanding of Coercive and Controlling behaviour in private children cases and the recent case of *F v M* (2021) 4', *Fletcher Day* (Website, 13 March 2021) <https://www.fletcherday.co.uk/insight/an-understanding-of-coercive-and-controlling-behaviours-and-the-recent-case-of-f-v-m-2021-4/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration>.

²⁴⁹ *F v M* (n 245).

²⁵⁰ Imrodova, 'Living up to a gold standard? The implementation of the Domestic Abuse (Scotland) Act', *Imrodova* (Blog Post) <https://www.imrodova.eu/blog/detail.php?we_objectID=231>.

²⁵¹ Marsha Scott, 'The Making of the New 'Gold Standard': The Domestic Abuse (Scotland) Act 2018' Australia' in Marilyn McMahon and Paul McGorrery (eds), *Criminalising Coercive Control Family Violence and the Criminal Law: Family Violence and the Criminal Law* (Springer, 1st ed, 2020) 177-96, 179-80 10.1007/978-981-15-0653-6_2.

²⁵² *Ibid.*

²⁵³ Stark (n 82).

The low penalty was because Scottish law did not contemplate long-term patterns of assault against the same individual.²⁵⁴ Edinburgh's DV Sheriff, Katherine Mackie, while describing Walker's behaviour as controlling, voiced her frustration with the regime, because, 'however abhorrent, unacceptable and abusive such behaviour might be it does not amount to a criminal offence'.²⁵⁵ Walker's case was one of many, and social awareness triggered a call by the Scottish Women's Aid for the cumulative effect of patterns of abusive behaviour to be considered leading to legal reform.²⁵⁶ *Domestic Abuse Act* acknowledges the lived experiences of victims and represents 'one of the most radical attempts yet to align the criminal justice response with a contemporary feminist conceptual understanding of DV as a form of coercive control'.²⁵⁷

Much more comprehensive than the *Serious Crime Act*, the *Domestic Abuse Act* specifically outlines elements of abuse (coercion and control) which, when combined, may result in 'abusive' behaviour towards the a partner or ex-partner.²⁵⁸ While the *Domestic Abuse Act* does not specifically reference coercive control, s 1 addresses the combined effect of two or more occurrences of abusive behaviour which create a 'course of conduct'.²⁵⁹ Such abusive behaviour includes any behaviour that is violent, threatening or intimidating.²⁶⁰ Using the reasonable person test, it must be clear that the purpose of the abusive behaviour is to cause one of the relevant effects

²⁵⁴ Robbie Dinwoodie, 'Walker case leads to call for new abuse law' *The Herald* (online at 1 December 2020) <<https://www.heraldscotland.com/news/13123842.walker-case-leads-call-new-abuse-law/>>.

²⁵⁵ Jenny Kemp, 'The Bill Walker affair shows 'real resolve' needed on domestic abuse', *The Guardian* (online at 1 December 2020) <<https://www.theguardian.com/uk-news/scotland-blog/2013/sep/12/scotland-domesticabuse-billwalker>>.

²⁵⁶ Stark (n 82).

²⁵⁷ Iona Cairns, 'The Moorov doctrine and coercive control: Proving a 'course of behaviour' under s. 1 of the Domestic Abuse (Scotland) Act 2018' (2020) 24(4) *The International Journal of Evidence & Proof* 396–417 doi: 10.1177/1365712720959857.

²⁵⁸ *Domestic Abuse Act* s 11; s 10(4) defines course of behaviour as behaviour which has taken place on at least two occasions.

²⁵⁹ There will be a further discussion on this later in this chapter.

²⁶⁰ *Domestic Abuse Act* s 2.

referred to in s 2(3).²⁶¹ These include, making the victim subordinate to the perpetrator; isolating the victim from sources of support; controlling, regulating or monitoring the victim's daily activities; depriving the victim of freedom; and, frightening, humiliating, degrading or punishing the victim.²⁶² These effects cover categories of physical, sexual, financial, psychological, and other forms of violence.

Stark has opined that the specificity of the provision may preclude forms of coercive control which are still evolving and currently unknown.²⁶³ This opinion is not conclusive, as evolving forms of coercive control may fall within the elements which comprise the single offence. For example, RC is not specifically criminalised by *Domestic Abuse Act*, but it involves a range of actions designed to subordinate the victim's will to the perpetrator's will and restrict the victim's freedom.²⁶⁴ Since *Domestic Abuse Act* frames abuse as a liberty crime encroaching on the individual's exercise of autonomy, RC falls within the offence.²⁶⁵

Another notable feature is that evidence of injury is not required.²⁶⁶ Instead, the victim can prove that the offender's acts were capable of causing the effects outlined in section 2(3).²⁶⁷ This is in contrast to the *Serious Crime Act* which requires the victim to prove that harm occurred.²⁶⁸ Unlike the *Serious Crime Act*, *Domestic Abuse Act* makes the offence applicable to ex-partners with no requirement of cohabitation. However, like the *Serious Crime Act*, the *Domestic Abuse Act* offence has both subjective and objective conditions. Firstly, a reasonable person must consider the course

²⁶¹ *Domestic Abuse Act* ss (2)(a) and 2(2)(b)(ii).

²⁶² *Domestic Abuse Act* s 2(3).

²⁶³ Stark (n 82).

²⁶⁴ Tarzia and Hergarty (n 16).

²⁶⁵ Australia's National Research Organisation for Women's Safety (ANROWS), Submission No 96 to Joint Select Committee on Coercive Control, NSW Parliament, *Inquiry Into Coercive Control* (29 January 2021).

²⁶⁶ *Domestic Abuse Act* s 4(1).

²⁶⁷ *Ibid.*

²⁶⁸ *Serious Crime Act* s 76(1)(c).

of behaviour as likely to cause harm.²⁶⁹ Secondly, it must be proved that the perpetrator intended to cause harm or was reckless as to whether the course of behaviour would harm the victim.²⁷⁰

Situating RC within the UK DV Legislation

Both the *Serious Crime Act* and *Domestic Abuse Act* recognise that DV is not limited to acts of physical violence or injury, but also includes verbal, psychological, emotional, sexual and financial abuse. According to Stark, coercive control is centred on the subordination of the victim in a manner which results in ‘perspecticide’, that is, the gradual erosion the individual’s sense of self and perspectives.²⁷¹ This would surely encompass situations where the victim is not considered by the perpetrator as being capable of expressing her sexuality through the exercise of her sexual agency and is made to feel powerless to exercise her reproductive autonomy.²⁷² One victim described the constraint she experienced with RC, stating that although there was no gun to her head, she felt like she had no choice but to abort her pregnancy.²⁷³

RC is not limited to physical acts, but also encompasses the psychological. It is therefore important for the police and courts to fairly assess the effects referred to in *Domestic Abuse Act* and the *Serious Crime Act*. In particular, victims of RC are more likely to experience the relevant effects referred to in *Domestic Abuse Act* ss 2(3)(a), (c), (d) and (e). An offender may cement his control over the victim through RC, because sharing a child creates a lifetime connection which may produce a feeling of helplessness or dependence on the perpetrator; a relevant effect under s

²⁶⁹ *Domestic Abuse Act* s 1(2)(a).

²⁷⁰ *Domestic Abuse Act* s 1(2)(b).

²⁷¹ Stark (n 82).

²⁷² Stark (n 84).

²⁷³ Anonymous, ‘I was married to a wealthy man and had two daughters at private schools. Now, I’m homeless.’ *Mamamia* (Blog Post, 21 March 2020) <https://www.mamamia.com.au/reproductive-coercion/>; Anonymous, ‘A boyfriend, a husband: At 44 I fell pregnant, and the fallout has devastated my life.’ *Mamamia* (Blog Post, 6 May 2020) <https://www.mamamia.com.au/reproductive-coercion-personal-story/>.

2(3)(a). Under s 2(3)(c), the control, regulation or monitoring of the victim's daily activities may occur where the offender dictates what the victim can do with regard to her reproductive health: whether she is allowed to use contraceptives, access reproductive health clinics or exercise her reproductive rights. As RC is a complex form of DV, the offender's actions may produce several relevant effects. Any restraint on the victim's exercise of reproductive rights may have the effect of depriving the victim of freedom of action is a relevant effect under s 2(3)(d).²⁷⁴ Finally, s 2(3)(e) encapsulates behaviour which may frighten, humiliate, degrade or punish the victim –this includes abusive name-calling, threats, mind games, etc.²⁷⁵ There is no doubt that RC falls within the range of behaviours proscribed under the *Domestic Abuse Act*.

With respect to claims of RC under the *Serious Crime Act*, the victim must prove that the perpetrator's behaviour caused her to fear that violence would be used against her on at least two occasions or resulted in serious alarm or distress which had a substantial adverse effect on her usual day-to-day activities.²⁷⁶ Pregnancy coercion, pregnancy outcome control and contraceptive sabotage are capable of causing serious effects. Associate Professor Laura Tarzia writes that the distinctive element of RC is the use of fear and control to compel the victim to make reproductive choices they would not otherwise make.²⁷⁷ By making the victim fearful or helpless, the perpetrator can get the victim to submit to whatever his reproductive wishes; the feelings of fear or helplessness are on their own, serious effects.

²⁷⁴ Explanatory Notes *Domestic Abuse Act*.

²⁷⁵ *Ibid*.

²⁷⁶ *Serious Crime Act* s 76(4).

²⁷⁷ Tarzia and Hegarty (n 16).

Contraceptive Sabotage and the *Sexual Offences Act*

In England and Wales, the definition of consent under the *Sexual Offences Act*, and consequent judicial decisions capture stealthing and other forms of contraceptive sabotage. In Chapter Two, there was a discussion on the legal reforms to consent law in Australian jurisdictions which are specifically focused on stealthing, and not the broader subject of contraceptive sabotage. It is therefore instructive to examine the provisions of the *Sexual Offences Act* on consent to see what useful lessons Australian jurisdictions can learn for the purpose of future legal reform.

Consent under the Sexual Offences Act

Consent to sex was largely governed by the common law before the enactment of the *Sexual Offences Act*. The Act was prompted by the recognition that existing rape and sexual offences law had not evolved at the same pace as societal views on consent, sexual autonomy, and ‘what is right and wrong in sexual relations’.²⁷⁸ The *Sexual Offences Act* aims to protect autonomy and bodily integrity, noting that any unwanted touch of a sexual nature is distinct from other forms of physical harm.²⁷⁹ The protection of these rights is also essential as part of the wider programme of the law to promote equality between men and women.²⁸⁰

Following a review on sexual offences legislation by the Home Office in 2000, a recommendation was made for legislation that would create coherent sexual offences that protects individuals from abuse and exploitation; enabling appropriate punishment of offenders in accordance with the

²⁷⁸ Jesse Elvin, ‘The Concept of Consent under the *Sexual Offences Act 2003*’ (2008) 72(6) *The Journal of Criminal Law* 519-36, 519-21 doi:10.1350/jcla.2008.72.6.536.

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.*

European Convention on Human Rights and the *Human Rights Act 1998* (UK).²⁸¹ The *Sexual Offences Act* embodies the current English approach which interprets rape as a crime that violates autonomy, rather than an act which is necessarily associated with violence, or the use of force.²⁸² Consequently, the English reforms are applicable to RC, because not every act of contraceptive sabotage is accompanied by force. The major changes which may be applicable RC are in ss 74 and 76.

The *Sexual Offences Act* defines consent as when ‘a person agrees by choice and has the freedom and capacity to make that choice’.²⁸³ Before a person can effectively make a choice, knowledge of options leading up to that choice is crucial. Consent should ideally involve a full expression of the victim’s will. To ensure the exercise of sexual agency, the following elements must be present: the decisionmaker must be aware of the key facts/information necessary to make an informed decision; the decisionmaker must be able to make a choice based on the information provided; and the decisionmakers must be free from undue/illegitimate pressure.²⁸⁴ Several cases have been determined in reliance on s 74, some of which will be explored later in this chapter.²⁸⁵

Another aspect of s 74 is the requirement that the person has the capacity to make the choice. The *Sexual Offences Act* does not define ‘capacity’, so reliance is placed on judicial decisions to determine what capacity entails for the purpose of interpreting s 74. In *R v Bree*, it was held that the circumstances of each case must be examined in order to properly decide whether the complainant lacked the capacity to consent.²⁸⁶ The Explanatory Notes refer to incapacity due to

²⁸¹ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) (‘*ECHR*’). The *Human Rights Act 1998* (UK) came into force to incorporate the rights guaranteed by the *ECHR* into the domestic law of England and Wales.

²⁸² Elvin (n 278); Clough (n 167) 178.

²⁸³ *Sexual Offences Act* s 74.

²⁸⁴ Jonathan Herring, ‘Mistaken Sex’ (2005) *Criminal Law Review* 511-524.

²⁸⁵ See *R (F) v DPP* [2014] Q.B. 581 [26] (Lord Judge CJ) (‘*R(F) v DPP*’).

²⁸⁶ *R v Bree* [2007] EWCA Crim 256 [34] (Hallett LJ).

age, mental disorder, intoxication, learning disabilities, and whether the individual was asleep or unconscious.²⁸⁷ These considerations are not exhaustive, hence Dr Jesse Elvin has opined that a complainant does not have the capacity to consent when their knowledge and understanding of the situation are so limited that they are not in a position to decide whether to agree.²⁸⁸ The question that remains is whether a person can validly consent to an act where they lack complete knowledge of what the act entails.

The Effect of Deception on Consent

The *Sexual Offences Act* s 76 provides for conclusive presumptions relating to consent.²⁸⁹ Where it is proved that the defendant either intentionally deceived the complainant as to the nature or purpose of the act, it would be conclusively presumed that the complainant did not consent, and that the defendant did not believe that the complainant consented.²⁹⁰ Deception as to nature or purpose includes penetration for medical reasons when it is for sexual gratification.²⁹¹ As regards s 76(2)(b), RC does not cover instances of impersonation, so this chapter will not include an examination of that conclusive presumption.

S 76(2)(a) codifies the common law position on the invalidation of consent by fraud by providing that consent would be vitiated where there is deception as to the nature and purpose of an act.²⁹²

The replacement of ‘quality’ with ‘purpose’ expands the scope of application.²⁹³ Catarina Sjolín

²⁸⁷ CPS, ‘What is Consent?’

<https://www.cps.gov.uk/sites/default/files/documents/publications/what_is_consent_v2.pdf>.

²⁸⁸ Elvin (n 278); Office for Criminal Justice Reform, *Convicting Rapists and Protecting Victims—Justice for Victims of Rape: A Consultation Paper* (2006) 14.

²⁸⁹ Explanatory Notes *Sexual Offences Act*.

²⁹⁰ *Sexual Offences Act* s 76(2)(a).

²⁹¹ United Kingdom, *Setting the Boundaries: Reforming the Law on Sex Offences, Vol. 1* (2000, Home Office) [2.10.3].

²⁹² Herring (n 284); see also *R v Bree* (n 285) [22] (Hallett LJ).

²⁹³ Catarina Sjolín, ‘Ten years on: Consent under the *Sexual Offences Act 2003*’, (2015) 79(1) *The Journal of Criminal Law* 20–35 doi 10.1177/0022018314566744.

writes that these revisions create room for the English Courts to categorise sexual relations involving intentional deception as rape or sexual assault, even if the victim was aware that she was consenting to sex.²⁹⁴ With regard to contraceptive sabotage, the question is whether the English Courts would interpret consent to sexual relations in one manner as precluding consent to sexual relations in another manner.²⁹⁵ Deception is worse than threats or force, because it involves the misuse of sexual agency, making the victim complicit in a plot against her reproductive autonomy.²⁹⁶

Prior to the *Sexual Offences Act*, common law decisions regarding deception as to nature or quality involved cases where the victim was unaware that sex was taking place.²⁹⁷ The *Sexual Offences Act 1956* criminalised deceptive sex through the offence of ‘procurement of a woman by false pretences’.²⁹⁸ Under the *Sexual Offences Act*, deception as to the nature or purpose of the act qualifies as rape, sexual assault, or assault by penetration.²⁹⁹ In all these instances, the relevant question is not whether the accused’s act was what the victim consented to, but whether the victim’s mistake or erroneous understanding of facts vitiated consent. Basically, ‘was the form of sex which occurred contemplated by the victim’, rather than ‘did she say yes to sex’? Or, was the purpose of the act the same as what the victim contemplated – sexual gratification, as opposed to humiliation? If the courts choose to interpret s 76(2)(a) in its literal and plain meaning, it will mean that cases of contraceptive sabotage can be prosecuted.³⁰⁰

²⁹⁴ Ibid 28. Essentially, in deception cases decided under the *Sexual Offences Act* s 74, the defendants have been found guilty because of the deprivation of the complainant’s ability to choose whether to consent.

²⁹⁵ Nickeitta Leung, ‘Education Not Handcuffs: A Response to Proposals for the Criminalization of Birth Control Sabotage’ (2015)15 (1) *University of Maryland Law Journal of Race, Religion, Gender & Class* 146-69.

²⁹⁶ Herring (n 284).

²⁹⁷ *R v Flattery* (1877) 2 QBD 410 and *R v Williams* [1923] 1 KB 340.

²⁹⁸ *Sexual Offences Act 1956* s 3.

²⁹⁹ *Sexual Offences Act* ss 1-3.

³⁰⁰ Clough (n 167) 178.

In *R v Devonald*, the victim had been led to believe that he was providing a form of sexual pleasure of the defendant, whereas his sexual activity had been taped for public humiliation.³⁰¹ It was held that the defendant had deceived the complainant as to the purpose of the act and that the conclusive presumption set out in s 76(2)(a) applied. The facts of *R v Devonald* are such as leave no room for ambiguity or doubt as to the application of s 76(2)(a). If the English Courts could interpret the facts of *R v Devonald* in this manner, then misrepresentation as to purpose, such as pregnancy coercion/contraceptive sabotage as opposed to sexual gratification should satisfy the conclusive presumption under s 76(2)(a). This would also mean that a misrepresentation regarding a physical aspect of the act, such as the use of a condom, would qualify as rape.

Unfortunately, the Courts are hesitant to hold that acts of contraceptive sabotage fall within s 76(2)(a). In *Assange*, the accused removed his condom without the knowledge of the complainant, despite the express agreement to use a condom.³⁰² There was no hesitation on the part of the Court to find that the complainant's consent was conditional upon the use of a condom – where the defendant removed the condom without her knowledge and consent, it was deceptive and a clear breach of the *Sexual Offences Act*. The main issue was whether the defendant's conduct was a breach of s 76(2)(a) or 74. It was argued that sex without a condom was different from sex with a condom, given the presence of a physical barrier, a perceived difference in the degree of intimacy, risk of disease and the likelihood of pregnancy. The Court acknowledged that unprotected sex is different in nature to protected sex and should be treated as such. Regrettably, the Court leaned more towards the application of s 74, stating that the failure to use a condom removed any purported freedom of agreement under s 74.³⁰³

³⁰¹ *R v Devonald* [2008] EWCA Crim 527.

³⁰² *Assange* (n 167).

³⁰³ *Assange* (n 167).

Since *Assange* set a precedent, the Court relied on that decision in *R(F) v DPP & A*.³⁰⁴ In that case, the parties had previously agreed that the accused would always use the withdrawal method. During the act in question, the accused held the complainant down and informed her that he would ejaculate inside her, because she was his wife, and he could do as he wished.³⁰⁵ The Court found that the deception displaced any free agreement and negated consent. This was because the complainant was deprived of choice relating to the crucial feature on which her original consent to intercourse was based.³⁰⁶ Following the decisions in *Assange* and *R(F) v DPP*, it is clear that in cases of contraceptive sabotage, the Courts were unwilling to rely on s 76, and preferred to rely on s 74 instead, regardless of the consequences of the defendant's actions on the nature and purpose of the act.

Similarly, the case of *R v Lawrence* provided a great opportunity for the English Courts to offer more clarity on the application of s 76(2)(a) to cases of contraceptive sabotage, whether or not pregnancy was an intended outcome.³⁰⁷ Although these cases have been prosecuted because of the clear violation of consent which they presented, they are worth examining because of their relevance to instances of contraceptive sabotage as a form of RC. In *R v Lawrence*, the complainant agreed to unprotected sex because the appellant implied that he had gotten a vasectomy. After sex, the appellant informed the complainant that he was still fertile. The complainant later discovered that she was pregnant and underwent a termination. The Court affirmed the decision in *Assange* and also drew a distinction between deception which is 'sufficiently closely connected to the performance of the sexual act, rather than the broad circumstances surrounding it'.³⁰⁸ Where the

³⁰⁴ *R(F) v DPP* (n 285).

³⁰⁵ *Ibid.*

³⁰⁶ *Ibid.*

³⁰⁷ *R v Lawrence* [2020] EWCA Crim 971.

³⁰⁸ *Ibid* [29] (Maldon CJ).

conduct was sufficiently close, it could vitiate consent under s 74. Surprisingly, it was held that the facts of the case did not fall within either of the categories identified in s 76(2), neither was consent vitiated under s 74.³⁰⁹ To the Court, the lie about the appellant's fertility was more connected to the broad circumstances surrounding the sexual act, rather than the nature or purpose. The Court drew a questionable distinction between a lie about fertility and a lie about whether a condom was worn during sex.³¹⁰ Since the complainant agreed to sex without imposing any physical restrictions, she had consented to the penetration of her vagina and to ejaculation without the protection of a condom. Although she was deceived about the nature or quality of the ejaculate and therefore, the attendant risks and possible consequences, the Court held that the deception was not related to the physical performance of the sexual act but to risks or consequences associated with it (thus, a broad circumstance surrounding the act).³¹¹

It is conceded that in *R v Lawrance*, the complainant's preoccupation was with the quality of the ejaculate and the prevention of pregnancy and she did not request the use of a physical barrier. However, it was unfair for the Court to draw a distinction between a request for the use of a condom and a confirmation of a vasectomy to prevent pregnancy. Not every use of a condom is to prevent the transmission of diseases; in several instances, a condom is used simply to prevent unwanted pregnancy. The same can be said when a woman requests that her sexual partner uses the withdrawal method to prevent pregnancy. If the woman was concerned with the transmission of diseases, the withdrawal method would not be sufficient protection because there would still be skin-to-skin contact and the exchange of bodily fluids. With due respect, the Court's understanding of the facts of *R v Lawrance*, and the application of ss 74 and 76(2)(a), was nothing short of

³⁰⁹ *R v Lawrance* (n 306) [27] (Maldon CJ).

³¹⁰ *R v Lawrance* (n 306) [35]-[36] (Maldon CJ).

³¹¹ *R v Lawrance* (n 306) [37] (Maldon CJ).

myopic. By drawing a conclusion that the quality of the ejaculate was not closely related to the nature and purpose of the sexual act, particularly when the complainant made it expressly clear that she did not wish to conceive, the Court laid a dangerous precedent for future cases.

Perhaps the English Courts' attitude to the *Sexual Offences Act* can be described in this obiter:

Any novel circumstances must be considered by reference to the statutory definition, namely whether the alleged victim has agreed by choice and has the freedom and capacity to make that choice. There is no sign that Parliament intended a sea change in the meaning of consent when it legislated in 2003.³¹²

The above statement is highly contradictory. Had the Court considered the novel circumstances of *R v Lawrance* in light of ss 74 and 76, it would have correctly held that the complainant's consent was vitiated. Instead, the Courts appear convinced that the changes to the *Sexual Offences Act* were minimal.³¹³

The Court's unwillingness to apply s 76(2)(a) in this regard may also be attributed to the conclusive presumption from which the defendant would be unable to escape liability. Where it is established that the complainant did not consent to the act in question, reliance is placed on s 74. It appears that the English Court's understanding of sexual agency has not developed to accommodate current social understandings. Despite the reluctance to rely on s 76, it is undeniable that contraceptive sabotage would interfere with the nature (essence or intrinsic elements) of the sexual act. Whether in relation to the nature (ejaculation versus no ejaculation, fertile versus not fertile or contraceptive versus no contraceptive), or the purpose (sexual gratification versus RC), contraceptive sabotage amounts to an infringement of the boundary set by the victim. As Associate Professor Natalie

³¹² [42].

³¹³ Mark Dsouza, 'Deception, Consent to Sex, and *R v Lawrance* [Part 1]' *UCL Centre for Criminal Law* (Blog Post, 3 August 2020)

<https://www.ucl.ac.uk/criminal-law/sites/criminal-law/files/deception_consent_to_sex_and_r_v_lawrance_part_1.pdf>.

Wortley puts it, where a victim is seeking to exercise her sexual autonomy within the limits of a deal-breaker, the accused's deception would harm the exercise of that sexual autonomy by frustrating the deal-breaker.³¹⁴ Without the deception by the accused, the victim's sexual autonomy would not suffer any violation.³¹⁵ Although contraceptive sabotage inarguably vitiates consent, its criminal classification depends on the Court's interpretation of the relevant act and the circumstances surrounding it.

Conclusion

The above examination of legal responses to RC in the UK shows promise regarding the prosecution of RC incidents. Despite the fact that there is no express mention or prohibition of RC, there is a clear scope for its recognition in the UK, particularly through DV legislation criminalising coercive control, as opposed to Australia where poor references to coercive control are likely to leave victims navigating through the dark. The criminalisation of coercive control under the *Serious Crime Act* and *Domestic Abuse Act* provide a clear and comprehensive framework for the criminal justice system. In contrast with the UK's advancement in DV legislation, what would have been a major win for victims of contraceptive sabotage under the *Sexual Offences Act* has been constrained by the narrow interpretation of s 76(2)(a). The only recourse for victims of contraceptive sabotage lies in the broad definition of consent under s 74. In this regard, it is worth speculating that Australia's sexual offences regime is better positioned to provide legal redress for victims of contraceptive sabotage.

³¹⁴ Natalie Wortley, 'Limiting the Scope of the Conclusive Presumptions in the *Sexual Offences Act 2003: R v B* [2013] EWCA Crim 823'. *The Journal of Criminal Law*. 2013;77(5):370-375, 370 doi:10.1350/1740-5580-77.5.

³¹⁵ *Ibid.*

CHAPTER FOUR

COMPARING THE UK'S LEGAL RESPONSES TO REPRODUCTIVE COERCION WITH AUSTRALIA'S LEGAL RESPONSES

Chapters Two and Three examined the Australian and UK legal responses to RC by looking at coercive control legislation, and legal provisions relating to contraceptive sabotage. While coercive control and contraceptive sabotage are not the exclusive means through which RC occurs, they are the predominant forms of RC and currently at the forefront of legislative reform. While the UK position is more advanced and comprehensive, this chapter offers a comparative analysis to consider the areas where the Australian position is more straightforward and practical, and where Australia might learn from the UK.

Comparing Coercive Control Legislation in the UK and Australia

The Creation of a Separate Legal Offence

While *Sexual Offences Act* s 76 criminalises coercive control in the UK and *Domestic Abuse Act* s 2 prohibits 'abusive' behaviour broadly, there is no express prohibition on coercive control in Australia.³¹⁶ The closest references to coercive control legislation in Australian law lie in the definitions of FDV which reference behaviour that coerces or controls.³¹⁷ The most comprehensive legislative provision which references elements of coercive control is found in the *Family Violence*

³¹⁶ *Sexual Offences Act* s 76; *Domestic Abuse Act* s 2.

³¹⁷ See *Family Law Act 1975* (Cth) s 4AB; *Domestic and Family Violence Protection Act 2012* (Qld) s 8(1)(e), (f); *Family Violence Protection Act 2008* (Vic) s 5(1) (v); *Restraining Orders Act 1997* (WA) s 5A(1)(b); *Family Violence Act 2016* (ACT) s 8(1)(a)(vi); *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 11(1)(c); *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8(2)(c); and *Family Violence Act 2004* (Tas) s 7.

³¹⁷ *Domestic and Family Violence Act 2007* (NT) s 5.

Act 2004.³¹⁸ Despite these references to coercive control, there is no clear definition of what constitutes coercive or controlling behaviour.

While Australia's DV legislation does not address RC, it is arguable that, as a form of coercive control, RC can form part of behaviours for which protective orders can be granted. Where these protective orders are breached, criminal action can be taken. The earlier cited judicial decisions in *Ahmed* and *Kemsley v Kemsley* indicate that acts of RC may be recognised as falling within DV.³¹⁹ Unfortunately, despite several references to coercive control across jurisdictions, the interpretation of what constitutes FDV will remain subject to various judicial interpretations, and results would vary across cases. What the UK offences teach Australian jurisdictions is the need to avoid any ambiguity in the recognition of coercive control as a form of DV. By attaching a specific label and giving a definition to coercive control and the forms of behaviour proscribed, states and territories would pave the way for victims to get protection. In this regard, women in circumstances similar to Hannah Clarke and Preethi Reddy will have a better awareness of their rights.

Time Limitation

Assuming the Tasmanian offences of economic and emotional abuse are relied on as the standard for 'coercive control offences' in Australia, jurisdictions will still fall short of the bar set by the UK. Unlike Tasmania's 12-month statutory limitation period the UK offences have no time-limitation, leaving adequate time for proper reporting, investigation and prosecution of offences best described as complex.³²⁰ Tasmania's time limitation incurs additional hardship on victims who may be dealing with posttraumatic stress disorder alongside the physical consequences of

³¹⁸ *Family Violence Act 2004* ss 8, 9; see also section 4AB(1) of the *Family Law Act 1975*.

³¹⁹ *Ahmed* (n 131); *Kemsley v Kemsley* (n 129).

³²⁰ Both the *Domestic Abuse Act* and *Serious Crime Act* make no mention of a time limit, leaving the impression that unlike the *Family Violence Act*.

their RC experience.³²¹ The time-limitation may also result in several cases falling through the cracks. In this regard, Australian jurisdictions seeking to criminalise coercive control would do well to avoid attaching a statutory limitation.

Proof of Harm

A laudable aspect of the Tasmanian provisions is that there is no requirement for the victim to prove that they suffered harm, just like the Scottish provision which does not require the victim to prove that she has experienced a serious effect or show proof of such effects.³²² What matters is that a reasonable person would deem the abusive behaviour as harmful. With the Tasmanian offences, the course of conduct must be embarked upon with the aim of causing the stated harms.³²³ Future legal reform in other Australian jurisdictions should lean toward these models, as they penalise the act itself, rather than its consequences. In addition to creating awareness, this would acknowledge that there are non-physical forms of abuse and there need not be proof of injury for claims to be validated.

Rate of recurrence

In applying *Serious Crime Act* s 76 there is no strict requirement for a high rate of frequency over a long period of time.³²⁴ In the Lee Coleman case, coercive behaviour which spanned a duration of one week satisfied the requirement because there was a clear campaign of coercive actions.³²⁵

³²¹ *Family Violence Act 2004* s 9A.

³²² *Domestic Abuse Act* ss 4 (1), (2) DASA; *Family Violence Act* ss 8, 9.

³²³ *Family Violence Act* ss 8, 9.

³²⁴ *Serious Crime Act* s 76(4).

³²⁵ Una Yates, 'Inside the Cage: A More Nuanced Understanding of Domestic Abuse' *The Oxford Student* (Blog Post, 14 July 2020)

<<https://www.oxfordstudent.com/2020/07/14/inside-the-cage-a-more-nuanced-understanding-of-domestic-abuse/>>; Express, 'Thug jailed for three years under new law to protect people from coercive lovers', *Express* (online at 30 January 2022) <<https://www.express.co.uk/news/uk/691900/Thug-jailed-new-law-protect-people-from-coercive-lovers-abusive-relationships>>.

In Scotland, the requirement is a course of behaviour which occurs on at least two occasions.³²⁶ In Tasmania reference to a ‘course of conduct’ relates to the manner in which the abuse is perpetrated, rather than its frequency.³²⁷ In *Howe v S*, it was held that a single act of threat or intimidation sufficed.³²⁸ The same reasoning can be applied to references of coercive control in other Australian jurisdictions, which do not specify the number of times such abusive behaviour must occur. This is a positive note for RC, because regardless of its frequency, it constitutes abusive behaviour.

Detailing Abusive Behaviour

In Scotland, the abusive behaviour must be ‘violent, threatening or intimidating’ or affect the victim by, in any of the ways outlined in ss 2(3)(a)–(e).³²⁹ This detailing of the impact stands in stark contrast to s 9 of Tasmania’s *Family Violence Act* where the impact of emotional abuse is not outlined.³³⁰ As discussed in Chapter Two, in other Australian jurisdictions, some references to coercive control are included in the definition of FDV, however, there is no specific prohibition. Any attempt to detail abusive behaviour will be hinged on such definitions, requiring proof that the perpetrator’s behaviour was coercive, controlling or dominating; an unreasonable denial of autonomy; associated with emotional and psychological violence; or causing harm, damaging property, intimidation, stalking and economic abuse.³³¹ The harm in this approach lies in the

³²⁶ *Domestic Abuse Act* s 10(4).

³²⁷ Vanessa Bettinson, ‘A Comparative Evaluation of Offences: Criminalising Abusive Behaviour in England, Wales, Scotland, Ireland and Tasmania’ in Marilyn McMahon and Paul McGorrery (eds), *Criminalising Coercive Control Family Violence and the Criminal Law: Family Violence and the Criminal Law* (Springer, 1st ed, 2020) 197-218, 203 10.1007/978-981-15-0653-6_2.

³²⁸ *Howe v S* [2013] [22].

³²⁹ *Domestic Abuse Act* s 2(2)(a).

³³⁰ *Family Violence Act* s 9.

³³¹ *Domestic and Family Violence Protection Act 2012* (Qld) s 8(1)(e), (f); *Family Violence Protection Act 2008* (Vic) s 5(1) (v); *Restraining Orders Act 1997* (WA) s 5A(1)(b); *Family Violence Act 2016* (ACT) s 8(1)(a)(vi); *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8(2)(c); *Restraining Orders Act 1997* (WA) s 5A(2)(d); *Family Violence Protection Act 2008* (Vic) ss 5(1)(ii), 7; *Domestic and Family Violence Protection Act 2012* (Qld) ss 8(1)(b), 11; *Family Violence Act 2016* (ACT) s 8(1)(a)(iii); *Family Violence Act 2004* (Tas) s 7; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8(4)(a); *Domestic and Family Violence Act 2007* (NT) s 5; Taylor and Marshall (n 151) 3; *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9 (3)(d).

reliance of inferences, rather than legal provisions which are direct and specific. Providing details of the type of harms experienced by victims due to coercive control will help raise awareness among judicial officers and shape a judicial interpretation. Specifically listing the behaviours prohibited and their impacts will make them more visible and enable victims to identify those harmful behaviour, providing legal certainty.

Mens Rea and Defences

Interestingly, the *Serious Crime Act*, *Domestic Abuse Act* and *Family Violence Act* rely on a combination of subjective and objective approaches regarding the *mens rea*. While a subjective approach may result in a higher degree of culpability and stiffer penalties, they present evidentiary challenges.³³² This is worth considering in cases of coercive control which are inherently complex, especially when drawing boundaries across healthy and unhealthy actions in relationships. The *Serious Crime Act* requires the defendant to be aware of the serious effect of his conduct.³³³ Scotland's offence combines the subjective and objective requirements but places a lighter onus on the prosecution; if it cannot be proved that the defendant intended to cause the victim harm, it may be proved that the defendant was reckless as to the effect of his conduct.³³⁴

The Tasmanian offence of economic abuse uses the subjective approach, with an interesting twist; the defendant must intend to 'unreasonably' control the victim, pointing to an objective interpretation.³³⁵ The standards of compromise in every relationship varies, and this wording creates complexity. Since there is no specific offence of coercive control in other jurisdictions, proof of intent is dependent on the categorisation of the offence. For example, in NT, an attempt

³³² Bettinson (n 325) 208.

³³³ *Serious Crime Act* s 76(1)(d).

³³⁴ *Domestic Abuse Act* s 1(2)(b).

³³⁵ *Family Violence Act* s 8.

to associate the offence of economic abuse with coercive or controlling behaviour will not require proof of intent to intimidate the victim, because economic abuse in itself, does not require proof of intent.³³⁶ The same applies in other jurisdictions that recognise economic abuse.³³⁷ In NSW, the perpetrator must commit the relevant offence with the intention to coerce, control or intimidate the victim.³³⁸ Where a person wishes to associate offences like stalking and damage to property with coercive control, they must prove intent.³³⁹ The uncertainty and speculation surrounding these attempts to ground coercive control within DV legislation only underscores the need for more clarity on the status of coercive control as a DV offence. Regarding the *mens rea*, it is suggested that Australian jurisdictions that decide to criminalise coercive control lean toward the Scottish requirement which gives some leeway to the prosecution. In cases of RC, where it may be difficult to prove the defendant's motives, the prosecution may rely on his reckless conduct.

Both the UK and Tasmanian jurisdictions allow a defence of reasonableness.³⁴⁰ While Associate Professor McMahon and Dr McGorrery argue that these provisions may allow for 'reasonably' controlling or intimidating behaviour, surely, every relationship involves some level of control and compromise. What amounts to 'reasonable' will be subject to judicial scrutiny and determined by the circumstances of each case. Under the *Serious Crimes Act*, a person can escape liability where it is shown they believed they were acting in the best interest of the individual.³⁴¹ In NSW, defences to DV offences, which may involve coercive or controlling behaviour, include self-defence,

³³⁶ *Domestic and Family Violence Act 2007* (NT) ss 5(e), 8.

³³⁷ *Family Violence Protection Act 2008* (Vic) s 8; *Domestic and Family Violence Protection Act 2012* (Qld) s 12; *Family Violence Act 2016* (ACT) s 8.

³³⁸ *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 11(1)(c).

³³⁹ *Domestic and Family Violence Act 2007* (NT) s 7; *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13.

³⁴⁰ *Domestic Abuse Act* s 6; *Serious Crime Act* s 76(8); *Family Violence Act 2004* ss 8, 9 refer to unreasonable control, giving rise to the interpretation that control which is reasonable will not be regarded as abusive behaviour.

³⁴¹ *Serious Crime Act* s 76(8)(a).

mistaken identity, duress, intoxication, and etcetera.³⁴² However, it may be difficult to justify any interference with the exercise of an individual's reproductive autonomy.

Comparing the UK and Australia's Legal Responses to Contraceptive Sabotage

The *Sexual Offences Act* was enacted following the comprehension of rape as a crime which violates autonomy, rather than a mere act of violence.³⁴³ The aim of the *Sexual Offences Act* was to embody society's view of what is right and wrong in sexual relations, positioning English consent law within modern understandings of consent.³⁴⁴ The broad definition of consent under *Sexual Offences Act* s 74 has its advantages and disadvantages.³⁴⁵ While its interpretation in judicial decisions encompasses scenarios where lack of knowledge can vitiate consent (as in *Assange*) it has also stunted s 76's potential for development on the judicial interpretation of deception as to the nature or purpose. Like Australian courts, English courts continue to adopt a narrow interpretation, restricting its application to medical cases.³⁴⁶ Both jurisdictions have this reluctance in common and there is no indication that either jurisdiction will interpret deception as to the nature and purpose of the sexual act in favour of contraceptive sabotage.

The benefit of the broad definition of consent in English law is that it allows for acts of stealthing or more broadly, contraceptive sabotage, to be categorised as rape/sexual assault, as in *Assange* and *R v F(DPP)*.³⁴⁷ Perhaps the preference for s 74 is based on the incorporation of the word, 'choice', indicating that the victim's decision was predicated on a set of circumstances or facts

³⁴² Avinash Singh, 'Australia: Affirmative Consent to be introduced in NSW' *Mondaq* (Blog Post, 21 July 2021) <<https://www.mondaq.com/australia/crime/1093734/affirmative-consent-to-be-introduced-in-nsw?type=popular>>.

³⁴³ Home Office, *Setting the Boundaries* (n 291) [0.2].

³⁴⁴ *Ibid* [0.6].

³⁴⁵ Sjolín (n 293) 27-28.

³⁴⁶ Tom O'Malley and Elisa Hoven 'Consent in the Law Relating to Sexual Offences' in Kai Ambos et al (eds), *Core Concepts in Criminal Law and Criminal Justice: Volume I* (Cambridge University Press, 2020) 135.

³⁴⁷ *Assange* (n 167); *R(F) v. DPP* (n 285).

which they had believed to be genuine. In Australia, there has been no conviction for contraceptive sabotage based solely on the definition of consent. While the absence of consent is central to rape/sexual assault, determining the presence or absence of consent often involves contention.³⁴⁸ As opposed to the English emphasis on ‘choice’, the Australian emphasis is on ‘freely and voluntarily given’, resulting in the prevailing but limited understanding that mere submission, silence or a lack of struggle does not constitute consent.³⁴⁹

While the English definition of consent vaguely recognises affirmative consent and conditional consent, the definition in some Australian jurisdictions seems stuck in history, despite the ongoing legal reform to criminalise stealthing.³⁵⁰ This solidifies the argument being put forward in this thesis that cases of contraceptive sabotage are not likely to be prosecuted, if based solely on Australian jurisdictions’ definitions of consent.³⁵¹ For all its laudable features, the ACT’s *Crimes Act 1900* (as amended) which criminalises stealthing, lacks a statutory definition of consent, and instead relies on the ‘negative’; what consent is ‘not’ as opposed to what consent ‘is’.³⁵² The same applies to SA’s Criminal Law Consolidation (Stealthing) Amendment Bill 2021.³⁵³ The NSW’s Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021 clarifies the definition of consent as being free and voluntary agreement to a sexual activity at the time of the activity.³⁵⁴ While the Bill criminalises stealthing and establishes affirmative consent, the only reference to choice is in its objectives.³⁵⁵ In Victoria, the Law Reform Commission has released a report into

³⁴⁸ O’Malley and Hoven (n 346).

³⁴⁹ Murphy (n 40).

³⁵⁰ *Crimes (Stealthing) Amendment Act 2021* (ACT); Criminal Law Consolidation (Stealthing) Amendment Bill 2021; and the Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021 (NSW).

³⁵¹ *Ibid.*

³⁵² *Crimes Act 1900* (ACT).

³⁵³ Criminal Law Consolidation (Stealthing) Amendment Bill 2021 (SA).

³⁵⁴ Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021 (NSW).

³⁵⁵ *Ibid.*

sexual violence and the justice system which recommends the requirement of affirmative consent and calls for stealthing to be criminalised.³⁵⁶ These recommendations would not be brought before the Victorian Parliament until 2022, so it is uncertain whether the definition of consent will change. In this regard, Australia's definition of consent which still excludes an active reference to 'choice' is lagging behind, and its mere inclusion, as with the English definition, may go a long way towards changing judicial interpretations and community understandings of consent.

The definition of consent in the *Sexual Offences Act* appears to be the only advantage over Australia, in terms of sexual offences relating to RC. As stated above, some Australian jurisdictions have specifically criminalised/are in the process of stealthing via legislative reform, while the UK lags behind in that respect. The ACT and SA refer to the intentional misrepresentation as to the use of a condom, while NSW's Bill to criminalise stealthing provides that consent to a particular sexual activity does not constitute consent to other sexual activities.³⁵⁷ These legislative provisions refer to the use of a condom, which indicates that there may be difficulty in grounding a conviction under the broad term of contraceptive sabotage. Cases such as an intentional failure to withdraw prior to ejaculation, tampering with contraceptive pills, or even poking holes in a condom may fail based on technicalities in interpretation. This points to the importance of a broader definition/interpretation of consent which can accommodate gaps where legal provisions on stealthing fall short.³⁵⁸

Some Australian jurisdictions have separate legal provisions which criminalise the procurement of sexual relations by fraud, different from fraud as to the nature of purpose/quality of the sexual

³⁵⁶ Victoria Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report, September 2021).

³⁵⁷ *Crimes (Stealthing) Amendment Act 2021* (ACT); *Criminal Law Consolidation Act 1935* (SA); and the *Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021* (NSW).

³⁵⁸ Chesser and Zahra (n 35).

act. The broader provisions exist in SA, Tasmania, WA and Victoria.³⁵⁹ Under these provisions, any material misrepresentation regarding the sexual activity results in a negation of consent to sexual relations. This could be in the form of false pretences, false representations, fraudulent or the procurement of sexual acts by fraud. This provision in Victoria saw the conviction of the defendant in *Diren* for stealthing.³⁶⁰ It was held that the defendant's removal of the condom created an entirely different circumstance that what the complainant had envisaged.³⁶¹ The success of this legal provision lies in its simplistic drafting, and it is surprising that despite the judiciary's reluctance to overcriminalise the vitiating of consent by fraud, the Parliaments of the respective States have opted to preserve them. In these four States, any act which can be properly categorised as fraud is capable of vitiating consent. These provisions operate alongside the provisions relating to fraud as to the nature and/or purpose of the act, suggesting that in States like Tasmania and WA where 'stealthing' is not being considered as part of legal reform, a defendant can still be convicted for contraceptive sabotage.

Conclusion

Although the *Sexual Offences Act* has a future-forward definition of consent, there is a higher likelihood of grounding a conviction of rape/sexual assault through contraceptive sabotage in several Australian jurisdictions. In this sense, the British Parliament may learn a thing or two from some Australian jurisdictions' outright criminalisation of stealthing and/or, the criminalisation of sexual activities procured by fraud in general. To address the possibility of overcriminalising

³⁵⁹ *Criminal Law Consolidation Act 1935* (SA) s 60; *Criminal Code* ss 2A(f), 129; *Criminal Code Act Compilation Act 1913* (WA) ss 319(2)(a), 192; *Crimes Act 1958* (Vic), s 45.

³⁶⁰ *Diren* (n 214).

³⁶¹ *Ibid* [26] (Wraight J).

sexual assault by fraud, a detailed definition of fraud may be included in the legislation, so that it is clear what specific instances of fraud would fall under the legal reform.

However, regarding the recognition of, and response to coercive control, the UK's advanced approach is a template for Australian jurisdictions. While there is great reluctance to criminalise coercive control in Australia, the *Serious Crime Act* and *Domestic Abuse Act* highlight the benefits of clear and coherent legislation. Should Australian jurisdictions decide against criminalisation, legal reform to properly include coercive control in the definition of FDV, with a clear definition of what amounts to coercive or controlling behaviour. Where this also includes examples to serve as a guide, it would go a long way towards addressing RC, particularly where reforms are efficiently implemented.

CHAPTER FIVE

SOCIAL RESPONSES TO REPRODUCTIVE COERCION IN AUSTRALIA AND THE UK

As earlier established, RC thrives on its subtle overlap with other forms of DV, making it difficult to identify.³⁶² Despite its budding recognition in academic, medical and social circles over the past decade, it is yet to receive a proper legal definition.³⁶³ The absence of a legal definition and the complexity associated with its occurrence stunt the development of societal responses.³⁶⁴ In a 2019 survey, some participants confirmed that while they knew they were experiencing DV, they were unable to specifically label the violence they experienced.³⁶⁵ Others admitted that they had misinterpreted acts of RC as other forms of DV like sexual assault.³⁶⁶ Difficulty in identifying and labelling abuse may serve as barriers to seeking help.³⁶⁷

This chapter seeks to explore societal responses to RC in Australia and the UK. Exploring societal responses to RC is important, as history has shown the cyclical relationship between social awareness, public advocacy and legal reform.³⁶⁸ For example, in NSW, the growing awareness and advocacy on the role of coercive control as a strong precursor to physical assault and DV homicide resulted in a review of DV legislation and the recommendation of the criminalisation of

³⁶² Miller et al (n 15).

³⁶³ Joint Select Committee on Coercive Control (n 158).

³⁶⁴ Ibid.

³⁶⁵ Heather Douglas, Nicola Sheeran and Laura Tarzia, 'Identifying and responding to reproductive coercion in a legal context' *The University of Queensland* (Issues Paper, 2020).

³⁶⁶ Ibid.

³⁶⁷ Laura Tarzia et al, 'How do health practitioners in a large Australian public hospital identify and respond to reproductive abuse? A qualitative study' (2019) 43(5) *Australian and New Zealand Journal of Public Health* Volume 457-63.

³⁶⁸ 'Social Movement Stages: Emergence, Coalescence, Bureaucratization & Decline' *Study.com* (Web Page, 27 April 2013) <study.com/academy/lesson/social-movement-stages-emergence-coalescence-bureaucratization-decline.html>.

coercive control.³⁶⁹ In a similar vein, campaigns by advocates like Saxon Mullins, a rape victim, prompted an extensive review into NSW's sexual consent laws and the NSW government announced a major overhaul which includes the adoption of an affirmative consent model alongside the criminalisation of stealthing.³⁷⁰

While there are several aspects of societal responses to RC this chapter will focus on governmental policy, responses in education, and responses in healthcare. These responses are central to the fight against RC. Policy shapes governmental, law enforcement and frontline responses; education creates awareness to influence cultural change; and frontline responses because healthcare professionals and police officers are often the first and only lifeline for victims seeking help.³⁷¹ These sector responses are well-positioned to serve as key players in primary, secondary and tertiary intervention for the prevention of DV.³⁷²

Australia's DV Policy and Responses of Frontline Responders (Police and Healthcare Workers)

Aside from the important role policy plays in driving cultural and social change, it is less rigid than legislation; policy might be embedded in legislation as a supplementary provision or it could

³⁶⁹ Paul Gregoire and Ugur Nedim, 'NSW to Consider Coercive Control Laws, As National Campaign Picks Up' *NSW Courts* (Web Page, 14 October 2020) <<https://nswcourts.com.au/articles/nsw-to-consider-coercive-control-laws-as-national-campaign-picks-up/>>.

³⁷⁰ Stephen Odgers, 'The Guardian, Affirmative sexual consent: what the NSW law reforms mean and how other states compare' *The Guardian* (online at 1 January 2020) <[https://www.theguardian.com/law/2021/may/25/affirmative-sexual-consent-what-the-nsw-law-reforms-mean-and-how-other-states-compare#:~:text=The%20NSW%20government%20plan%20to,have%20consent%20before%20sex%20occurs.&text=\(b\)%20an%20accused%20person's%20belief,did%20something%20to%20ascertain%20consent](https://www.theguardian.com/law/2021/may/25/affirmative-sexual-consent-what-the-nsw-law-reforms-mean-and-how-other-states-compare#:~:text=The%20NSW%20government%20plan%20to,have%20consent%20before%20sex%20occurs.&text=(b)%20an%20accused%20person's%20belief,did%20something%20to%20ascertain%20consent;)>; Stephen Odgers, 'Tread carefully on sexual consent - some of these 'reforms' are dangerous' *The Sydney Morning Herald* (online at 1 January 2022) <<https://www.smh.com.au/national/nsw/tread-carefully-on-sexual-consent-some-of-these-reforms-are-dangerous-20210528-p57w3i.html>>.

³⁷¹ Stop Violence Against Women, 'Explore the Issue' *Health Care Providers And Forensic Medical Institutes* <<http://hrlibrary.umn.edu/svaw/domestic/explore/index.htm>>.

³⁷² Alternatively identified in Chapter One as the prevention, early intervention and the mitigation and response. See also, World Health Organisation, 'Violence against women: What health workers can do', <<https://www.who.int/gender/violence/v9.pdf>>; Bonnie M. McClure, 'Domestic Violence: The Role of the Health Care Professional' (1996) 2(1) *Michigan Family Review* 63-75 doi: <http://dx.doi.org/10.3998/mfr.4919087.0002.105>.

work as a standalone measure to combat social issues.³⁷³ As a standalone measure, the establishment of policy involves research, acknowledgement of the social ills in question, and public consultation.³⁷⁴ It may also serve as a foundational framework for future legislation, where it is developed as an embodiment of societal sentiments towards a specific occurrence. While those sentiments may not constitute the majority view at the time of its establishment, the policy may gain traction worthy of legislative pursuit. In this way, policy helps future legislation to reflect emerging social norms.³⁷⁵ This highlights the association between public advocacy, policy development and legal reform. Pending the time RC gets legal recognition, policy may serve as a veritable tool to manage the occurrence of RC.³⁷⁶ Establishing policies may improve multi-sectoral responses and set the platform for a uniform response from the healthcare sector and law enforcement.

Unsurprisingly, there is no national policy addressing RC in Australia, as it is impossible to address a problem which has not been acknowledged. Australia also has no national sexual and reproductive health strategy.³⁷⁷ This is despite the ratification of the *Convention on the Elimination of All Forms of Discrimination Against Women* which guarantees sexual and reproductive health as a human right enjoyable by women.³⁷⁸ Some states and territories have sexual and reproductive health strategies which are used for the development of implementation plans between the government and service providers, for the improvement of access to maternal, sexual and

³⁷³ Sonia Allan and Meredith Blake, *Australian Health Law* (LexisNexis Butterworths, 1st ed, 2018) 8.

³⁷⁴ *Ibid.*

³⁷⁵ Judith de Groot and Geertje Schuitema, 'How to make the unpopular popular? Policy characteristics, social norms and the acceptability of environmental policies' (2012) 19(20) *Environmental Science and Policy* 100-107.

³⁷⁶ Allan (n 370).

³⁷⁷ Public Health Association of Australia, 'Time for a National Sexual and Reproductive Health Strategy' <<https://www.familyplanningallianceaustralia.org.au/wp-content/uploads/2015/09/Time-for-a-national-srh-strategy-call-to-action.pdf>>.

³⁷⁸ *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

reproductive health clinics. These include the Queensland Sexual Health Strategy; WA's Women's Health and Wellbeing Policy which acknowledges that some women have restricted control over their own bodies and reproductive choices, with limited access to safe and affordable health and support services; NT's Department of Health has Guidelines for the Management of Sexually Transmitted Infections in the Primary Health Care setting which is directed more toward STDs than issues related to sexual and reproductive health and rights. Like NT, NSW's guidelines and policies are more centered on preventing the transmission of STDs and Blood-borne viruses; Victoria released its first women's sexual and reproductive health strategy plan which spanned 2017–2020.³⁷⁹ Its aim was to reduce stigma while improving access to health services and knowledge of sexual and reproductive health. In the absence of these policies, this chapter will look to national and state policies on DV which may be applicable to RC.

As with legislation, the policy landscape is decentralised. Australia had put in place a National Plan to Reduce Violence Against Women and Their Children between 2010-2022 ('National Plan') as an initiative of the Commonwealth, State and Territory governments.³⁸⁰ There is no comprehensive approach to sexual and reproductive health and rights under the National Plan.³⁸¹ This makes it difficult to have a coordinated response to forms of abuse like RC. The draft 2022-

³⁷⁹ Queensland Health, 'Queensland Sexual Health Strategy 2016-2021' *Queensland Government* <https://www.health.qld.gov.au/_data/assets/pdf_file/0024/601935/qh-sexual-health-strategy.pdf>; Department of Health, 'Western Australian Women's Health and Wellbeing Policy' *Government of Western Australia 25* <<https://ww2.health.wa.gov.au/~media/Files/Corporate/general-documents/Health-Networks/Womens-health-and-wellbeing-policy/WA-Womens-Health-and-Wellbeing-Policy.pdf>>; Department of Health, 'NT Guidelines for the Management of Sexually Transmitted Infections in the Primary Health Care setting' *Northern Territory Government* <<https://digitalibrary.health.nt.gov.au/prodjspui/bitstream/10137/1298/3/Updated%20NT%20STI%20Guidelines%20April%202019.pdf>>; NSW Health, 'STI & BBV Related Policies and Guidelines' *NSW Government* <<https://www.health.nsw.gov.au/sexualhealth/Pages/related-policies-and-guidelines.aspx>>;

³⁸⁰ Department of Social Services, 'The National Plan to Reduce Violence Against Women And Their Children 2010-2022' <<https://www.dss.gov.au/women/publications-articles/reducing-violence-against-women-and-their-children>>; and Department of Health, 'Women's sexual and reproductive health: key priorities 2017–2020' *Victoria State Government* <<https://www.health.vic.gov.au/publications/womens-sexual-and-reproductive-health-key-priorities-2017-2020>>.

³⁸¹ *Ibid.*

2032 National Plan has been published, with a call for public consultation. The focus areas for the government are prevention, intervention, response and recovery. An examination of the draft 2022-2032 National Plan raises the suspicion that the government has made no advancement in its responses to sexual and reproductive health. However, in a big win, the draft 2022-2032 National Plan highlights the need for clear and consistent national definitions of the different forms of violence, including coercive control.³⁸² The draft 2022-2032 National Plan forecasts the development of coercive control national principles which will consider the impact of coercive control on diverse groups of people, the barriers to support and the establishment of necessary and effective system responses.³⁸³ While this is neither a direct response to RC, nor does it guarantee the effective prevention of coercive control, it is a step in the right direction which will hopefully spark a ripple effect.

Alongside the draft 2022-2032 National Plan, state and territory governments have additional frameworks and policies to reduce violence against women and children.³⁸⁴ These frameworks emphasise the importance of DV prevention and highlight prevention mechanisms. Unfortunately, FDV rates have only worsened over the years, with policy and service responses remaining fragmented. There is a need to improve national health strategies and policies relating to DV and sexual and reproductive health and rights in relation to RC. Pending the development of a more comprehensive strategy, reference can be made Australia's National Women's Health Strategy

³⁸² Department of Social Services, 'Draft National Plan to End Violence against Women and Children 2022-2032' <<https://engage.dss.gov.au/draft-national-plan-to-end-violence-against-women-and-children-2022-2032/>>.

³⁸³ Ibid.

³⁸⁴ ACT Women's Plan 2016–26; NSW Domestic and Family Violence Prevention and Early Intervention Strategy 2017-2021; NSW Sexual Assault Strategy 2018–2021; NT's Domestic, Family and Sexual Violence Reduction Framework 2018–2028: Safe, Respected and Free from Violence; Queensland Domestic and Family Violence Prevention Strategy 2016–2026; SA's Women's Safety Strategy 2011–2022; Safe Homes, Families, Communities: Tasmania's action plan for family and sexual violence 2019–2022; Free from violence: Victoria's prevention strategy; Ending Family Violence: Victoria's Plan for Change; WA's Family and Domestic Violence Prevention Strategy to 2022; and, Action Plan 2015: Working towards the elimination of family and domestic violence in Western Australia.

2020-2030 which aims to prevent unintended pregnancies; optimise maternal and fetal outcomes; and improve health impacts of violence against women and girls as public health imperatives.³⁸⁵

While the strategy acknowledges the existence of RC and aims to increase sexual and reproductive health care information, it does not propose any focused intervention to address incidents of RC. However, an impact may be made through its proposed objectives like awareness-raising, addressing negative impacts of family and sexual violence and co-designing and delivering safe and accessible services for women experiencing violence.³⁸⁶

The UK's Domestic Violence Policy

In September 2012, the British Home Office announced a change to the Government definition of DV to reflect coercive control. The decision was based on the overwhelming request for this change, following a consultation which included respondents from various groups in the community.³⁸⁷ Under the Home Office policy, the term 'domestic violence' was changed to 'domestic violence and abuse', and the definition was expanded from "any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) between adults who are or have been intimate partners or family members, regardless of gender or sexuality" to "any incident or pattern of incidents of controlling, coercive or threatening behaviour,

³⁸⁵Department of Health, 'National Women's Health Strategy 2020-2030' *Australian Government* <<https://www.health.gov.au/sites/default/files/documents/2021/05/national-women-s-health-strategy-2020-2030.pdf>> ('National Women's Health Strategy'); Danielle Mazza, 'Achieving better sexual and reproductive health for women' (2020) 49 (6) doi: 10.31128/AJGP-04-20-5341.

³⁸⁶ National Women's Health Strategy (n 382).

³⁸⁷ Home Office *Cross-Government Definition Of Domestic Violence – A Consultation Summary Of Responses* (September 2012) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/157800/domestic-violence-definition.pdf>; Home Office, *Information for Local Areas on the change to the Definition of Domestic Violence and Abuse* (March 2013) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/142701/guide-on-definition-of-dv.pdf>.

violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality”.³⁸⁸

The Home Office’s rationale was that non-physical abuse was not adequately recognised as abusive behaviour, both by victims and practitioners. It was also noted that coercive control was a complex pattern of overlapping and repeated abuse perpetrated within a context of power and control and that abuse could occur not only in the form of isolated incidents but also in a continuum. The policy definition was not in any way legal but simply a guide to inform policy and identify DV cases, two years later, the *Serious Crime Act* criminalised coercive control; an example of how policy can prompt legal reform.³⁸⁹

Examining the Effect of Policy on Healthcare Responses in Australia

In Chapter One, there was a discussion around police responses to DV. Although the police play a vital role in the prevention of DV, there is very little confidence in police reporting.³⁹⁰ While there is no policy on RC in Australia, surveys have highlighted issues with prevailing police culture with respect to existing DV offences.³⁹¹ Attitudes range from the absence of proactive responses to a lack of understanding of the forms of DV and appropriate procedures for each scenario.³⁹² Results showing police preoccupation with physical violence are an indication that responses to reports of RC may not be positive.³⁹³

³⁸⁸ Home Office, *Information for Local Areas on the change to the Definition of Domestic Violence and Abuse* (n 384).

³⁸⁹ Ibid.

³⁹⁰ Voce and Boxall (n 106) 13.

³⁹¹ Meyer (n 107) 271; Douglas (n 6).

³⁹² NSW Bureau of Crime Statistics and Research (n 109) 1.

³⁹³ Walkate and Fitz-Gibbon (n 81)103.

Healthcare professionals who serve as frontline contacts of victims of DV play a crucial role. Through their awareness and responses, they may help to educate patients on DV prevention. Screening patients for RC is an opportunity to offer education on RC strategies, prevention, and the avenues through which patients can safely seek escape from abusive relationships. Where the healthcare professional can gain the patient's trust, it becomes easier to enlighten the patient on the way RC works as a form of DV, in a non-judgmental and supportive arena. Unfortunately, there is very little guidance available for healthcare professionals on how to respond to patients experiencing RC.

Not much data is available on the average response to RC in Australia's healthcare setting. The available data comes from research conducted in Victoria and cannot constitute a fair representation of healthcare responses in Australia. This demonstrates the need for wider research and discussions into healthcare responses across the country. In 2018, a survey of 24 clinicians across various clinical settings across Australia highlighted the dismal prospects regarding the proper understanding and response to RC in clinical settings.³⁹⁴ Several participants admitted that RC was 'not in the frame' because they had no proper understanding of RC and were not well-equipped to provide better care to their patients.

A second survey conducted in a large hospital in Victoria revealed the lack of a unified understanding of RC among the clinicians, and the need for a multidisciplinary approach.³⁹⁵ Results showed that health practitioners were aware of RC and could properly pinpoint intent as the key aspect of RC, but, among social workers and counselors, there was no shared understanding and language around RC incidents. This was projected as a possible hindrance to a

³⁹⁴ Hegarty and Tarzia (n 16).

³⁹⁵ Tarzia et al (n 2).

multidisciplinary approach.³⁹⁶ The surveys revealed that victims of RC not only require a broad range of services within the healthcare sector: medical services, counselling, social services, but that there must be proper coordination across those services to prevent a difference in results and outcomes among patients.

While the above surveys do not properly represent the overall healthcare response to RC in Australia, the results highlight the need for policies/best practice guidelines for RC. Clear policies and guidelines make it possible to follow a uniform procedure when dealing with victims. A lot more research needs to be conducted within the healthcare sector to properly determine the most efficient approach to RC. It is suggested that a national healthcare professional training program be developed in conjunction with medical colleges and service providers so there is a coordinated approach to RC risk assessment and trauma-informed responses.³⁹⁷

Responses of Frontline Responders under the UK's DV Policy

The change to the DV definition under the Home Office Policy mandated practitioners to utilise the broader definition when screening victims for DV.³⁹⁸ There was no express reference to RC, so the closest assessment of frontline officers' responses would be through their responses to coercive control complaints. In contrast with the Australian position, very little research is available on health practitioners' understanding and responses. Instead, this section will rely on

³⁹⁶ Ibid.

³⁹⁷ Hidden Forces (n 3).

³⁹⁸ Home Office, *Information for Local Areas on the change to the Definition of Domestic Violence and Abuse* (n 384).

results from two surveys examining the responses of police officers and guidelines for health practitioners responding to DV in sexual health settings.³⁹⁹

The results from a Domestic Abuse, Stalking and Harassment and Honor-based Violence study involving structured interviews with 61 police officers revealed the absence of a working knowledge of coercive control underpinning judgments of risk. This culminated in incorrect risk assessments for the threshold of intervention in certain cases despite the expansion of the national definition of DV in the UK. Often, these risk-assessments stemmed from a lack of understanding of the risks associated with non-physical abuse.⁴⁰⁰ Another study revealed a relatively fair understanding of coercive control by some police officers, with some expressing confidence in their ability to recognise the significance of coercive control and factor that knowledge into their risk assessment and decision-making regarding perpetrators and victim support. They were also conversant with the elements of coercive control. An overall assessment of both surveys would suggest that practitioners' recognition of coercive control was neither lacking nor experienced, but dependent on the circumstances of each case and the availability of information. Regarding victims presenting with cases of RC in the UK, the likelihood of police officers' understanding might be a gamble; they might either understand and identify such RC as a form of coercive control, or dismiss such reports, depending on the extend of evidence placed before them, and the association with other forms of physical violence. It is safe to say the results are indeterminate.

In the absence of surveys assessing healthcare workers' responses to RC in the UK, an examination of the guidelines published by the National Institute for Health and Care Excellence indicates that

³⁹⁹ BASHH Sexual Violence Group 'Responding to Domestic Abuse in Sexual Health Settings' (February 2016) <<https://www.bashhguidelines.org/media/1085/responding-to-domestic-abuse-in-sexual-health-settings-feb-2016-final.pdf>>.

⁴⁰⁰ N Sharp-Jeffs and L Kelly, *Domestic homicide review (DHR) case analysis* (Report for Standing Together, 2016) <http://www.standingtogether.org.uk/sites/default/files/docs/STADV_DHR_Report_Final.pdf>.

patients presenting in sexual health clinics can be subjected to case-based inquiries, where they present with questionable indicators.⁴⁰¹ Patients who disclose abuse undergo a risk assessment process and staff are trained to take action depending on their risk category.⁴⁰²

The results of the Australian surveys paint a picture where practitioners are lost and struggling to address RC incidents, while in the UK, practitioners' understandings are imperfect, yet more developed. The reason for Australian responses is the absence of clear policy capable of informing guidelines, while in the UK, the presence of policy aids responses. The Australian position is worsened by the lack of legislation which recognises coercive control adequately enough to inform policy changes. With the draft 2022-2032 National Plan recognising coercive control, it is hoped that at least one action point from the final National Plan will be the creation of a national policy/strategy addressing coercive control; one which not only sets up a national definition of coercive control, with clear examples of the abusive behaviour, but one which also sets up a foundation for guidelines which frontline responders can follow in their responses to RC victims.

Assessing Community Responses to RC in Australia and the UK

Education is a valuable tool for the promotion of awareness regarding the impacts of DV in any contemporary society. One of the forms of primary prevention of DV involves a transformation of the values, structures, and norms that promote gender inequality. These include the condoning of violence against women; men's control of decision-making within the family unit, including women's reproductive autonomy; seemingly inflexible gender roles and gender stereotypes; and a

⁴⁰¹ These may include unexplained injuries or depression. There will also be targeted inquiries for specific categories of patients, like those under 18 and migrants, among others. See National Institute for Health and Care Excellence, 'Domestic violence and abuse: multi-agency working' (Public health guideline, 24 February 2014) <<https://www.nice.org.uk/guidance/ph50/chapter/1-Recommendations#recommendation-15-provide-specific-training-for-health-and-social-care-professionals-in-how-to>>.

⁴⁰² BASHH Sexual Violence Group (n 396).

perception of masculinity characterized by aggression and disrespect for women.⁴⁰³ There is currently little awareness of RC within Australian communities, despite its high occurrence.⁴⁰⁴ This reveals a gap in awareness-generation on RC, with greater awareness generated on other forms of DV in general.⁴⁰⁵

Although this chapter focuses on the respectful relationships curricula, it is important to educate the entire population, because the prevention of RC requires intergenerational effort.⁴⁰⁶ Community education on the harms caused by the values and ideas promoting gender inequality can result in a change in attitudes and a better understanding of women's rights. In Australia, the 2017 NCAS Survey showed positive shifts in people's understanding of DFV compared to the 2013 NCAS Survey. In particular, young people showed an improved understanding of the different forms of violence against women, with more respondents endorsing gender equality. For this reason, recommendations in Chapter Six will consider community education initiatives that should be implemented.

The Role of Education in Community Awareness

Schools play a significant role in educating children and young people about gender-based violence. Recent research shows that young people are more vulnerable to DV as they are unaware

⁴⁰³ Monica Puccetti et al, 'Exploring Readiness for Change: Knowledge and Attitudes towards Family Violence among Community Members and Service Providers Engaged in Primary Prevention in Regional Australia' (2019) 16 (21) *International journal of environmental research and public health* doi:10.3390/ijerph16214215/.

⁴⁰⁴ Hilary Freeman, 'Reproductive coercion is abuse. But many women don't even know it' *The Guardian* (online at 1 January 2022) <<https://www.theguardian.com/commentisfree/2019/jan/09/reproductive-coercion-abuse-women-control-choices>>; Ashleigh Stevenson, 'Reproductive coercion affects one in three female domestic violence victims, study shows' *ABC News* (online at 1 January 2022) <<https://www.abc.net.au/news/2019-06-24/reproductive-coercion-affecting-domestic-violence-survivors/11223778>>.

⁴⁰⁵ Department of Social Services *Reducing violence against women and their children: Research informing the development of a national campaign* (Australian Government, November 2015) <https://www.dss.gov.au/sites/default/files/documents/11_2015/dss_violence_against_women_public_report.pdf

⁴⁰⁶ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6862075/>.

of the appropriate boundaries to be drawn in relationships.⁴⁰⁷ It is therefore crucial to develop their understanding on the importance of consent in relationships, and to equip them with the skills required to respond assertively to protect their personal boundaries and standards.⁴⁰⁸

Australia's Respect Matters curriculum aims to support teachers to address respectful relationships and consent education across the country.⁴⁰⁹ An evaluation of this education program which was rolled out in primary and secondary schools in 2016 showed clear, consistent and positive impacts on student's attitudes, knowledge and skills and the beginnings of change in school policies, culture and ethos.⁴¹⁰ The Health and Physical Education curriculum is the main curriculum area addressing respectful relationships education. It includes content about respectful relationships and consent, including negotiating consent, managing relationships online and offline, and dealing with an imbalance of power.⁴¹¹ The curriculum teaches students the harm of relationship dynamics where coercion, intimidation and manipulation lead to non-consensual or abusive behaviour.⁴¹² Positive practices are taught in relation to their reproductive and sexual health which includes aspects associated with sexual consent. Communication skills needed to navigate relationship dynamics are also taught. While the curriculum does not address RC, these lessons can better equip

⁴⁰⁷ Silke Meyer, Ellen Reeves and Kate Fitz-Gibbon, 'The intergenerational transmission of family violence: Mothers' perceptions of children's experiences and use of violence in the home' (2021) 26(3) *Journal of Child and Family Social Work* 476-484 <https://doi.org/10.1111/cfs.12830>.

⁴⁰⁸ Department of Education and Training, 'Department program: Respectful Relationships' State of Victoria <<https://www.education.vic.gov.au/about/programs/Pages/respectfulrelationships.aspx>>.

⁴⁰⁹ Australian Curriculum, 'Curriculum Connections: Respect Matters' <<https://www.australiancurriculum.edu.au/resources/curriculum-connections/portfolios/respect-matters/>>.

⁴¹⁰ Our Watch and Victoria State Government, *Respectful Relationships Education In Schools: The Beginnings of Change* (Final Evaluation Report, February 2016) <https://media-cdn.ourwatch.org.au/wp-content/uploads/sites/2/2019/06/24034138/RREiS_R3_Final_AA.pdf>; Alison Branley, 'Young people don't understand how texting can turn ugly, report says' *ABC News* (online at 1 January 2022) <<https://www.abc.net.au/news/2019-05-22/young-people-do-not-understand-texting-can-be-abuse-report-finds/11133602?nw=0>>.

⁴¹¹ Australian Curriculum, 'Curriculum Connections: Respect Matters (n 406).

⁴¹² Amanda Keddie and Debbie Ollis, 'Let's make it mandatory to teach respectful relationships in every Australian school' *The Conversation* (Blog Post, 28 May 2019) <<https://theconversation.com/lets-make-it-mandatory-to-teach-respectful-relationships-in-every-australian-school-117659>>;

students in their responses. The major challenge lies in the decentralised adoption of the curricula in Australian states and territories.

Respectful Relationships Education in Australian states and territories

Although Respectful Relationships Education ('RRE') is recommended as part of the Australian education curricula, each State and Territory takes a different approach. The States with the most comprehensive programs are NSW, Victoria and Queensland.⁴¹³ The curricula is taught across a range of students, depending on the State, with focus on proper guidance with regard to respectful relationships.⁴¹⁴ The NSW syllabus references issues of DV explicitly, with the aim of providing schools with 'a significant platform for helping young people identify, report and protect themselves and others from abuse', though no reference is made to coercive control or RC.⁴¹⁵ Victoria takes a laudable 'whole school approach' because it involves the incorporation of the curriculum in the social, physical, cultural and spiritual environment of schools.⁴¹⁶ The Victorian Curriculum is taught in all government and Catholic schools and in several independent schools.⁴¹⁷ The Queensland program runs up until Year 12, to be delivered as part of the schools' pastoral

⁴¹³ Personal Development, Health and Education ('PDHPE') syllabus (NSW); the Resilience, Rights and Respectful Relationships curriculum (Vic); and the Respectful Relationships Education Program (Qld).

⁴¹⁴ Board of Studies, Teaching and Educational Standards NSW, 'PDHPE teacher toolkit for implementing content relating to the prevention of domestic violence' <<https://educationstandards.nsw.edu.au/wps/wcm/connect/20b46bd0-8f56-4d34-ba6f-864dc6854bcc/PDHPE-teacher-toolkit-prevention-domestic-violence.pdf?MOD=AJPERES&CVID>>.

⁴¹⁵ Eamonn Duff, 'How a 14-year old domestic violence sufferer changed the NSW Department of Education school syllabus' *The Sydney Morning Herald* (online at 13 March 2021) <<https://www.smh.com.au/national/nsw/how-a-14-year-old-domestic-violence-sufferer-changed-the-nsw-department-of-education-school-syllabus-20150702-gi3udq.html>>.

⁴¹⁶ The Education State, 'Respectful Relationships: A Resource Kit For Victorian Schools' *State Government of Victoria* <<http://fuse.education.vic.gov.au/Resource/Download?objectId=cfee82ef-67f8-488c-a167-52759afda882&SearchScope=All>>.

⁴¹⁷ *Ibid*.

care.⁴¹⁸ While Victoria and Queensland have made the curriculum compulsory in public schools, in NSW it is mandatory in both public and private schools.⁴¹⁹

RRE in WA, NT and SA are not compulsory. WA relies on the ‘Youth Say No!’ campaign where teachers are able to use the online teaching resources made available on their own inclination.⁴²⁰

This will undoubtedly leave room for a varied teaching of respectful relationships within the State.⁴²¹ The NT position is similar. While the Social and Emotional Learning (‘NT SEL’) is

geared towards Early Years-Year 12 students, it is not compulsory for schools if they are confident that their current program meets the needs of their students. From the perspective of primary prevention, this is problematic, as there is no yardstick for determining whether schools are meeting the needs of their students.⁴²² SA implements two mediums which are useful in spreading

awareness regarding respectful relationships. The first is a statewide scheme organised in conjunction Sexual Health Information Networking and Information (‘SHine SA’) which supports the implementation of a whole-of-school approach to relationships and sexual health education.⁴²³

The other medium is the ‘Keeping Safe: Child Protection Curriculum’ applicable to children and young persons ranging from age 3 to year 12 and designed to help develop mentally appropriate

⁴¹⁸ Queensland Curriculum and Assessment Authority, ‘F-10 Australian Curriculum Health and Physical Education: Australian Curriculum Health and Physical Education’ Queensland Government <<https://www.qcaa.qld.edu.au/p-10/aciq/learning-areas/health-and-physical-education/australian-curriculum>>;

⁴¹⁹ Neelima Choahan, ‘Push to make sexual consent education compulsory in Australian curriculum to stem assaults’ *ABC News* (online at 1 January 2022) <<https://www.abc.net.au/news/2021-09-17/consent-education-australian-curriculum-teach-us-consent/100449910>>.

⁴²⁰ School Governance, ‘More States roll out domestic violence resources for schools in time for White Ribbon Day’ (Web Page, 26 November 2015) <<https://www.schoolgovernance.net.au/news/2015/11/26/more-states-roll-out-domestic-violence-resources-for-schools-in-time-for-white-ribbon-day>>.

⁴²¹ Government of Western Australia, ‘Culture of respect key to breaking the cycle of domestic violence’ (Media Release, 24 March 2019); Western Australia, ‘Responsible Government: Respectful Relationships Teaching Support’ (Fourth Action Plan actions) <<https://plan4womenssafety.dss.gov.au/initiative/respectful-relationships-teaching-support-program/>>.

⁴²² Department of Education, ‘NT Social and Emotional Learning: Northern Territory Social and Emotional Learning (NT SEL)’ *NT Government* <<https://education.nt.gov.au/support-for-teachers/nt-social-and-emotional-learning>>.

⁴²³ Shine SA, ‘Sexual Health and Relationship Wellbeing’ (Web Page) <<https://shinesa.org.au/>>.

strategies to keep students safe.⁴²⁴ Focus is placed on themes such as assessing the health of relationships, rights, responsibilities and power dynamics in relationships, sexual abuse, sexual harassment and sexual consent, privacy, types of abuse and dating violence, and etcetera.⁴²⁵ Comprehensive as these programs may be, they are not mandatory. Meanwhile, in Tasmania and the ACT, there is no indication whether their curricula are mandatory. Tasmania maintains a whole-of-system approach towards RRE, drawing on resources from both Victoria and WA.⁴²⁶ The ACT relies on the Australian Curriculum: Health and Physical Education already discussed earlier.⁴²⁷

Assessing the overall response to RC in the Australian education sector

A few points are worth noting with regard to the respectful relationships curricula in all states and territories. The first relates to the recommended definition of DV. Where a State or Territory curriculum defines DV, it is either based on a definition in its DV legislation, which does not recognise RC, or the one used in the syllabi make no reference to RC. At best, such a definition would reference behaviour which is coercive or controlling.⁴²⁸ While these definitions are useful, they do not properly capture RC for the purpose of education as a tool in primary prevention. Currently, the possibility of learning about RC would rest with the teachers who may venture outside the scope of resources provided by states and territories to give students comprehensive training. Until the definition of RC is entrenched in legislation, it may be difficult for educators to

⁴²⁴ Department for Education ‘Keeping Safe: Child Protection Curriculum’ *Government of South Australia* <<https://kscpc.kineoportal.com.au/>>.

⁴²⁵ Ibid.

⁴²⁶ Tasmanian Government ‘Teaching and Learning: Respectful Relationships’ <<https://respectfulrelationships.education.tas.gov.au/teaching-and-learning/>>.

⁴²⁷ ACT Government, ‘Respectful Relationships Education’ <<https://www.education.act.gov.au/schooling/resources-for-teachers/respectful-relationships-education>>.

⁴²⁸ Tasmanian Government, ‘Safe Homes Families Communities Tasmania’s Action Plan For Family And Sexual Violence 2019-2022’ <https://www.communities.tas.gov.au/_data/assets/pdf_file/0030/133599/Safe_Homes_Families_Communities_Tasmanias_action_plan_for_famly_and_sexual_violence_WCAG_27_June_V1.pdf>.

incorporate a comprehensive definition of DV into the curricula. However, as States have the discretion to design their curricula, various forms of DV, including RC, can be included and addressed before legal reform commences.

It also appears that the bulk of the responsibility rests on the teachers, who are expected to be trained by the schools, and rely on additional resources and support. However, these resources are simply a guide. Whether there would be an in-depth exploration of the forms of DV – i.e., signs of abuse and violence, ways to respond to violence, either as a victim or a witness in class teachings – is dependent on the teacher. To a large extent, the teacher’s individual views play a major role in determining the translation of the curriculum into real-life lessons for students. This means there will continue to be several external factors that influence teaching in schools. Such factors include cultural, religious and societal perceptions towards RC. This illustrates the need for greater community education and social advocacy, as both eventually impact the education sector, even if indirectly.⁴²⁹

In general terms, it is fair to say all Australian states and territories are taking steps towards incorporating RRE. Schools, teachers and students appear to have generally embraced it, particularly where mandatory. The results of the NCAS Survey are a clear indication of the efficacy of RRE in the transformation of community values regarding issues of violence against women. It recorded that between 2013 and 2017, the average score for Australians on the measure of understanding of violence against women increased from 64 to 70; while the score for attitudinal

⁴²⁹The Association of Independent Schools of NSW also has policies in place which guides staff on their duties regarding the safety, welfare or wellbeing concerns for children and young people that arise from or during the course of their work. The Association provides a broad range of support to staff of independent schools, including professional development, investigations, reporting and compliance with various government regulations; see Association of Independent Schools of NSW, ‘Whole-School Wellbeing’ *AISNSW* (Web Page) <<https://www.aisnsw.edu.au/teachers-and-staff/supporting-students/wellbeing>>.

support for gender equality increased from 64 to 66.⁴³⁰ It is possible that these results were achieved partly because of the incorporation of RRE into the Australian curriculum.⁴³¹

The improvement in community attitudes aside, it remains a question, whether the curricula discussed above properly captures DV, let alone RC. On the one hand, most of the curricula offer an inadequate definition of DV. On the other hand, as evidenced from the survey of women who had experienced RC, a definition may not be as important as the knowledge of what actions constitute abusive behaviour.⁴³² A few of the curricula, for example, the NSW and Victorian curricula, include numerous activities designed to help children and young persons properly understand and identify abusive behaviour.⁴³³ The inclusion of a proper definition of RC will be useful but inadequate if individuals lack an understanding of how it could be perpetrated. Therefore, a proper definition of RC and well-designed educational activities, which illustrate abusive behaviour to watch out for, are necessary. There is not enough societal awareness of RC to guarantee that educators are taking it into proper consideration when designing the curricula. Currently, sole optimism lies in the fact that any understanding drawn from illustrations/descriptions of coercive control may assist with the identification of RC when it occurs.

⁴³⁰NCAS Summary Report, 'Are we there yet? Australians' attitudes towards violence against women & gender equality' *ANROWS* https://ncas.anrows.org.au/wp-content/uploads/2019/04/300419_NCAS_Summary_Report.pdf.

⁴³¹ Ibid.

⁴³² Douglas, Sheeran and Tarzia (n 362).

⁴³³ Department of Education and Early Childhood Development, 'Respectful Relationships Education: Violence prevention and respectful relationships education in Victorian secondary schools' (State of Victoria, November 2009) <<https://www.partnersinprevention.org.au/wp-content/uploads/Respectful-Relationships-Education-Violence-prevention-and-respectful-relationships-education-in-Victorian-secondary-schools.pdf>>; The Education State, 'Respectful Relationships A Resource Kit For Victorian Schools' (State of Victoria) <<https://www.bethany.org.au/wp-content/uploads/2019/07/respectfulrelationshipsresourceakitforvictorianschools.pdf>>; NSW Government, Education Standards Authority, 'NSW Syllabus for the Australian Curriculum - Personal Development, Health and Physical Education K-10 Syllabus 2018' <<https://educationstandards.nsw.edu.au/wps/portal/nesa/k-10/learning-areas/pdhpe/pdhpe-k-10-2018>>; NSW Government, Education Standards Authority, 'PDHPE Teacher Toolkit: Prevention of Domestic Violence' <https://www.boardofstudies.nsw.edu.au/syllabus_sc/domestic-violence-prevention.html>.

Fundamentally, including RC in RRE is not a panacea and teaching the curriculum is not without its challenges. As a lot of responsibility lies with the teachers, they need to carefully avoid misinformation surrounding the curriculum. Moreover, while several States adopt a whole-of-school approach, it would require extensive support and resources to implement the curriculum in that manner. States need to ensure that adequate funding is provided to support schools' efforts.⁴³⁴

The UK's Approach to Respectful Relationships Education

To raise awareness of all forms of abuse, including coercive control, the British Department for Education made relationship education mandatory in all schools from September 2020.⁴³⁵ Relationships education is compulsory in all primary schools in England while relationships and sex education is compulsory in all secondary schools. The Department for Education arrived at the curriculum following a consultation process which involved responses from parents, young people, schools, and experts. Under the statutory guidance the curriculum is mandatory and a whole-of-school approach is required; involving anyone associated with the school system.⁴³⁶ Every school is also required to have an up-to-date policy for the teaching of mandatory subjects, published on the school website. A typical policy would include: the definition of relationship and/or sex education; set out the subject content; mode of teaching; details of content/scheme of work and when each topic is taught; taking account of the age of pupils; the individual responsible to teach

⁴³⁴ Keddie and Ollis (n 409).

White Ribbon Australia, *Breaking the Silence: NSW Curriculum Review* (30 November 2018) <<https://www.abc.net.au/news/2021-09-17/consent-education-australian-curriculum-teach-us-consent/100449910>>.

⁴³⁵ 'Coercive control: what is this compulsory school subject in the UK and how does it help young people to get rid of a 'toxic' relationship?' *Digismak* (Web Page, 17 November 2020) <<https://digismak.com/coercive-control-what-is-this-compulsory-school-subject-in-the-uk-and-how-does-it-help-young-people-to-get-rid-of-a-toxic-relationship/>>.

⁴³⁶ Department of Education, 'Relationships Education, Relationships and Sex Education (RSE) and Health Education: Statutory guidance for governing bodies, proprietors, head teachers, principals, senior leadership teams, teachers' *UK Government* 11

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1019542/Relationships_Education_Relationships_and_Sex_Education_RSE_and_Health_Education.pdf>.

the subjects; how the policy has been produced; and how it will be kept under review in consultation with parents.⁴³⁷

Looking at the British curriculum, the impact of legislation is clear. Considering the *Serious Crime Act* s 76, coercive control is one of the harmful behaviours which must be addressed under the curriculum. When the students are taught the forms of DV and the definition does not include RC, several elements of sexual and reproductive health education which are taught broadly cover RC-related education such as: facts about reproductive health, including fertility; the range of strategies for identifying and managing sexual pressure; consent to sexual intimacy and contraceptive choices; facts around pregnancy; pregnancy choices and access to confidential sexual and reproductive health advice and treatment.⁴³⁸ In addition, free resources are available online to teach young adults the forms of coercive control. One example is the five-part drama created by BBC Teach, which depicts the evolution of coercive control in a relationship between two young people, after which students are asked to analyse each part and share their thoughts.⁴³⁹

Outside England, other countries within the UK have adopted similar approaches. In Northern Ireland, students are taught similar content under the Learning for Life and Work curriculum.⁴⁴⁰ In Scotland, the Health and Wellbeing curriculum teaches on relationships, sexual health and parenthood so that students recognise the power dynamics that exist within relationships and know how to seek legal and social support for their protection.⁴⁴¹ In Wales, the Health and Wellbeing

⁴³⁷ Ibid 11-2.

⁴³⁸ Department of Education, 'Relationships Education, Relationships and Sex Education' (n 436) 29.

⁴³⁹ Department of Education, 'Relationships Education, Relationships and Sex Education' (n 436) 17.

⁴⁴⁰ Anna Freud National Centre for Children and Families, 'Coercive Control Lesson Plan' *Mentally Healthy Schools* (Web Page) <<https://www.mentallyhealthyschools.org.uk/resources/coercive-control-lesson-plan/>>.

⁴⁴¹ Ibid.

curriculum teaches students to consider the role of safety in relationships as well as how to identify and respond in threatening situations.⁴⁴²

By way of a comparative analysis, it is possible to conclude that the British approach is more coordinated than the Australian approach. In fairness to Australia where the federal system of government means that states and territories exercise more autonomy, the UK has a more centralised system of administration. In the UK, it is easier to implement the teaching of the curriculum since the requirement for the publication of each school's policy imposes accountability, first to the Department for Education, and thereafter, students, parents, and other stakeholders.⁴⁴³ In addition, by creating a curriculum based on public consultation and community engagement, awareness is being generated, not only within the education sector but also within the community. Another advantage of the UK approach is the ability to control the direction of relationship and sex education. In religious schools, for example, faith perspectives may be taught from the distinctive beliefs of that religion, provided balanced debates are entertained regarding issues that are seen as contentious.⁴⁴⁴ In this regard, there is sensitivity towards sacred beliefs in each religion but there is room for knowledge regarding the exercise of legally recognised rights. This presents as a win-win situation.

Finally, and most importantly, the advancement in UK legislation is reflected in the curriculum design, as coercive control is included in the range of abusive acts which students are taught to identify and avoid. Although RC is not included, the benefit of having a comprehensive definition of coercive control in legislation along with clear examples cannot be overemphasised. Since the curriculum reflects legislation, students are well-placed to protect themselves from being victims

⁴⁴² Ibid.

⁴⁴³ Department of Education, 'Relationships Education, Relationships and Sex Education' (n 433) 11.

⁴⁴⁴ Department of Education, 'Relationships Education, Relationships and Sex Education' (n 433) 12.

of RC, while potential perpetrators also learn the harmful effects of such abusive behaviour. Although Australia operates a federal system, the UK approach is still workable in several respects; states and territories have the autonomy to design the curriculum and can incorporate teaching on subtle forms of DV, including RC. In addition, following the exploration of gaps in Australia's legal regime addressing DV, future reform can be applied to the curriculum to further encourage a whole-of-system approach.

Conclusion

Like the position in Australia, it is clear that in the UK, there are still challenges in reaching a proper understanding of coercive control among frontline responders. In both countries, more awareness, education and training spanning various sectors is required. However, in terms of having a foundation for a better understanding of RC, the UK is better set-up, as there is a national DV definition and legislation which incorporates coercive control that can accommodate RC. This national definition has been included in the education curriculum and guidelines for frontline responders, and in this manner, the UK is ahead of Australia. Given the federal system of government in Australia and pending the development of the 2022-2032 National Plan addressing these gaps, the best approach would be for states and territories to carefully consider incorporating a broader definition of DV into their respective policies addressing violence against women. This may go a long way if accompanied with realistic action plans that are effectively implemented.

CHAPTER SIX

RECOMMENDATIONS AND CONCLUSION

Considering current legal and societal responses to RC in Australia and the UK, it is clear what acts constitute RC, and how those acts intersect with other forms of DV. It is also evident that RC impacts victims negatively, with ripple effects on the family unit, community, and the economy. Huge gaps exist in current responses, including the failure to properly recognise and acknowledge RC, either as a form of DV or sexual violence against women. The lack of a uniform definition of RC or its express prohibition in Australian legislation is also a gaping hole in legal responses. As highlighted in Chapter Two, the inadequate definitions of consent in sexual offences legislation that fail to properly capture the modern-day intricacies of consent contribute to the grey areas regarding stealthing as a form of contraceptive sabotage.

Other gaps exist in the delay in efficiently legislating against coercive control and/or effectively implementing current DV legislation referencing coercive control. There also exists a lack of a cohesive national DV policy that addresses coercive control, and a lack of clear guidelines for responses to RC in the healthcare sector. In the education sector, the disjointed approach to the respectful relationships curricula across Australia promotes the prevailing community ignorance, which is associated with poor judicial and law enforcement responses. Finally, adherence to certain social and cultural norms implicitly contributes to the occurrence of RC. Combined, these factors contribute to the inadequate responses to RC in Australia. To close these gaps, deliberate steps must be taken to promote education across various sectors, while pursuing legislative reform. This Chapter will make recommendations for three broad areas: legal reform; review of the respectful

relationships' curricula; community education; and training for frontline responders, namely, healthcare workers and law enforcement officers.

As most healthcare workers feel ill-equipped to identify and respond to RC, establishing national policies which serve as guidelines and enable clinicians to approach cases with confidence, would improve service delivery. In addition, police responses may be improved where they are properly trained and equipped with policy and guidelines on appropriate responses to RC. An effective national policy should provide a comprehensive definition of DV which includes RC; develop evidence-based guidelines for health and support workers to recognise all forms of DV, (including RC); and conduct a proper risk-assessment while implementing trauma-informed responses.⁴⁴⁵ In the event that a policy is designed to address sexual and reproductive health, such a policy should also include RC so that there is room for victims to have their specific needs catered to by service providers. It is also important for national policy to simplify access to contraception which is less prone to detection and tampering, and pregnancy testing in DV settings. At the very least, a national definition of DV which includes coercive control may inform policy and aid in risk assessment and management frameworks for a better recognition of coercive control, just as in the UK.⁴⁴⁶

⁴⁴⁵ Australia's National Research Organisation for Women's Safety (n 80) 7.

⁴⁴⁶ Australian Women Against Violence Alliance, *Criminalisation of Coercive Control* (Issues Paper, January 2021) <https://awava.org.au/wp-content/uploads/2021/01/FINAL_-2021_-AWAVA-Issues-Paper-Criminalisation-of-Coercive-Control.pdf> ('AWAVA Issues Paper').

Recommendations for Legal Reform

Several layers of legal reform must occur to properly tackle RC, as it not only has the effect of prohibiting specific behaviour but can also serve as a veritable tool for guidance and enlightenment within the community.⁴⁴⁷

Recognition of RC as a form of DV

Until legally recognised, other recommendations regarding RC, where implemented, would only be partially effective. It is important for RC to be recognised as a form of DV in Australia because of its broad-reaching effects, including its potential inclusion as a form of DV in the respectful relationships curricula. When students are currently taught the DV module, the forms of DV which are discussed are those prohibited by law.⁴⁴⁸ It is possible that some proactive teachers may touch on aspects of RC, but they are not duty-bound. Similarly, law enforcement officers are not bound to take action against incidents not recognised under law or policy. The exception would be where they interpret reported cases of RC as coercive control, which is referenced under DV legislation. This likelihood would be largely dependent on their awareness.

⁴⁴⁷ Kenworthy Bilz and Janaice Nadler, 'Law, Moral Attitudes, and Behavioral Change' in Eyal Zamir and Doron Teichman (eds) *The Oxford Handbook of Behavioural Economics and the Law* (Oxford University Press, 2014); Douglas (n 142).

⁴⁴⁸ Some examples include: Department of Education and Early Childhood Development, 'Respectful Relationships Education: Violence prevention and respectful relationships education in Victorian secondary schools' (State of Victoria, November 2009) <<https://www.partnersinprevention.org.au/wp-content/uploads/Respectful-Relationships-Education-Violence-prevention-and-respectful-relationships-education-in-Victorian-secondary-schools.pdf>>; The Education State, 'Respectful Relationships A Resource Kit For Victorian Schools' (State of Victoria)<<https://www.bethany.org.au/wp-content/uploads/2019/07/respectfulrelationshipsresourcekitforvictorianschools.pdf>>; NSW Government, Education Standards Authority, 'NSW Syllabus for the Australian Curriculum - Personal Development, Health and Physical Education K-10 Syllabus 2018' <<https://educationstandards.nsw.edu.au/wps/portal/nesa/k-10/learning-areas/pdhpe/pdhpe-k-10-2018>>; NSW Government, Education Standards Authority, 'PDHPE Teacher Toolkit: Prevention of Domestic Violence' <https://www.boardofstudies.nsw.edu.au/syllabus_sc/domestic-violence-prevention.html>.

Given the trajectory of legal reform in Australia, it would be premature to recommend legal reform which expressly outlaws RC. This is judging by the slow uptake of the legal recognition of coercive control, and conflicted debates regarding its criminalisation.⁴⁴⁹ Pending an appropriate time for the criminalisation of coercive control, the practical option is the express inclusion of RC in DV definitions or examples of abusive behaviour outlined in legislation. This would work best with a definition of RC in the interpretation section of the relevant legislation. Alternatively, a broad reference to RC, like references to coercive control in DV legislation might suffice. For instance, where *Family Law Act 1975* (Cth) s 4AB prohibits behaviour that coerces or controls another, the Act may also refer to interference with an individual's reproductive rights.⁴⁵⁰ Ideally, any reference to RC in legislation would be broad enough to capture most examples of RC, but specific enough to prevent an over proscription.

Following the assessment of DV and sexual offences legislation in Chapter Two, nothing prevents a victim from applying for a protection order on grounds of RC. The complainant may have to be strategic enough to avoid using terms not yet legally recognised, such as 'reproductive coercion', but framing the forms of abuse experienced using the language of existing legislation may suffice. Again, the possibility of this happening, and the results of such an application would be dependent on the level of awareness of all parties involved: the complainant, service providers, law enforcement officers, legal practitioners, and judicial officers. This is why education cannot be overemphasised.

⁴⁴⁹ Walkate and Fitz-Gibbon (n 81); Taylor and Marshall (n 152); AWAVA Issues Paper (n 446).

⁴⁵⁰ For an efficient interpretation and implementation of that law, the term 'reproductive rights' would have to be defined as well.

The Creation of a Separate Offence of Coercive Control/ the Improved Implementation of Existing Domestic Violence Legislation

Given the slow recognition of RC as a separate form of DV and the current legislative terrain, the more practical option might be the criminalisation of coercive control, under which RC can be categorised. This has been the subject of much debate among family violence experts and legal scholars.⁴⁵¹ Some arguments in favour are that it would trigger a change in the legal system, placing the spotlight on DV as a pattern of abuse rather than an isolated incident.⁴⁵² It would also improve community awareness and increase perpetrator accountability, providing a more powerful and direct legal path for victim-survivors by circumventing the bureaucracy involved in obtaining a protective order.⁴⁵³ Notwithstanding this advantage, legal scholars have highlighted the potential for superficial legislation, stating that any law which criminalises coercive control would be met with the usual challenges associated with DV law. This includes hesitant victims, inadequately trained police officers, evidentiary difficulties, and the risk that perpetrators may manipulate court systems to extend their abuse of the victim, or worse still, that victims may be misidentified as the perpetrators.⁴⁵⁴ Combined, these factors may mean that the criminalisation of coercive control would be merely symbolic and ineffective.⁴⁵⁵

⁴⁵¹ Kate Fitz-Gibbon, Sandra Walklate and Silke Meyer, 'Australia is not ready to criminalise coercive control — here's why' *The Conversation* (Blog Post, 1 October 2020) <<https://theconversation.com/australia-is-not-ready-to-criminalise-coercive-control-heres-why-146929>>; Kate Fitz-Gibbon, Jude McCulloch and Sandra Walklate, 'Australia should be cautious about introducing laws on coercive control to stem domestic violence' *The Conversation* (Blog Post, 27 November 2017) <<https://theconversation.com/australia-should-be-cautious-about-introducing-laws-on-coercive-control-to-stem-domestic-violence-87579>>; Douglas (n 142).

⁴⁵² AWAVA Issues Paper (n 446).

⁴⁵³ Sally Brooks, 'Sara wants Victoria to criminalise coercive control, but family violence and legal experts are split on the issue', *ABC News* (online at 15 June 2021) <<https://www.abc.net.au/news/2021-06-15/coercive-control-debate-under-a-spotlight-in-victoria/100183492>>.

⁴⁵⁴ Gleeson (n 83); Fitz-Gibbon, McCulloch and Walklate (n 451).

⁴⁵⁵ Fitz-Gibbon, McCulloch and Walklate (n 451).

For efficacy, the proper criminalisation of coercive control would require a whole-of-system approach to strengthen its implementation. This would involve a thorough consultation to understand victims' lived experiences and needs, alongside a considerable program of education and mandatory training for frontline responders and service providers to ensure effective management of reported cases.⁴⁵⁶ It would be remiss to simply recommend the criminalisation of coercive control in isolation of wider social and cultural structural factors, including the need for system reforms and adequate resourcing to specialist women's and family services.⁴⁵⁷ There is an important role for criminal justice responses to coercive control which is worth exploring, including the promotion of community safety and the public denunciation of coercive control.⁴⁵⁸ Some Australian States are taking steps towards the criminalisation of coercive control. After a parliamentary inquiry into coercive control, the NSW government announced plans to create a standalone criminal offence for coercive control.⁴⁵⁹ The SA and Queensland governments are also taking steps to legislate against coercive control.⁴⁶⁰

An alternative to criminalisation would be working to improve the overall justice system response to coercive control. This would work best when coercive control is expressly included in the national definition of DV, and that inclusion is adopted by all jurisdictions, at least to some degree. Establishing a shared understanding of family violence as coercive control and a better

⁴⁵⁶ Joint Select Committee on Coercive Control (n 158); Douglas (n 142).

⁴⁵⁷ Douglas (n 142); AWAVA Issues Paper (n 446).

⁴⁵⁸ Douglas (n 142).

⁴⁵⁹ Department of Communities and Justice (NSW), 'Government to criminalise coercive control' (Media Release, 18 December 2021).

⁴⁶⁰ Government of South Australia, Attorney-General's Department, 'Discussion Paper: Implementation considerations should coercive control be criminalised in South Australia' <<https://www.agd.sa.gov.au/documents/Discussion-Paper-coercive-control.pdf>> ; The Queensland Government, 'Taskforce report into coercive control to pave way for further DFV reform' (Media Release, 2 December 2021); The Queensland Government, 'Tough new domestic violence laws to tackle abuse' (Media Release, 27 October 2021).

understanding of law enforcement responses through education, training, best practices and family violence expertise in courts may be the first logical step towards closing the gap.

Updating the legal definition of Consent

As part of a wider suite of legal reforms, and dependent on the approach each State and Territory takes to prohibit contraceptive sabotage, it may be worth following the approach of the UK and adopting a broader definition of consent to align with current realities. The general rules surrounding consent should no longer be described in light of the victim's awareness that she was consenting to sexual activity, but, as the NSW amendment suggests, should be expanded to include the manner of sexual activity consented to; that is, consent to sexual activity in a certain manner does not amount to consent to sexual activity in another manner.⁴⁶¹ Already, some sexual offences legislation recognise affirmative consent. NSW, Victoria and Tasmania's adoption of the affirmative consent model, requiring a positive indication of consent, are laudable.⁴⁶² A proper definition of consent law should reflect the understanding that consent is informed, freely given, involves active affirmation, is specific to the sexual activity in question, and reversible.⁴⁶³ Currently, the English definition of consent under section 74 of the *Sexual Offences Act* is advanced enough to accommodate acts of contraceptive sabotage, and a similar, if not better approach in Australia may prove beneficial.⁴⁶⁴

⁴⁶¹ Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021 cl 61HI provides that 'A person who does not offer physical or verbal resistance to a sexual activity is not, by reason only of that fact, to be taken to consent to the sexual activity'.

⁴⁶² Rachel Burgin, 'Australian law doesn't go far enough to legislate affirmative consent. NSW now has a chance to get it right' *The Conversation* (Blog Post, 11 December 2019) <https://theconversation.com/australian-law-doesnt-go-far-enough-to-legislate-affirmative-consent-nsw-now-has-a-chance-to-get-it-right-125719>; *Criminal Code Act 1924* (Tas) s 2A(2)(a); *Crimes Act 1958* (Vic) s 36(2)(l); Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021; cls 61HI (4) and 61HJ (1)(a).

⁴⁶³ The idea of generalised consent has become redundant. Generalized consent is the notion that consent to a specific sexual activity constitutes consent to all other activities within the same sexual transaction or consent during a prior sexual transaction constitutes consent during a later sexual transaction with the same partner; see Plunkett (n 72).

⁴⁶⁴ *Serious Crimes Act* s 76.

Criminalising Stealthing

Since DV legislation does not capture casual sexual encounters where stealthing occurs, another option for the protection of unsuspecting victims may be through the criminalisation of stealthing.⁴⁶⁵ The benefits of criminalisation have been discussed in Chapter Two, and the ACT, SA, NSW and Victoria have/are already in the process of criminalising stealthing.⁴⁶⁶ In addition, based on the decision in *Diren*, stealthing may be prosecuted under the laws on fraudulent procurement of sexual relations in SA, Tasmania, WA and Victoria.⁴⁶⁷ In future legal reform, establishing a clear link between consent and the use of contraceptive devices would prevent questions about broader conditions that may arise or any allusions as to the overcriminalisation of rape.

Criminalising Contraceptive Sabotage

Beyond the criminalisation of stealthing, it might be more beneficial to criminalise contraceptive sabotage. This is because contraceptive sabotage is broader and capable of capturing more scenarios of stealthing. Since stealthing has been defined as non-consensual condom removal, there remains a grey area around the categorisation of other forms of contraceptive sabotage such as interference with the efficacy of contraceptive devices. The Victorian Law Reform Commission has recommended that consent should be deemed vitiated where an STI-prevention device or

⁴⁶⁵ In this context, DV legislation captures intimate partner relationships where ‘intimate partner’ generally refers to a spouse or former spouse; persons who share a child; and persons who are or were involved in a dating relationship. This does not include casual relationships like a one-night stand.

⁴⁶⁶ Brianna Chesser, ‘In an Australian first, stealthing is now illegal in the ACT. Could this set a precedent for the country?’ *The Conversation* (Blog Post, 12 October 2021) <https://theconversation.com/in-an-australian-first-stealthing-is-now-illegal-in-the-act-could-this-set-a-precedent-for-the-country-169629>; Tim Durnin, “‘Repugnant and disgusting act’: South Australia could become second jurisdiction to criminalise stealthing” *7News* (online at 30 January 2022) <<https://7news.com.au/politics/sa/sa-parliament-to-consider-stealthing-bill-c-4225907>>; Department of Communities and Justice, ‘Consent in relation to sexual offences’ (NSW Government) <https://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_current_projects/Consent/Consent.aspx>.

⁴⁶⁷ *Diren* (n 214); there was a detailed discussion of the case in Chapter Two.

contraceptive device, is not used or is removed without the other person's consent, despite an agreement to the contrary.⁴⁶⁸ It is uncertain whether the Bill to amend the *Crimes Act 1958* (Vic) will reflect this recommendation, but this is a sound approach similar to the Singaporean provision discussed in Chapter Two, which prohibits deception as to the use of 'any sexually protective measure'; a broad term which covers a wide range of scenarios that take place in RC.⁴⁶⁹

Recommendations for Respectful Relationships Curricula

All Australian states and territories should make the Respectful Relationships Curriculum mandatory in all Schools

As discussed in Chapter Five, although all Australian states and territories have taken steps towards incorporating respectful relationships education into their curriculum, it is only mandatory in NSW, Victoria and Queensland. Considering its importance, states and territories which have not mandated the curriculum ought to adopt a uniform approach across all schools by establishing a uniform curriculum and standardized implementation plan to set minimum expectations for the education of all young Australians, regardless of where they live. Where a uniform curriculum is unachievable, a 'best-practice' approach which establishes a minimum standard for respectful relationships education across the country may be adopted. The current position which allows an optional approach to the teaching of sex education has led to varied degrees of enlightenment; a situation bound to delay the education necessary to bring change.⁴⁷⁰

⁴⁶⁸ Victoria Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report, September 2021).

⁴⁶⁹ Zamira Rahim, "'Stealth'ing": Singapore set to jail or cane people who remove condom during sex without consent' *Independent* (online at 16 February 2021)

<<https://www.independent.co.uk/news/world/asia/singapore-stealth-sex-illegal-criminal-law-reform-bill-penal-code-a8782456.html>>. See *Criminal Law Reform Act 2019* (Singapore) s 376H; Wei and Wei (n 187).

⁴⁷⁰ Lauren Roberts, 'Push to introduce mandatory, unified sexual consent lessons in Australian schools' *ABC News* (online at 30 January 2022) <<https://www.abc.net.au/news/2020-02-29/australian-schools-on-how-they-teach-kids-consent/11969964#AustralianState1>>.

Furthermore, there is no guarantee that enforcing respectful relationships education in one State/Territory will protect its inhabitants from harmful ideologies or understandings possessed by an individual educated in another State/Territory. Implementing a uniform respectful relationships curriculum will reinforce the efficacy of education as a tool for the primary prevention DV.⁴⁷¹ In addition, schools need more funding to establish the framework for the efficient implementation of the curriculum, particularly where the State/Territory adopts a whole-of-school approach towards respectful relationships education. This includes funding for the training and professional development of all school staff and access to support services that provide assistance with schools' program and staff needs.⁴⁷²

All Australian states and territories should extend the scope of their Respectful Relationships Curricula to include Reproductive Coercion

Results from NCAS results indicate the efficacy of respectful relationships education in the transformation of community values regarding violence against women.⁴⁷³ There has been a marked improvement between 2013 and 2017, when several states and territories commenced respectful relationships education. The general understanding of violence against women and gender equality has evolved, such that DV is no longer viewed as a private matter. Attention has been drawn to the way gender inequality pervades various aspects of society, including family life, community and employment, with research indicating the promotion of gender equality as a

⁴⁷¹ Research shows that children are capable of learning about respectful relationships as early as in primary school. While the curriculum may not be as detailed or explicit as in higher levels of education, it is still impactful - Ollis and Keddie (n 409).

⁴⁷² Queensland Teachers' Union, 'Respectful relationships: we need to get it right' (2021) 126(4) *Queensland Teachers' Journal* <<https://www.qtu.asn.au/journal/queensland-teachers-journal-2021/queensland-teachers-journal-may-2021/respectful-relationships-we-need-get-it-right>>.

⁴⁷³ NCAS Summary Report (n 427).

critical part of violence prevention.⁴⁷⁴ Both themes, violence against women and gender equality, fall within the curriculum.⁴⁷⁵ Alongside mandating the implementation of the curriculum by all schools, its content must also be developed. Currently, NSW and Victoria have the most extensive respectful relationships curricula which other states and territories can use as templates. However, it is important to develop a more comprehensive curriculum which creates awareness of all forms of DV, including RC. This would include incorporating RC in the definition of ‘family and domestic violence’. Furthermore, since RC is such a complex form of DV, it is important to shed light on its intricacies so that students can learn to identify it.

Recommendations for Community Education

While using the formal education system to teach respectful relationships would serve as a catalyst for generational and cultural change, classroom education is not a panacea for transforming societal views on DV, including RC. Other sociological factors are involved, including religious, community, and socio-economic factors like norms, gender roles and expectations, and interpretations of masculinity will continue to impact reproductive health and choices.⁴⁷⁶ Children remain exposed to familial, religious and other community factors which contribute towards shaping their attitudes and perspectives on DV, and in particular, RC.⁴⁷⁷ Where a child grows up in a community with a high rate of crime, research has shown that the child’s understanding of

⁴⁷⁴ World Health Organisation, ‘Promoting gender equality to prevent violence against women’ Violence Prevention: The Evidence

<https://www.who.int/violence_injury_prevention/violence/gender.pdf>.

⁴⁷⁵ Department of Education and Early Childhood Development (n 413); The Education State (n 413); NSW Government, Education Standards Authority, ‘PDHPE Teacher Toolkit: Prevention of Domestic Violence’ (n 413).

⁴⁷⁶ Hidden Forces (n 3).

⁴⁷⁷ Royal College of Psychiatrists, ‘Domestic violence and abuse – the impact on children and adolescents’ (Web Page)

<<https://www.rcpsych.ac.uk/mental-health/parents-and-young-people/information-for-parents-and-carers/domestic-violence-and-abuse-effects-on-children>>.

violence in relationships will be largely influenced by his environment.⁴⁷⁸ Such a child is likely to engage in a variety of high-risk behaviour as an adult. Religious and cultural beliefs which differ from what is taught in schools can conflict with an individual's consciousness of right and wrong, so a multi-sectoral attitudinal change is the most effective way to implement broad education.⁴⁷⁹

Educating adults

A lot of focus has been placed on educating children, but a multi-sectoral attitudinal change also involves the education of adults. While the 2017 NCAS results show a marked improvement in community attitudes towards violence against women, there is room for a better understanding of the gendered nature of DV and the lived experiences of victims.⁴⁸⁰ These attitudes shape the responses to DV and influence social norms and expectations, hence, changing community attitudes will impact the societal tolerance or abhorrence of DV.⁴⁸¹ Initiatives like NCAS highlight the areas where education (or further education) is necessary. Perpetrator intervention in the form of Men's Behaviour Change Programs ('MBCPs') may serve as a useful platform for spreading knowledge regarding RC.⁴⁸² These programs are used by community service providers, government agencies and non-profit organisations to educate offenders and cultivate attitudinal change.⁴⁸³ Although these programs are useful, data indicates problems with their implementation;

⁴⁷⁸ Department of Communities and Justice, 'The effects of domestic and family violence on children and young people' *NSW Government* (Web Page) <<https://www.facs.nsw.gov.au/domestic-violence/about/effects-of-dv-on-children>>.

⁴⁷⁹ Philip Schwadel, 'Study redefines impacts of education on religious beliefs' *University of Nebraska-Lincoln* (Web Page) <<https://newsroom.unl.edu/announce/todayatunl/452/2932>>.

⁴⁸⁰ Respect Victoria, 'Reshaping Attitudes' <https://www.respectvictoria.vic.gov.au/sites/default/files/documents/202008/RespectVictoria_Reshaping%20Attitudes_Toolkit_F_200807.pdf>.

⁴⁸¹ Ibid 6.

⁴⁸² *DFV Bench Book* (n 12) <<https://dfvbenchbook.aija.org.au/perpetrator-intervention-programs/>>.

⁴⁸³ Department of Communities and Justice, 'Men's Behaviour Change Programs' *NSW Government* (Web Page) <http://www.crimeprevention.nsw.gov.au/domesticviolence/Pages/MiniStandardsforMen'sBehaviour/Minimum_Standards_for_Men's_Behaviour.aspx>.

in NSW, of the 750 men referred to the MBCP between 2019 and 2021, only 129 completed it.⁴⁸⁴ This emphasises the importance of the effective implementation of already established programs. There is the possibility that sufficient mechanisms already exist to appropriately educate adults, if properly implemented.

Use of public education campaigns

Foundations and non-governmental organisations such as MSI Reproductive Choices (Marie Stopes), ANROWS and other entities are known for their effective public campaigns relating to violence against women.⁴⁸⁵ In particular, the Marie Stopes White Paper on Reproductive Coercion has gone a long way in creating awareness of RC.⁴⁸⁶ Information provided by these organisations through publications, conferences, tailored workshops, seminars, information sessions and submissions have also proved useful for parliamentary committees making recommendations for future legal reform.⁴⁸⁷ The continued use of public campaigns and outreaches to local communities, including bystander empowerment centered on the dangers of RC will serve as an important tool.⁴⁸⁸ With communities in particular, these organisations can reach the grassroots and enlighten the public on sensitive issues such as the interaction of reproductive autonomy with cultural and religious beliefs.⁴⁸⁹ Championing reproductive autonomy is not an encroachment of

⁴⁸⁴ Sally Rawsthorne, 'Hundreds of violent NSW men fail to complete behavioural change programs' *Sydney Morning Herald* (online at 15 January 2022) <<https://www.smh.com.au/national/nsw/hundreds-of-violent-nsw-men-fail-to-complete-behavioural-change-programs-20211202-p59e8z.html>>.

⁴⁸⁵ Domestic Violence Prevention Center, 'Domestic Violence Prevention Month' (Web Page) <<https://domesticviolence.com.au/resources/campaigns/>>; Vic Health, *Review of Communication Components of Social Marketing/Public Education Campaigns Focusing on Violence Against Women Paper Two of the Violence Against Women Community Attitudes* (Report, September 2005).

⁴⁸⁶ Catriona Melville, 'Reproductive Coercion Understanding reproductive coercion: implications for practice in contraceptive counselling and pregnancy care' *Marie Stopes* (SHSQ, February 2020).

⁴⁸⁷ Marie Stopes Australia, Submission No 185, House of Representatives Standing Committee on Social Policy and Legal Affairs, *Inquiry into Family, Domestic and Sexual Violence* (July 2020).

⁴⁸⁸ Vic Health (n 482)

⁴⁸⁹ Ibid.

religious beliefs, particularly those which seek to protect the rights of every individual. There is room for respect for reproductive autonomy to co-exist with the observation of fair cultural and religious beliefs.

Using community initiatives and social advocacy to advocate against RC in Australia

One of the ways values and ideas are spread is through mainstream media. Discussion in earlier chapters cited examples of how ideas about RC are spread via social media platforms. As campaigns have begun to spread awareness of RC, mainstream media has shed light on the dangers of such practices. It is important to change the narrative through documentaries, initiatives, advertisements and even Australian TV shows (in recent times, one that has shed light on DV issues is ‘See What You Made Me Do’, an SBS documentary by investigative journalist, Jess Hill).⁴⁹⁰ Social advocacy groups also require support to continue to spread messages on the rights of individuals in intimate relationships. The importance of social advocacy cannot be overemphasised, even as the momentum gathers for an overhaul of laws regulating violence against women.

Cultural values also need to be reshaped. Respect for women’s rights is central to the establishment of civilised society. In religious settings, it is important for all individuals to be taught that women have equal rights, and that allowing women exercise those rights is not a violation, but a way to honour those religious teachings and norms. It may be possible for a woman to be empowered in the exercise of her reproductive health without losing her ability to be a true believer of the religion she practises. It is true that a person’s religious beliefs shape their choices, but those beliefs should be freely, and not forcefully developed. Ironically, the foundation of most religious teachings is

⁴⁹⁰ ‘Episodes 1-3’, *See What You Made Me Do* (Documentary, SBS on Demand, 2021).

respect for humanity. Feminist theologians argue that women's equality and faith are not inconsistent with one another. It is essential to actively engage in efforts to achieve gender equality from a perspective of faith. Religion can respect and celebrate women's rights without losing its essence. Correcting misinterpretations of religious texts would alleviate the segregation of society along gender lines and may ease gender inequality in religious communities.

Recommendations regarding Frontline Responders and Service Providers

Training the police force

Surveys have revealed a general lack of understanding of the various forms of DV, particularly, coercive control, within the police force. Other challenges include inadequate training on best practices and approaches to the investigation of coercive control cases, eliciting information from victims and issuing protective orders when necessary. A 2021 report showed that 60% of DV victims do not report their abuse to the police, often because they lack the confidence due to the fear of judgment, inability to properly label the abuse they experienced or in anticipation of a poor response to reports.⁴⁹¹ Prevailing societal assumptions that DV is personal is also a drawback to the efficient investigation of reported cases. All these responses create barriers to justice for victims.

In-depth training programs should be offered to police officers to enable them implement laws and policies effectively. In Victoria, police officers have been taught to identify the potential presence of coercive and controlling behaviour and conduct risk assessments to determine the best course of action for the safety of the victim. As part of the suite of reforms under the *Family Violence Act*

⁴⁹¹ Mridula Amin, 'Calls for more funding as most domestic violence victims don't go to police, says damning new report' *ABC News* (online at 20 January 2022) <<https://www.abc.net.au/news/2021-03-12/findings-show-60-per-cent-domestic-violence-victims-dont-report/13239476>>; AWAVA Issues Paper (n 446); Meyer (n 107).

2004, the police were given new powers in relation to entry, search and arrest in family violence cases, including the power to issue a Police Family Violence Order (PFVO).⁴⁹² This was based on the understanding that a mere reliance on broader definitions of DV would yield minimal results where the justice system was naturally inclined to recognise isolated incidents of physical violence. Just like Tasmania, other states and territories would need to develop a coordinated reform of criminal justice responses to DV, inclusive of processes and practices that better inform community attitudes and understandings.

Social workers, prosecutors, lawyers and judicial officers also need to be educated. Chapter Three cited an English case where the Judge acquitted a defendant charged with coercive control because the complainant was 'too strong to be victimised'.⁴⁹³ Such cases highlight the importance of training for judicial officers on the complexities of coercive control and the understanding that women's protection is not warranted on their assumed lack of strength, but on the promotion of equality.

Training for Healthcare workers

As a public health issue, RC can negatively impact victims' physical (sexual and reproductive) and mental health. Foetal health may also be impacted. Healthcare workers are often the initial point of contact for these victims, and may be able to identify signs of RC, even before the victim can place a label on the form of violence she is experiencing. The level of help which can be rendered by healthcare workers depends on the training and support available on the identification of RC, risk assessment, a suitable response and referral to appropriate support services. It has been suggested that training on RC should be included in the substantive training of healthcare workers.

⁴⁹² *Family Violence Act 2004* s 14.

⁴⁹³ Armstrong (n 242).

Such substantive training may include reference the importance of recognising and supporting women's autonomy in various ways, like ensuring private face-to-face consultations where possible to elicit the patients' RC experiences and where appropriate, provide access to discreet methods of contraception. Policy development works together with this approach, because it would inform guidelines for frontline responders, raise awareness, and promote the creation of risk assessment tools. A challenge associated with healthcare responses is the lack of qualitative research in Australia and internationally, aiming to understand, identify and respond to RC. Further research is required to better streamline access to health services and improve outcomes for women. This will determine how well healthcare providers navigate reported cases of RC.⁴⁹⁴

Conclusion

There are various reasons why it is important to legally recognise and address the existence of RC. The first reason lies in its ambiguous manifestation which often makes it difficult for victims and service providers to detect. RC takes on a somewhat amorphous nature. In some instances, it is possible to categorise RC as a form of DV because it may overlap with physical, sexual, emotional and financial violence.⁴⁹⁵ This is particularly so when it occurs within an intimate partner relationship. In other instances, RC takes shape as a form of violence against women. The discussion in preceding chapters shows that incidents of RC can exist within these broad categories, hence the focus on coercive control and contraceptive sabotage. Another complexity associated with RC, which service providers are likely to grapple with, is that when viewing its occurrence through the lens of DV, it can either occur as a precursor to other forms of DV or it

⁴⁹⁴Karen Grace and Jocelyn Anderson, 'Reproductive Coercion: A Systematic Review. Trauma Violence Abuse' (2018) 19(4) *Trauma Violence Abuse* 371-390 doi: 10.1177/1524838016663935.

⁴⁹⁵ Children by Choice Association Incorporated, 'Reproductive Coercion: What is Reproductive Coercion?' (Web Page, 26 April 2019) <<https://www.childrenbychoice.org.au/factsandfigures/reproductivecoercion>>.

can be instigated by other forms of DV such as physical or sexual abuse. Regardless, RC involves the use of power and control to deliberately interfere with a woman's sexual agency, bodily integrity, and reproductive autonomy.⁴⁹⁶

This threat to the victim's sexual agency, bodily integrity and reproductive autonomy emphasises the urgency of its legal recognition. By breaching the set preconditions for sex and identifying the victim's expression of her sexuality as being solely limited to reproductive purposes, the perpetrator interferes with her sexual agency. The recurring theme throughout this thesis has been that consent to sex in one manner does not amount to consent to sex in another manner. In cases of contraceptive sabotage, when a woman's expressed choice is made inferior to another's, she is deprived of her sexual agency.⁴⁹⁷ Similarly, when a woman is pressured into pregnancy or coerced to terminate her pregnancy, her reproductive autonomy is questioned. Drawing from Nicola Lacey's position on bodily integrity and mind-body dualism, the way RC is perpetrated violates the victim's capacity to integrate psychic and bodily experiences. The harm suffered by victims cannot be limited to the physical but affects their psychological being. The victim often has to deal with feelings of dehumanisation, shame, loss of confidence and regret simply because her fertility is used as a weapon of control against her.⁴⁹⁸

Closely associated with interference to the victim's sexual agency, bodily integrity and reproductive autonomy, are the threats to women's health and wellbeing. RC often results in a myriad of poor health outcomes, such as the increased risk of contracting STDs, urinary tract infections, and the impairment of maternal and foetal health (where a woman is pregnant).⁴⁹⁹ The

⁴⁹⁶ Tarzia at al (n 163).

⁴⁹⁷ Tuerkheimer (n 39) 335.

⁴⁹⁸ Lacey (n 1) 65.

⁴⁹⁹ Black (n 27) 428.

pressure experienced by victims may also result in substance abuse and mental-health issues. As a form of DV, RC contributes to more illnesses, disability and deaths than any other risk factor for women aged 15-44. Not only is RC associated with a disregard for sexual and reproductive health and rights, it is also worth identifying as a public health concern. These risks further highlight the importance of developing adequate legal and societal responses to RC.⁵⁰⁰

In addition to the preceding points which emphasise the seriousness of RC, DV costs the Australian economy \$22 billion annually in law enforcement, healthcare, housing and lost wages. Based on statistics which indicate that 1 in every 4 women who attend sexual health clinics experience RC over the duration of their reproductive lives, it is safe to estimate that RC contributes to 25% of the cost of DV to the Australian economy.⁵⁰¹ Surely, RC is worth exploring and addressing to prevent the ongoing depletion of Australian resources.

As RC has existed long before its recognition by researchers, it would be unrealistic to assume that its occurrence can be eradicated or minimised instantaneously. Despite the concerted efforts of the government, international and local organisations, service providers, frontline responders and community initiatives, there is still a struggle to minimise the occurrence of more well-known forms of DV. If a decision is made to combat RC through legal and societal responses, the journey would be long and arduous. No panacea exists for the prevention of RC, but when combined, legal reforms, alongside the effective use of the respectful relationships' curricula, community education, public campaigns and training of frontline responders, among others, would make an impact in the prevention of RC.

⁵⁰⁰ Phillips et al, (n 28).

⁵⁰¹ BMJ, '1 in 4 women at sexual health clinics reports coercion over their reproductive lives', *BMJ Newsroom* (Web Page, 2018) <<https://www.bmj.com/company/newsroom/1-in-4-women-at-sexual-health-clinics-reports-coercion-over-their-reproductive-lives/>>.

A major milestone would be the recognition of RC as a form of DV in legislation, however, sufficient community interest must be generated to garner parliamentary attention. The relationship between legal reform and social attitudes can be likened to an infinity symbol existing in a continuum; legal reform changes societal attitudes, but social attitudes shape legal reform. For that reason, this thesis has pointed to societal attitudes as both promoter of RC and the instigator of legal reform. Addressing RC will therefore involve deliberate and continuous attempts. In the meantime, a lot can be done by grassroot organisations and service providers if they are provided with adequate resources to continue to spread awareness on the existence, forms and impacts of RC in Australia. In addition, improving police responses is just as crucial as legal reform. Implementing legal reform is essentially dependent on the police's ability to identify the forms of abusive behaviour present in each case and appropriately respond.

It is safe to say that there is scope for the recognition of the forms of RC in both DV and sexual offences legislation in Australian jurisdictions. In addition, societal enlightenment on the existence, forms and impacts of RC is ongoing in clinical settings, the education and in the wider community. Is there scope for improvement in these responses? Definitely. There are several lessons which Australia can learn from the UK with respect to the criminalisation of coercive control, the adoption of a broader definition of consent to sexual intercourse, and the implementation of a uniform and well-detailed respectful relationships curricula. While lessons can be drawn from the UK, it is conceded that there are differences in the legislative and governmental landscapes between the two countries. Any change to the legal and societal systems in Australia in response to RC requires well-considered and adequately researched collaborative efforts from the government, victims, frontline responders, service providers and the community as a whole. The journey of a thousand miles begins with one step.

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