

Advising Clients Charged Under the New Coercive Control Legislation –

Control of an Inner Conflict

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The [Crimes Legislation Amendment \(Coercive Control\) Act 2022](#) (NSW) “the Act” makes coercive control illegal in New South Wales (‘NSW’), with perpetrators facing up to 7 years imprisonment if found guilty. The Act is the product of a building shift in jurisprudence and social understanding of domestic violence. Pioneering examples of similar legislation are to be found in Scotland, England and Wales, Ireland and Northern Ireland. Within an Australian context, only Tasmania has enacted legislation which criminalises economic and emotional abuse in the *Family Violence Act 2004 (Tas)*. In addition to NSW, legislation is in the process of enactment in Queensland. Victoria, South Australia and Western Australia have current parliamentary consultation processes underway in various forms. Activism of many groups, including family members of victims has made calls for a nationally applicable scheme. In September 2023 the Standing Council of Attorneys General released the *National Principles to Address Coercive Control in Family and Domestic Violence*. As yet, there is no National scheme.

The NSW offence will commence prior to 1 July 2024. The Act also provides a definition of ‘domestic abuse’ for the [Crimes \(Domestic and Personal Violence\) Act 2007](#). The definition will commence in February 2024.

A comprehensive dissertation of coercive control can be found in The Australian Institute of Family Studies’ June 2023 *Coercive Control Literature Review: Final Report*. For NSW based readers, the first Statutory Report tabled in June 2023 provides a helpful discussion of the NSW scheme rollout. Additionally, the *National Domestic and Family Violence Bench Book* provides helpful content, especially regarding the nationally recognised Domestic Violence

Order Scheme. *The National Bench Book* appears primed for future amendments, which I suspect will follow at some point at a national level.

For practitioners, it will be useful to know as a point of reference, victims in this space, are called 'victim-survivors' or 'survivors' and offenders are called 'perpetrators'. Within a criminal law space, this language is unlikely to be used, and the standard use of complainant and accused is likely to be sustained.

With the NSW laws soon to be in force, how do practitioners apply ourselves when working with clients who are the subject of charges under this legislation? This article hopes to provide some guidance when wrestling with inner conflicts in providing legal services to clients who find themselves on the wrong side of these legislative advancements.

What is Coercive Control – Understanding the NSW Legislation

Dr Dina McMillan, PhD, in her article¹, provides one of the most succinct definitions. She quotes, Evan Stark, an American expert, academic and author, who developed the term 'coercive control'. Dr McMillan explained²;

[Stark] identified four key factors: violence, intimidation, isolation, and control. Violence includes all types of punishment: emotional, psychological, sexual, and physical. Intimidation involves threats including emotional blackmail, menacing behaviours, vows to harm or ruin the victim or loved ones. Isolation involves actions that make it difficult or impossible for victims to maintain relationships with others. Control includes loss of agency by the victim over every aspect of life through strict rules and demands. It includes close monitoring and surveillance through means such as scrutinising devices or installing stalker apps.

¹ *Criminalising Coercive Control: A Complex Discussion*. Judicial Officers Bulletin, Vol. 33, No. 6, Jul 2021: 57-60

² Stark, E. (2007). *Coercive control: How men entrap women in personal life*. Oxford University Press.

It is envisaged coercive control offences will be charged where incident- driven acts of violence or the 'assault model' is unable to capture conduct against 'person-hood'.

What the NSW Act will do is;

- Create a standalone offence of coercive control in the *Crimes Act 1900* committed where an adult engages in a **course of conduct of abusive behaviour** against a current or former intimate partner, **with the intention** of coercing or controlling that person
- Insert a statutory definition of domestic abuse in the *Crimes (Domestic and Personal Violence) Act 2007* (to commence by 1 February 2024)

The Journey to Legislation

The short backstory of how we get to criminalising conduct starts with the emergence of the legal concept of domestic violence. Academics observe historically, Australia was ignobly known for the common practice of 'wife-beating' or 'wife chastisement'³. Over time, as women's social status improved with increased opportunities for employment and education, each generation gained further advances for the rights of women. From the journey through the 1970's feminist movement, to the creation of the *Anti-Discrimination Act* in 1977, the *Sex Discrimination Act* in 1984, then to the introduction of domestic violence legislation in various forms across the 1990's and early 2000's, a direct line of incremental advances can be seen with the aim of prohibiting common problematic conduct within intimate relationships. In addition to advances in the criminal law space, family law paved the way in addressing family violence. Although earlier forms of legislation such as the *Matrimonial Causes Act* 1899 may

³ DAY TWELVE: A 'National Disgrace?': Notes from a history of domestic violence in Australia. 16 Days Blogathon. Retrieved January 15, 2024, from <https://16daysblogathon.blog/2021/12/06/day-twelve-a-national-disgrace-notes-from-a-history-of-domestic-violence-in-australia/>

appear as terribly draconian to modern eyes, progression to the *Family Law Act* in 1975 and subsequent amendments shifted focus to the rights of children to be protected from family violence. This laid the groundwork for protection of mothers, and any person within a family. In the late 70's in family law, Australia was at the time, at the international forefront of changes of this nature, and as such, many will recall the social disturbances the Family Court encountered during it's emergence.

Parallel to the development of social sciences and legal jurisprudence around subjects including the impact of PTSD, so is the cross interaction of intimate partner violence and trauma exposure emerging as a new field of awareness within our legal systems, albeit one defined by an "incident" or an "assault" model. It is now accepted practice for experts in social sciences to be called to support a defence case based on studied trauma characteristics of domestic violence and it's impacts, as most starkly observed in the study of battered woman syndrome. As experts in fields relating to mental health, psychology and psychiatry can provide expert evidence in Courts, it appears as an obvious corollary for experts in coercive control to be called in a similar capacity in coercive control prosecutions. Despite the numerous and varied criticisms of the legislation, and the inherent obstacles which will no doubt be faced in prosecuting, the legislation emerged as a result of extensive studies and data collection relating to intimate partner violence⁴

⁴ "Of 112 intimate partner domestic violence homicides that occurred in New South Wales between 2008 and 2016, the Domestic Violence Death Review Team found that there was intimate partner abuse using coercive controlling behaviours towards the victim in every case bar one." First Reading Speech, CRIMES LEGISLATION AMENDMENT (COERCIVE CONTROL) BILL 2022 Attorney General Mr Mark Speakman <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1323879322-127845'>

Further statistical data available within chapter 3 Prevalence of Coercive Control Beckworth, Stephanie; Lowe, Lauren; Wall, Liz; Stevens, Emily; Carson, Rachel; Kaspiew, Rae; et al. (2023). Coercive Control Literature Review: Final Report. La Trobe. Report.

Section 54D Abusive Behaviour Towards Current or Former Intimate Partners

Section 54D of the Act will set out the elements of the offence. These should be read in combination with the definitions of *intimate partner*, *course of conduct* and *abusive behaviour*, as provided within the legislation.

Section 54D provides

(1) An adult commits an offence if –

(a) The adult engaged in a course of conduct against another person that consists of abusive behaviour, and

(b) the adult and other person are or were intimate partners, and

(c) the adult intends the course of conduct to coerce or control the other person, and

(d) a reasonable person would consider the course of conduct would be likely, in all the circumstances, to cause any or all of the following, whether or not the fear or impact is in fact caused—

(i) fear that violence will be used against the other person or another person, or

(ii) a serious adverse impact on the capacity of the other person to engage in some or all of the person's ordinary day-to-day activities.

Maximum penalty—Imprisonment for 7 years.

Assuming the parties meet the definition of intimate partners, practitioners will need to turn their minds to the following set of questions when analysing a brief, namely;

1. Did the accused engage in a course of conduct against the complainant consisting of abusive behaviour? (*actus reus*)

2. Did the accused intend the course of conduct to coerce or control the complainant? (*mens reus*)

3. Would a reasonable person consider the course of conduct to be likely, in all the circumstances, to cause (whether or not the fear or impact is in fact caused) –
 - a. fear that violence will be used against the complainant or another person
or
 - b. a serious adverse impact on the capacity of the complainant to engage in some or all of the complainant’s ordinary day-to-day activities

(*reasonable person test*)

An Abusive Course of Conduct

As well as a definition of “abusive behaviour”, the legislation will helpfully provide a comprehensive (but not exhaustive) list of behaviours as examples within the description of “abusive behaviour”, at s 54F and a definition of what is a “course of conduct” at s 54G.

Section 54F(2) will provide examples of coercively controlling behaviour, including economic or financial abuse. This will extend to preventing or unreasonably restricting or regulating employment or control of the complainant’s own income or financial assets. Other examples within the section will include shame-based conduct, tracking movements or communications, limiting access to family and friends and making threats to pets or loved ones.

Section 54H will set out procedural requirements. Section 54H will provide;

(1) In proceedings for an offence under section 54D(1)—

(a) if a specific incident of abusive behaviour is alleged to form part of the course of conduct, the prosecution is not required to allege the particulars that would be necessary if the incident were charged as a separate offence, but

(b) the prosecution is required to allege—

(i) the nature and description of the behaviours that amount to the course of conduct, and (ii) the particulars of the period of time over which the course of conduct took place.

(2) For the accused to be convicted of an offence under section 54D(1), the trier of fact—

(a) must be satisfied beyond reasonable doubt that the evidence establishes a course of conduct that consists of abusive behaviour, and

(b) is not required to be satisfied of the particulars of any specific incident of behaviour alleged to form part of the course of conduct that it would have to be satisfied of if the incident were charged as a separate offence.

Section 54D(2) will provide

(a) the course of conduct may be constituted by *any combination* of abusive behaviours, and

(b) whether the course of conduct consists of abusive behaviour must be assessed by *considering the totality* of behaviours. (emphasis added)

An Intention to Coerce or Control

To prove the intent element of the offence (*mens rea*), the prosecution must establish the accused intended the course of conduct to coerce or control the complainant. The terms of 'coerce' or 'control' are not specifically defined in the Act.

It seems from the Second Reading Speech, that in not defining that term, the Attorney General intended the words be given their “ordinary meaning”⁵. This term may be given judicial consideration in future.

An accused’s intention is generally determined considering the circumstances and/or the conduct. As explained in the draft directions in the *NSW Criminal Trials Bench Book*:

Intention may be inferred or deduced from the circumstances in which the act occurred ... and from the conduct of [*the accused*] before, at the time of, or after [*he/she*] did the specific act. Whatever a person says about [*his/her*] intention may be looked at for the purpose of finding out what that intention was in fact at the relevant time.

In some cases, a person’s acts may themselves provide the most convincing evidence of [*his/her*] intention. Where a specific result is the obvious and inevitable consequence of a person’s act, and where [*he/she*] deliberately does that act, you may readily conclude that [*he/she*] did that act with the intention of achieving that specific result.

For the offence of coercive control, the circumstances and/or acts of the accused must show the accused intended to achieve the coercion or control of the complainant. The acts themselves may sufficiently demonstrate the necessary intent. A practical example of what this may look like is: the accused locks the door, takes away the complainant’s phone, and then prevents the complainant from leaving the house to attend work or education. Those acts specifically demonstrate the state of mind of the accused – that the accused intended to engage in acts to prevent the complainant from leaving, and in doing so, intended to prevent the complainant from engaging in normal activities of everyday life.

⁵ Second Reading Speech, CRIMES LEGISLATION AMENDMENT (COERCIVE CONTROL) BILL 2022 Attorney General Mr Mark Speakman
<https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1323879322-127845'>

Mechanics

Written into the legislation are a series of review and prosecutorial provisions. Section 54H provides in order to achieve a conviction, the prosecution is not required to establish the particulars of any specific incident of the alleged course of conduct, in the way they would if were to be charged as a separate offence. This means, where there is a lengthy narrative of a course of conduct, made up of lots of different acts over a period of time, the Court does not have to be satisfied of the particulars of *each* act in order to be satisfied of the allegation as a whole. This is modelled in the way prosecutions of persistent sexual abuse of a child under section 66EA of the Crimes Act are proved.

Another procedural aspect, is acts which were alleged as part of *prior* charges, are barred by the common law concept of double jeopardy, from being alleged to form part of the course of conduct for *fresh* charges of coercive control – the act provides this at a notation to section 54H. Section 156 of the *Criminal Procedure Act* covers this as well, whereby, there is a bar to run a case again where the same conduct has been run to finality under a different charge.

Thirdly, the act, has review provisions at both sections 54I and 54J which will include extensive reviews of the laws at the 1 month, 1 year and 2 year marks.

Examples from Other Jurisdictions

The majority of overseas appeal cases in this area arise from factual scenarios where abuse is chronicled over a lengthy history. They are cases which demonstrate a departure from shorter courses of events that would be more in line with narratives of kidnapping, stalk/intimidate or common assault. These coercive control narratives illustrate domestic histories characterised by ongoing and systematic acts that create an overarching dynamic of control, exploitation and threat over an extended period of time.

When reading cases from other jurisdictions, it is to be noted coercive control legislation differs across jurisdictions, including in the range of penalties as well as the language used to describe the offence and the way in which the offence is proved. These noted cases below are to be used for demonstrating trends and scope within coercive control offending and are not in any way binding on NSW courts.

English Authorities

R v Conlon [2018] 1 Cr. App. R (S.) 38

This case is a strong demonstration of misplaced victim loyalty to the perpetrator. Amongst other actions of the perpetrator detailed in this case, the offending acts spanned a period of about 14 months including:

- The perpetrator limited the victim's contact with friends and work colleagues, and controlled the clothes she wore and how she styled her hair
- The perpetrator checked her mobile telephone and accusing her of being unfaithful.
- When the perpetrator left the house at the request of police, he telephoned the victim repeatedly. On an occasion when the police answered, he said he would not stop ringing until she answered. When he received a telecommunications conviction for this, he received a fine but asked the victim to pay this, which she did.
- The perpetrator frequently broke conditions and orders prohibiting him from having contact with the victim, even when he was in custody.
- The relationship ended on a number of occasions but each time they would reconcile. The police were called many times but, on each occasion, the victim either refused to make a statement to the police or, having made a statement, retracted it at the behest of the perpetrator.

- In his case in mitigation, the perpetrator alleged the victim was coercively controlling him.

R v Brown [2021] EWCA Crim 126

The Perpetrator did the following:

- Moved in and then forced the Victim to evict her long-term lodger and get rid of her dog.
- Stopped her from driving her daughter to work and restricted contact with her parents.
- Demanded the victim keep in regular touch with him during the day.
- When the victim tried to end the relationship, threatened suicide.
- Physically stopped the victim from leaving the house by holding her arms, locked the door, placed his hand over her mouth, challenged her when using her phone to call for help and, when she tried to escape, stopped her and threw her to the floor.

R v Chilvers [2021] EWCA Crim 1311

The perpetrator did the following over several years:

- Made the victim eat his hair and, if she refused, he said, "*if you loved me, you would eat it*".
- Slapped the victim on the face with his penis, forced oral sex and mistreated her breasts.
- Engaged in possessive behaviour in public, including striking the wall near the victim's face, in an incident prompted by her looking at other men.

- Pressured the victim to have a termination after falling pregnant and then wanted the victim to keep a baby when she wanted to have a termination.
- Drew up a contract on how he wanted the child raised by the victim.
- Verbally and physically assaulted the victim
- Destroyed the victim's possessions,
- Required her to ask for money, with her maternity leave having been paid into his relative's bank account, and told her his financial contributions were a loan, even though he made minimal contributions to the costs of the child.
- Forced the victim to have her car registered into his relative's name.
- Had solicitors draw up a cohabitation agreement, the terms of which were that the victim would pay him rent per month to live with him but would have no claim over his house or equity.
- Accessed the victim's social media and phone and sent abusive messages to a social media account of the victim

Interestingly, *Chilvers'* case permitted the inclusion of evidence of events that occurred prior to the enactment of the legislation, led as tendency evidence. In this case, the relevant legislation came into effect on 29 December 2015, and the Crown adduced evidence of events from early on in the relationship of the parties in 2012. (Some of the incidents above were in this category.) The Court noted at [45];

This may be relevant evidence to show that he had a tendency to behave like that and thus support the prosecution case that he did so after 29th December 2015

What is most interesting is how the defence case was run in *Chilvers*. The defence position at [33] was as follows;

The defence case was that the complainant had given a dishonest and misleading account to which she had deliberately tried to create a false impression. It was alleged that she was a vengeful, duplicitous, calculating, manipulative, controlling and deceitful liar whose motive was to seek revenge upon the applicant. It was said she had falsely portrayed herself as a victim.

This position of the defence is a relevant matter. The topic of misidentification is explored further on in this article.

R v Kingswell [2022] EWCA Crim 814

The perpetrator did the following across a period of 11 months:

- When he believed the victim wished to end the relationship, threatened suicide.
- Abused and assaulted her, including strangling her to the point of unconsciousness.
- Destroyed her property, especially her phone.
- Demanded money from her, leading her to take out loans and work to give him money.
- Forced the victim to leave the home they shared, eventually let her back in on condition she give him money and, once she was inside, assaulted her and stopped her from calling police.
- Wanted the victim sell photographs of herself naked.

R v Jeffries [2023] EWCA Crim 21

The perpetrator did the following over at least four months:

- Monitored the victim's phone use, interrogated her about her phone use and required her to leave her phone with him.

- Insisted on accompanying her to work as a mobile hairdresser and, when clients came to her home, sat in with her as she performed her appointments with clients.
- Isolated her from friends, including assaulting a friend who challenged him.
- Assaulted and threatened her, including beginning to strangle her and squeezing her mouth, knowing she was in pain from having a tooth removed.
- Damaged items around her home.
- Engaged in loud verbal violence towards the victim and her daughter.
- Self-harmed and blamed her for provoking him to do so.
- Forced washing liquid into her daughter's mouth to teach her a lesson.
- Accused her of cheating on him.

These cases assist by way of demonstrating narratives which can form charges under coercive control legislation. The above cases displayed long histories of violations of a person by another. As noted in *Chilvers'* case, it is described as being able to reach the *actus reus* through the cumulative impact of many acts over an extended period of time, which, in some ways, reflects more contemporary understanding of how some trauma can be experienced – as in a tipping over after ongoing exposure. Again, very typical in studied aspects of battered woman syndrome.

Scottish Authorities

Stark and Hester in their article, *Coercive Control: Update and Review* (Violence against women 2019 Vol 24(1) 81-104) provide a description as to how the Scottish laws differ:

In marked contrast to England, the Scottish Executive adopted a gendered definition of domestic abuse ... which explicitly positions it both as a cause and a consequence of gender inequality....The new offence in Scotland represents one of the most radical attempts ... to

align the criminal justice response with a contemporary feminist conceptual understanding of domestic abuse as a form of coercive control.”

In the Scottish laws, where the maximum penalty is 14 years, exposure of children to abuse is specifically defined as an aggravating feature in sentencing.

Procurator Fiscal, Livingston v H (J) 2021 S.L.T (Sch Ct) 415

The perpetrator did the following over several months;

- Struck the victim to the body and head
- Persistently asked the victim for sexual intercourse and refused to use contraception during sex
- Demanded the victim meet him and issued a threat at the same time
- Demanded the victim cease contact with male acquaintances
- Accused the victim of infidelity

HM Advocate v B (L) [2022] HCJAC 48

This case involved the one perpetrator and three victims. It was a case of multiple sexual assaults of the victims by the perpetrator as well as engaging in a course of abusive behaviour of two of them. With reference to the abuse:

- In relation to victim 2, over a two-year period: the behaviour involved name-calling, for example calling her stupid, fat, ugly, a cow, a cheat. The perpetrator would chase and kick victim 2's vehicle, causing numerous dents. He cut up her clothes and threw her shoes in the bin. When she attempted to end the relationship he would send her photos of his self-harm, involving cuts on his arm. When she did end the relationship, she

received hundreds of calls from him, which turned to his creating fake email and Facebook profiles to contact her when she blocked his calls. He followed her in his car whilst she was driving.

- In relation to victim 3, over a three-month period, the perpetrator was verbally abusive and controlling towards her, called her derogatory names, and said she was disgusting and crazy. He accused her of cheating and threatened to commit suicide. He monitored her mobile phone and repeatedly called her, even after the end of the relationship, when he left abusive voicemails on victim 3's phone. He called her a "lying cunt" a "slag" and a "fucking bitch". On an occasion after the relationship had ended, he called at her home without warning.

Walker (Scotland) v Procurator Fiscal, Dunoon [2022] SAC (Crim) 9

Notwithstanding the legislation is different in NSW, this is an interesting case for defence practitioners as it was effectively a successful conviction appeal. In this matter, on appeal it was found the following did *not* amount to an offence of engaging in a course of abusive behaviour:

- Despite parenting contact orders that the appellant should collect his daughter on Fridays from a contact centre at 3.45pm, the appellant waited across the road from his daughter's school to watch her exit the school. He sat on a bench and waved at her, and she waved back. His ex-partner, also the child's mother, objected to his attendance in this fashion and her solicitor wrote to him advising him of this. He sought his own advice and was advised there was no legal restriction on him doing as he was. On two further occasions he attended the same location, these times, waiting in his car observing his daughter leaving school. On one of the two occasions, the mother/complainant was not present.

Tasmanian Authorities

The Tasmanian offence is found in Section 9 of the *Family Violence Act, 2004* (Tas). The Tasmanian legislation will be different from the legislation in NSW. Two reported cases applying the Tasmanian law, are *Howe v S* [2013] TASMC 33, and applied in *Police v Benjamin James Nunn* [2021] TASMC 3.

Howe's case dealt with the defendant application to traverse his pleas. Count 3 dealt with a charge of emotional abuse alleged on facts where the defendant harassed his then partner by demanding she spend the night with him at his house, stating that the consequences of not doing so would be that he would take her child to Melbourne and she would not get her back, and telling her the only way to fix the issues was to spend the night with him. He also stated to her that with regard to the pending family law court matters,

if you take this to court things will get vicious and you know what happens when things get vicious. So it's up to you. Either come and meet me tonight at the house or we will be enemies.

His Honour Magistrate Brett considered the meaning of *course of conduct* for the purposes of the charge. Magistrate Brett at [21] and [22] agreed with the general proposition that a course of conduct would normally be interpreted as:

conduct which is protracted or conduct which is engaged in on more than one separate occasion

Magistrate Brett noted, on the other hand, that section

Include(s) limiting the freedom of movement of a person, spouse or partner by means of threats or intimidation it seems to me.....if a threat or act of intimidation had the effect of limiting the freedom of movement of a person, spouse or partner, that a single act or threat or intimidation

could, in those circumstances, amount to a “course of conduct” and hence amount to an offence contrary to that section.

It was unnecessary, however, for Magistrate Brett to resolve the issue.

In *Nunn*, the relevant conduct involved the defendant pouring petrol on the boot, roof and sides of a car over a period of less than 10 seconds. When this was done, the defendant knew a 10-year-old girl was inside the vehicle and the child’s mother was witnessing what was occurring. At the time the mother and the defendant were in a domestic relationship.

The prosecutor argued the conduct amounted to a course of conduct pursuant to section 9 and referred to the remarks about “course of conduct” in *Howe*. The prosecutor argued the conduct fell within the wider definition of “course of conduct” in relation to stalking in the *Criminal Code 1924* because the petrol was poured on four parts of the car, requiring the defendant to walk around the car. Her Honour Magistrate Cure also looked to an authority to the effect that, to amount to a course of conduct, the conduct in question must be engaged in on more than one occasion or be protracted.

Magistrate Cure found that, based on the facts of the case, the conduct was not protracted.

At [27] Magistrate Cure remarked:

it occurred over 10 seconds and there is not reference to other matters, including what occurred leading up to it, what the relationship was between the parties, other than it was a significant relationship for the purposes of the Family Violence Act 2004.

At [28]

I do not accept that to pour petrol on different panels of a car constitutes a course of conduct that is protracted or can be described as separate acts.

At [32] and [38], in relation to section 9(2):

It would, as is suggested in Howe's case be something more than what is required by the definition of stalking

I agree that a single act could have that effect and fall within the section

And at [40]:

The difficulty is that there is no evidence upon which I can infer that the threat had the effect of limiting her freedom of movement.... in this case I do not know where she was or what she being asked to do.

In *Nunn's* case it appears, although recognising the view in *Howe*, that a course of conduct can be proved from a single act, a requirement for a successful prosecution must establish the element of limiting the freedom of movement of the victim. Limiting freedom of movement is not an aspect of the NSW legislation.

Is There a Defence?

The Act will provide at section 54E a defence if the course of conduct was *reasonable in all the circumstances*.

The scope of what constitutes conduct "reasonable in all the circumstances" will be an area for defence practitioners to explore. As yet, and in the absence of any cases, the task will be left to the courts to define that scope.

Below are some theoretical examples where it will be interesting to see what NSW Courts define as reasonable given the nuance and complexity of domestic relationships.

1. Partner A is working. Partner B has lost their job. Partner A suspects Partner B is gambling and drinking during the day and funding their habit using money from Partner B's own bank account. However, Partner B has stopped contributing to joint expenses. Partner A repetitively sends Partner B texts demanding money to pay for joint expenses or else "it won't be good when I get home". Partner A is paying for the upkeep of all household costs and Partner A is frustrated with Partner B's issues. Partner A and B have volatile arguments most evenings. Partner A wants Partner B to change and find a job. Partner A removes Partner B from their joint health insurance. Partner A won't pay for Partner B's prescription medication anymore. Partner A continues to send texts which say things like "you need to change or else I'm kicking you out on the street", "You need to ask your parents for money or else I'll tell them you've been doing drugs every day". Partner B takes jointly owned wedding gifts and sells them at pawn shops to make money to support their gambling and alcohol addiction.
2. Partner C and D have engaged in a lengthy but unsuccessful attempt to settle their parenting matter since separation. Partner D wants to see the children at Christmas. There are no parenting orders in place and there is no history of family violence or any risk to the children. Despite this, Partner C has withheld the children without explanation and is engaging in parental alienation of Partner D, including not allowing phone calls and removing the children from school early, preventing Partner D from seeing them at the school gate. Partner D is concerned the children are being taken interstate at Christmas without permission or notice and as such, placed a covert tracking device in the car to track Partner C's movements with the children. Partner D did this to locate the children and out of concern for the children's safety. Partner D also posted a number of defamatory messages on community social media sites saying unkind things and pinning unflattering images of Partner C, including 'child stealer' and 'alienating parent beware'. Partner D, suspects Partner C has created a fake social media profile and has been using this to send constant messages such as,

“People see what you are doing” and “Watch your back”. Both Partner C and D make cross complaints of coercive control to the police.

3. Partner E, who is 18, met F online. Partner F is 14 years older than Partner E. Partner E doesn't speak English very well and is on a student visa. Partner F has promised partner E a partner visa. Partner E moves into Partner F's home in a domestic relationship capacity. Partner E was financially supported by Partner F, and also allowed to drive one of Partner F's cars. Partner F starts telling Partner E how to dress and how to behave in public. Partner E's student visa expires and Partner E goes onto a bridging visa whilst awaiting their Partnership visa approval. Since moving in, Partner F has treated Partner E very badly. Partner F has locked Partner E outside several times, Partner F saying “you have no legal rights to stay here. I own this house and you are not on any lease with me”. Partner F has forced Partner E to cut communication with their friends and has prevented Partner E from reliably messaging their family overseas. As time goes by, the control continues. Partner F threatens often to cancel the partner visa and withholds money from Partner E. Partner F from time to time breaks Partner E's possessions. After one very heated exchange Partner E decided to take Partner F's car and leave. Partner E also took Partner F's credit card and started spending money out of it on food and a hotel room. Partner E had nowhere else to go and no means of their own. Partner E sent Partner F a spate of messages protesting their anger and hurt at how they have been treated. Partner E's messages have included remarks such as “I report you as pedophile to police”, “I say I see you with young boy and you do the sex unless you do as I say. I am not really 18. I was 15 when you met me. You Pay. I keep car”. Fearing being reported, Partner F did not report the stolen car to police or the use of their credit cards. Partner E's threats continue over a series of weeks. Partner F suspects Partner E is responsible for spray painting the words “Pedo” out the front on his driveway. Partner F just wants to leave Partner E alone but wants their car back. Partner F decides to report Partner E to police

for take and drive conveyance. The police speak to Partner E who discloses the initial conduct.

These examples capture common issues Police find in many domestic disturbances, particularly where there is clearly no “perfect” victim. Judicial sector, police and community sector employees all need support to work with people where it can be very difficult to identify ‘who is who’ in a trauma / abuse dynamic.

Defence practitioners will be assisted by investigations into any forms of prior contact between the accused and the complainant, including phone downloads. As many will be aware, often communication records are difficult to obtain or are not stored in a retrievable manner. Scrutinizing records for contradictory evidence including conduct consistent with participating in a shared relational dynamic may prove helpful in establishing what was considered reasonable within the context of the relationship. For example, where economic control is alleged, a defence practitioner may wish to look at spending practices over a longer period of one or both parties of the relationship to see if there is any evidence the economic structure in the relationship was mutually agreed to and applied. By way of example, were the parties saving for a house and as a result, pooled their resources and only lived off a smaller allowance, which is now alleged as a form of economic restriction? Did both the parties in the relationship share the same discretionary allowance, despite different earnings? How were expenses shared? Another example may be defending the allegation one party controlled how the other dressed. Are there records of social media photos inconsistent with this suggestion over time, including before or after the allegation is placed on the accused? Are there medical records consistent with the allegation of being cut off from family members, or is there a history of problems with interpersonal relationships for the complainant prior to the relationship, especially including the same relatives now alleged to be ostracized from? Defence practitioners will need to explore many avenues of how the private lives of the complainant and the accused demonstrate scope for inconsistency.

How to Run a Hearing or Trial

The *Criminal Procedure Act* 1986 NSW makes provision for special procedures for domestic violence complainants to give evidence. The essential takeaways are as follows;

- The complaint's evidence-in-chief may be given by pre-recorded interview (DVEC).
- The complainant may give oral evidence from a remote witness room.
- The complainant cannot be directly cross-examined by an unrepresented accused.
- The court must be closed for the complainant's evidence.
- There are additional provisions for vulnerable and child witnesses/complainants

At the time of writing, it is unknown when the offence will be dealt with on indictment. However, based on overseas authorities, these matters are generally being dealt with in a summary context. Within the first reading speech, the then Attorney General (reference at footnote 3), stated it is to be dealt with in the Local Court unless elected upon. Defence practitioners will readily await further information regarding the circumstances when Director of Public Prosecutions will elect to prosecute on indictment.

Sentencing

The sentencing council of the United Kingdom has a sentencing guideline that came into force in 2018 for sentencing of coercive control offences under s76 of the Serious Crimes Act 2015. It can be found at [Controlling or coercive behaviour in an intimate or family relationship – Sentencing \(sentencingcouncil.org.uk\)](https://www.sentencingcouncil.org.uk/controlling-or-coercive-behaviour-in-an-intimate-or-family-relationship-sentencing)

The UK sentencing scheme is codified and provides a stepped process in the sentencing exercise, very much unlike the instinctive synthesis method adopted in sentencing in NSW.

The UK scheme provides for the classification of culpability within categories A - C, akin to the objective seriousness grading in NSW and then, the classification of the harm inflicted into categories 1 -2. These are then cross referenced into an applicable sentencing table. Although non-binding to NSW courts, and concerned with differently worded legislation, practitioners may wish to refer to the categorisation within the UK scheme to provide guidance as to where offending might fall within the range of objective seriousness noting that coercive control is different from offences of stalk/intimidate, assault, blackmail, fraud, demand with menaces and damaging property but may include components of each of these types of offences.

Victim or Perpetrator?

The literature within this area describes the common difficulty of misidentification of victim and perpetrator. There are two types of misidentification. The first is where the accused in a coercive control charge, has been misidentified and he is or she actually a victim of coercive control. This is often known as legal systems abuse. The more commonly observed second type of misidentification is where a person is accused of some other offence (for example stalk/intimidate or a common assault), where they are, in fact, a victim of coercive control who is engaging in reactive abuse. Misidentification has been raised as one of the main concerns in the debate around criminalisation.

Also colloquially referred to by the acronym “DARVO” which stands for “deny, attack, reverse victim and offender”, is a phenomenon within this area that causes significant difficulties on all sides. Court users in both the criminal and family law environments are commonly witness to cross claims of abuse, cross Apprehended Domestic Violence Applications and difficulty in finding one party only at fault. Practitioners need to be alive to the extremely well documented systemic problems for victims to be properly identified, and properly assisted by authorities. A thorough discussion of this topic is within the *Coercive Control Literature Review: Final Report*. The chapter on misidentification helpfully identifies the concerns. By way of a brief summary, practitioners should know the following issues arise:

- There are certain groups of victims who are more at risk of being misidentified.
- Confusion can arise due to assumptions about what victim behaviour should look like. Very often victims do not always present with assumed 'victim like' conduct. Part of the complexity of domestic relationships, is that it is possible for victims to work to protect their perpetrator, or also, engage in acts of reactive abuse against the perpetrator.
- Perpetrators can exploit legal mechanisms and engage in systems abuse. Examples include making the first report to police when the victim is in a highly charged emotional state, whilst the perpetrator is able to present a composed image. Examples also including making numerous reports to police to create a documented record in support of misidentification, and making formal complaints against the other party alleging other types of improper conduct, including false complaints and allegations of parental alienation. Added to this, perpetrators can be more effective in enlisting help from other family members including children to further obscure the true dynamics of abuse.

These are profoundly complex issues for practitioners to grapple with. As a best practice model, if you are working in this space, extensive enquiries ought to be taken when discussing your client's history, especially if you are concerned the client may be a misidentified victim. Importantly, practitioners need to be alive to the very real possibility of their own internal biases and subconscious judgements. Keeping both an open mind, and an analytical mind will assist practitioners in taking a close and somewhat forensic approach to power abuse dynamics. The clues may be in bread crumb form such as long text histories, banking records, photograph records in phones, the accounts of other family members and friends and an oral history from your client.

ATSI, Culturally, Religious, Linguistic, Gender and Socially Diverse Cohort

By way of a very brief introduction, people from a “CALD” – culturally and linguistically diverse background, and expanding on that definition to include gender and socially diverse people, including the LGBTQIA+ community, experience greater rates of marginalization, vulnerability and increased rates of domestic violence. These are risk factors that have translated to coercive control, so that, it is more likely a person in a relationship involving coercive control will identify to be from a CALD background⁶.

Particularly with reference to First Nations People, there are difficulties including;

[entrenched] barriers to reporting which can include a fear of institutional racism, lack of cultural safety, reluctance to access the criminal justice system in response to family violence because of the ways in which Indigenous people have been negatively treated in the past, fear that their children will be removed, and fear of homelessness⁷.

Power abuse dynamics within these groups not only exist within domestic relationships, but within the relationships victim-survivors have with authorities, medical professionals, the legal system, and community sector. Practitioners need to ensure early identification of these increased risk factors are made and assess where they may need to ensure appropriate responses are engaged if and when representing a misidentified victim/perpetrator. This may involve the use of support persons for cultural safety purposes when conferring or using qualified interpreters or discussing what needs the client have when discussing highly personal content.

Conversely, practitioners may need to cross examine a complainant from a CALD or otherwise diverse background in defended proceedings. In this context, practitioners may need to

⁶ Chapter 8 Experiences of Coercive Control Among Particular Groups within Beckworth, Stephanie; Lowe, Lauren; Wall, Liz; Stevens, Emily; Carson, Rachel; Kaspiew, Rae; et al. (2023). Coercive Control Literature Review: Final Report. La Trobe. Report.

⁷ Chapter 13 Criminalising Coercive Control within Beckworth, Stephanie; Lowe, Lauren; Wall, Liz; Stevens, Emily; Carson, Rachel; Kaspiew, Rae; et al. (2023). Coercive Control Literature Review: Final Report. La Trobe. Report.

perform their role through an interpreter, via a remote witness room and may need avoid using questions which frame more complicated propositions, such as “that didn’t happen, did it?”, or “that’s not what he said, isn’t it?”.

Male Victims

Although this category of victims remains small statistically and poorly documented, some interesting observations are available within the statistics. According to the Australian Bureau of Statistics release regarding Personal Safety Australia, for the year 2021 – 2022 financial year, recorded “1 in 14 men experienced violence by an intimate partner (7.3%) since the age of 15”. Further, 1 in 18 men experienced cohabiting partner violence (5.5%), 1 in 7 men experienced cohabiting partner emotional abuse (14%), and 1 in 13 men experienced cohabiting partner economic abuse (7.8%) Similarly, with CALD victims, they are less likely to report, less likely to be believed and are significantly more likely to be identified by as perpetrators. Practitioners need to be aware of the possibility of bias against male victims.

The Professional Ethical Space for Lawyers: Managing inner conflicts

Many practitioners at one time or another may have felt the prickly hair feeling at the back of the neck when working with clients in relation to material that society would call a variety of words starting with the prefix “un” – unsavory, unseemly, unpalatable, unfavorable. Clients whose charges offend not just our laws, but often, offend personal morals. Many practitioners will experience at one time or another, a level of personal unease working on certain matters, despite the self-protective measures we put in place to stay professional.

Sometimes despite our best efforts, there will be that case that you just can’t take on for personal reasons. For some, the coercive control laws might be where we have to get in the professional gym and train up in our capacity to wrestle this inner conflict. The Coroner’s reports in the cases of Olga Edwards and her two children, and Hannah Clark and her three children, just two horrifying examples, demonstrate where numerous layers of the legal system

failed these families. These cases have become synonymous with systems failure and are a heartache for our country. Particularly in the Edwards and Clarke examples, the failures are described as occurring within the Swiss cheese model of harm⁸. This model is described where in a complex system, harm is prevented by a series of barriers. Each barrier however, has unintended weaknesses, or holes. When the holes line up, or when a perpetrator can make their way through each hole in each barrier, the system fails. The work of representing an accused person in these matters, may require you to explore how other professional systems failures have facilitated traversal through the cheese. Imagine if you were to advise an accused in a case where there were similar horrifying acts like there were in lead up to the homicides in the above cases. How do we as practitioners deal with the inner conflict this may create?

The Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 provides the starting point of professional guidance. Remember, you are not a mere mouthpiece. Rule 17 provides:

17 Independence—avoidance of personal bias

17.1 A solicitor representing a client in a matter that is before the court must not act as the mere mouthpiece of the client or of the instructing solicitor (if any) and must exercise the forensic judgments called for during the case independently, after the appropriate consideration of the client's and the instructing solicitor's instructions where applicable.

17.2 A solicitor does not breach the solicitor's duty to the client, and will not have failed to give appropriate consideration to the client's or the instructing solicitor's instructions, simply by choosing, contrary to those instructions, to exercise the forensic judgments called for during the case so as to—

17.2.1 confine any hearing to those issues which the solicitor believes to be the real issues,

⁸ Reason, J. (1990) The Contribution of Latent Human Failures to the Breakdown of Complex Systems. *Philosophical Transactions of the Royal Society (London)*, Series B, 327, 475-484.

17.2.2 present the client's case as quickly and simply as may be consistent with its robust advancement, or

17.2.3 inform the court of any persuasive authority against the client's case.

17.3 A solicitor must not make submissions or express views to a court on any material evidence or issue in the case in terms which convey or appear to convey the solicitor's personal opinion on the merits of that evidence or issue.

As a defence practitioner, you may have heard this one before, "Trust me, if I wanted to hurt them, they'd know it"? It's not uncommon for clients to struggle with accepting the process of charges being laid and sometimes this is particularly so when it involves domestic violence matters. Perhaps you may have heard a client say in exasperation "How can they say this?", "How can they charge me for that", "It's just their words, there's no proof" or "I want to sue to them for saying this". By way of professional experience, I have often found if you spend a little bit of time assisting a client to adjust to the reality that charges have been filed and can be filed based on word-on-word accounts, it can help a client move through to the more substantive stages of case preparation. By no means are practitioners meant to play therapist, but a few helpful statements that focus on explaining the process why police and prosecutors file charges, can help a client move onto the next stage of focusing on going through a process.

The lighthouse for practitioners is to exercise forensic judgement. Forensic judgement is the light in the dark that assists you to steer through the content to a set course melding analysis of evidence, instructions and knowledge of the law. As noted in rule 17.3, practitioners' professional obligations require steering clear of the rocks of personal opinions that could crash your client's boat.

Risk for Lawyers?

Practitioners ought to be aware of psychological risks in undertaking work in the coercive control space. Notwithstanding the impact of long-term exposure to traumatic work, within the

limited amount of literature relating to the study of perpetrators of coercive control, as noted, in the Coercive Control Literature Review quoting Pitman's 2017 study, some

*common elements identified in the behavioural styles of perpetrators who use coercive control,.. is an entitled and adversarial attitude, a lack of empathy and consistently violating boundaries*⁹.

This behaviour could, potentially, be translated into the relationship between client and lawyers. Practitioners need to be aware that if they are experiencing any of these behaviours being directed towards them by their clients, they ought to disengage from the provision of services relying on rule 13.1.3, which allows the law practice to terminate the engagement for just cause and on reasonable notice.

Where Criminal Law has Impacts on Family Law and Beyond

The new coercive control laws may have significant impacts for family law proceedings, for which many clients may also need assistance. This paper does not seek to explore the impacts of these laws within family law. There is, however, an obvious area of crossover. Practitioners will need to ensure when advising on the criminal implications of coercive control charges, that family law advice ought to be provided or obtained as well. An obvious deduction is that any conviction of coercive control, would be placed before the court in family law proceedings and used in making any finding as to risk of family violence. Even if a criminal charge of coercive control is successfully defended, material relating to the charge, such as the court file, can also be used in family law proceedings. In the family law space, the burden is only to the balance of probabilities, so even if a charge does not result in a conviction in a criminal law context, a court in family law proceedings may be otherwise satisfied the conduct occurred or the material is otherwise relevant.

⁹ Chapter 5 Experiences of coercive control by victim-survivors and perpetrators within Beckworth, Stephanie; Lowe, Lauren; Wall, Liz; Stevens, Emily; Carson, Rachel; Kaspiew, Rae; et al. (2023). Coercive Control Literature Review: Final Report. La Trobe. Report quoting Pitman, T. (2017). Living with coercive control: Trapped within a complex web of double standards, double binds and boundary violations. *The British Journal of Social Work*, 47(1), 143-161.

Thinking beyond family and criminal law, a possible trajectory for coercive control law is the area of financial compensation for injuries and loss caused by trauma from domestic violence. Stark's work considers this. Although he writes from an American legal perspective, he cites the findings in the OJ Simpson civil case as an example of coercive control being a type of civil tort, and therefore, damages can follow. Whether coercive control might be recognised as a tort in Australia is a live question. Perhaps it is not outside of contemplation for damages to be imposed on the perpetrator as an added lever of criminal denouncement. This is certainly the next frontier in the evolution of coercive control law and is also an area where further resistance to legislation may arise. Once again, it may be the Family Court as the leader in this arena, just as it was in 1975. Indeed, the Family Court considers injury from domestic violence to be relevant to property settlements: *Kennon (1997) 22 Fam LR 1*. Also, Stark's more recent works highlight the impact on children as separate victims of coercive control¹⁰. Perhaps financial provisions for child victim-survivors may at some stage be a possible consideration in the advance of coercive control jurisprudence.

Conclusion

Going back in time as laws change, we can see how societal changes are reflected in legal shifts. Our laws must speak to our society and for our society and set our community standards. We have made progress in criminalising sexual misconduct, grooming, child exploitation, and also in decriminalising homosexuality, and, in some jurisdictions, abortion. It is 48 years since the Family Court started this journey. Where do we want to be in 48 years from now? The number of victims impacted by coercive control and the need for change are irrefutable. The community has demanded change.

Perhaps the goal of this law is lofty, in circumstances where enforcement, detection and prosecution will certainly be fraught with challenges. Despite many reasons to critique or even

¹⁰ *Coercive Control: Update and Review*, Evan Stark and Marianne Hester *Violence Against Women* 2019, Vol. 24(1) 81-104.

denounce the legislation, I have faith it will be the work of the courts, and those that work within courts, who will shape the jurisprudence to follow. I hope that jurisprudence is measured in improved statistics. The lyrics of Helen Reddy come to mind, so capturing the feeling of that brave late 70's change era, "*In numbers too big to ignore*". A song, like the voices of those lost to domestic violence, we must not let fall silent.