

## CRIMINALISING COERCIVE CONTROL IN NEW SOUTH WALES: MISUNDERSTANDINGS AND MISSED OPPORTUNITIES

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*In 2022, New South Wales ('NSW') became the first Australian jurisdiction to criminalise coercive control, with the offence commencing on 1 July 2024. This follows the creation of similar offences overseas. These novel offences are designed to respond to the extensive critique of the criminal law which has largely focused on discrete incidents of physical violence leaving absent the full range and pattern of abuse experienced as domestic and family violence. In legislating in this area, the NSW Government sought to balance key tensions that emerged in the debates about criminalisation, such as: not to over-reach; the risk of victims being misidentified as offenders; the over-criminalisation of Aboriginal and Torres Strait Islander peoples; while at the same time addressing coercive control. In this article, I critically examine the NSW offence drawing attention to various misunderstandings about coercive control and misidentification that appear to underpin the NSW approach.*

### I INTRODUCTION

In November 2022, New South Wales ('NSW') became the first Australian jurisdiction to criminalise coercive control.<sup>1</sup> The offence is called 'abusive behaviour towards intimate partners' and commenced operation on 1 July 2024.<sup>2</sup>

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1 *Crimes Legislation Amendment (Coercive Control) Act 2022* (NSW) ('*Amendment Act*'). In 2004, Tasmania introduced offences of economic abuse and emotional abuse or intimidation which are seen as precursors to the more recent offences introduced in NSW and overseas jurisdictions which more comprehensively address coercive control or domestic abuse: see *Family Violence Act 2004* (Tas) ss 8–9; Kerryne Barwick, Paul McGorrey and Marilyn McMahon, 'Ahead of Their Time? The Offences of Economic and Emotional Abuse in Tasmania, Australia' in Marilyn McMahon and Paul McGorrey (eds), *Criminalising Coercive Control: Family Violence and the Criminal Law* (Springer, 2020) 135 <[https://doi.org/10.1007/978-981-15-0653-6\\_7](https://doi.org/10.1007/978-981-15-0653-6_7)>.

2 The *Amendment Act* (n 1) section 2(3) provided a commencement time frame between 1 February 2024 and 1 July 2024. The NSW Coercive Control Implementation and Evaluation Taskforce confirmed that the commencement date for the offence is 1 July 2024: Department of Communities and Justice (NSW), *Crimes Legislation Amendment (Coercive Control) Act 2022: Statutory Report* (Report, 1 December

This followed the creation of similar offences in England and Wales in 2015,<sup>3</sup> Scotland and Ireland in 2018,<sup>4</sup> Northern Ireland in 2021,<sup>5</sup> and a range of other countries.<sup>6</sup> While the drafting of these various offences differ, they are all designed to address the patterned and cumulative nature of domestic and family violence ('DFV')<sup>7</sup> which involves a wide range of behaviours beyond, and including, those typically addressed by the criminal law. The NSW offence adopts some of the approaches seen in other jurisdictions, as well as other features designed to address the unique environment of NSW.<sup>8</sup>

These dedicated offences to address coercive control<sup>9</sup> or domestic abuse<sup>10</sup> were created in response to the extensive critique of the traditional framework of

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2023) 26 ('*Amendment Act Report Dec 2023*'). This article was finalised in June 2024 prior to the commencement of the offence.

3 *Serious Crime Act 2015* (UK) s 76 ('*SCA*'). This offence only applies in England and Wales.

4 *Domestic Abuse (Scotland) Act 2018* (Scot) s 1 ('*DASA*'); *Domestic Violence Act 2018* (Ireland) s 39 ('*DVA*').

5 *Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021* (NI) s 1 ('*DACPA*').

6 Most of the discussions in Australia about the criminalisation of coercive control have tended to concentrate on the legislation in the United Kingdom and Ireland, but these are not the only jurisdictions that have legislated to address psychological forms of abuse or the wider concept of coercive control. For example, see the overview of legislative responses across the European Union: European Institute for Gender Equality, *Combating Coercive Control and Psychological Violence against Women in the EU Member States* (Report, 2022) ch 4.

7 A wide range of different terms (and definitions) have been used over time to describe this harm. While some terms have been used interchangeably others are also associated with particular theorisations about this harm and whether gender is centralised. For example, over time and in different jurisdictions, we have seen terms such as spousal abuse, wife battering, family violence, domestic violence, domestic abuse, family and domestic violence, intimate partner violence, and coercive control. Different jurisdictions have also used these terms in different ways. For example, in the United States of America family violence has been a term associated with a more gender-neutral framing of domestic violence, whereas in Australia family violence has been a term preferred by Aboriginal and Torres Strait Islander peoples and to encapsulate violence in relationships beyond intimate partners: see Helen MacDonald, 'What's in a Name? Definitions and Domestic Violence' (Discussion Paper No 1, Domestic Violence and Incest Resource Centre, 1998). Different legislative schemes also rely on different language and different definitions. In this article, I use domestic and family violence ('DFV') as this is the predominant terminology used in NSW. I also use coercive control in the discussion of the offence. Terminology also appears to be a shifting and confusing landscape in NSW with the *Amendment Act* (n 1), which introduces the offence of coercive control with a definition of 'abusive behaviour' (*Crimes Act 1900* (NSW) s 54D ('*Crimes Act*')) at the same time that a slightly different definition of 'domestic abuse' was inserted in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ('*C(D&PV) Act*'): *Amendment Act* (n 1) sch 2 item 2. 'Domestic abuse' is also being used in the NSW Government's community education website to support the coercive control legislation, launched on 30 August 2023: see 'What Is Coercive Control?', *NSW Government* (Web Page) <<https://www.nsw.gov.au/family-and-relationships/coercive-control/what-is-it>> ('What Is Coercive Control?').

8 The Attorney-General's second reading speech refers to the need for the offence to be 'bespoke' to address the unique circumstances, context and population of NSW: New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 October 2022, 9046, 9052 (Mark Speakman, Attorney-General).

9 Ireland is the only jurisdiction that uses this language in the name of its offence: *DVA* (n 4) s 39. In England and Wales, the offence is called 'controlling or coercive behaviour in an intimate or family relationship': *SCA* (n 3) s 76. However, England and Wales, Ireland and NSW all refer to 'control or coerce', or 'controlling or coercive' in the text of the offence.

10 This is the language used in Scotland and Northern Ireland. While NSW uses the language of 'coerce or control' in the text of the offence, the offence itself is called 'abusive behaviour towards current or former intimate partners': *Crimes Act* (n 7) s 54D.

the criminal law which left much of what was experienced as DFV absent from the legal response which largely focused on incidents of physical violence.<sup>11</sup> This focus on discrete incidents meant that any charged offence was viewed in isolation, disconnected and de-contextualised from the other acts and behaviours that were used to control the victim.<sup>12</sup> These new offences attempt to address these critiques by providing a legal response that better fits with the lived experience of victims of DFV. They do this by creating an offence that responds to the patterned and cumulative nature of DFV that involves a wide range of behaviours (including physical violence, sexual violence and coercion, emotional and psychological abuse, property damage, verbal abuse, technology-facilitated abuse, surveillance, financial abuse, isolation and many other individualised acts and behaviours) used by the perpetrator against the victim to control them and limit their freedom.<sup>13</sup>

In legislating for a new offence to address coercive control, the NSW Government sought to traverse several key tensions that emerged in the discussions and debates leading up to, and including, its introduction to Parliament. These included: not to over-reach (that is, not to construct a law that reaches too far into what might be considered normal or regular behaviours that were not intended to be captured by a law of this kind); to avoid the risk of victims being misidentified as offenders;<sup>14</sup>

11 See Rosemary Hunter, *Domestic Violence Law Reform and Women's Experience in Court: The Implementation of Feminist Reforms in Civil Proceedings* (Cambria Press, 2008) 1; Jane Wangmann, 'Incidents v Context: How Does the NSW Protection Order System Understand Intimate Partner Violence?' (2012) 34(4) *Sydney Law Review* 695, 696.

12 Like the different terms used to describe DFV (see above n 7), different terms have been used to describe the people who experience this harm: victim, survivor, and victim/survivor. In this article, I use the term 'victim' because at the point of engagement with the criminal legal system many people may still be experiencing violence and abuse and are still in the process of obtaining some response about that violence. The term also usefully helps to capture the way in which many victims experience the criminal legal system as traumatic and a potential site of further abuse: see Zoe Rathus et al, "'It's Like Standing on a Beach, Holding Your Children's Hands, and Having a Tsunami Just Coming towards You': Intimate Partner Violence and "Expert" Assessments in Australian Family Law' (2019) 14(4) *Victims and Offenders* 408, 435 n 6 <<https://doi.org/10.1080/15564886.2019.1580646>>.

13 I use gendered language in this article, referring to victims as women and perpetrators as men. This is in recognition of the fact that women comprise the vast majority of victims of DFV: see *Royal Commission into Family Violence: Report and Recommendations* (Report, March 2016) vol 1, 17. For homicide data, see NSW Domestic Violence Death Review Team, *Report 2019–2021* (Report, 2022); Australian Bureau of Statistics, *Personal Safety Survey, Australia* (Catalogue No 4906.0, 15 March 2023). The use of gendered language does not mean that I do not recognise that men may also be victims and women perpetrators of violence in heterosexual and same-sex relationships – they can and are. I also recognise the high rates of violence perpetrated against trans women and men and those who do not identify with the gender binary, who are particularly vulnerable to gender-based violence: see, eg, Jane M Ussher et al, 'Crossing the Line: Lived Experience of Sexual Violence among Trans Women of Colour from Culturally and Linguistically Diverse (CALD) Backgrounds in Australia' (Research Report No 14, Australia's National Research Organisation for Women's Safety, June 2020).

14 Misidentification refers to situations where the predominant victim of DFV in the relationship is identified as the offender in civil or criminal proceedings. The reasons why this might happen are complex and we see a range of different contexts for misidentification lumped together which, as I argue in Part IV, are potentially unhelpful. These include where the incident framework of traditional criminal law and policing practices means that an incident of violence perpetrated by one intimate partner against another is identified as DFV regardless of the context in which that act took place. The term also includes systems abuse or manipulation by the predominant perpetrator where the perpetrator can successfully persuade police that the victim is the aggressor, including by making false allegations and seeking a civil protection

to avoid the law exacerbating the over-criminalisation of Aboriginal and Torres Strait Islander peoples; while at the same time providing a mechanism to address the serious problem of coercive control. This is a difficult balance to navigate, and one might ask whether the government has managed to get this balance right, and whether it is appropriate to primarily see these tensions as amenable to drafting solutions rather than confronting the complex problem of addressing entrenched practice and cultural issues.

In this article I am not addressing questions about whether coercive control should be criminalised as these arguments have been canvassed extensively elsewhere.<sup>15</sup> Instead, my focus is on critically examining the NSW offence and the environment in which it is to be implemented. The remainder of this article is divided into three parts. In Part II, I outline the background to the criminalisation of coercive control in NSW, briefly canvassing the various processes and debates that took place. In Part III, I critically explore the Act that was finally passed by Parliament, which criminalises coercive control and inserts a definition of ‘domestic abuse’ in NSW civil protection order legislation for the first time. The final Part explores various misunderstandings about coercive control and misidentification that appear to underpin the NSW approach and that represent missed opportunities to more deeply consider the legal and practice environment in which this law reform will be implemented.

## II THE MOVEMENT TO CRIMINALISE COERCIVE CONTROL IN NSW

Since 2020, there has been heightened interest in NSW and other Australian jurisdictions<sup>16</sup> in considering how the law, particularly the criminal law, can

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order cross application. The term may also be used to include the simple criminalisation of victims for unrelated acts and behaviours (for example, for resisting arrest, assaulting police, or outstanding warrants). In some circumstances, these factors intersect to enhance the possibility of misidentification. This wide array of reasons means that we need to unpack what is meant by misidentification carefully, particularly in the legal context, where acts and behaviours that are criminal offences may not be amenable to discretion or self-defence arguments but may necessitate a different response.

- 15 For some discussion of these arguments, see Joint Select Committee on Coercive Control, Parliament of New South Wales, *Coercive Control in Domestic Relationships* (Report No 1/57, 30 June 2021) (*‘Coercive Control Report’*); Marilyn McMahon and Paul McGorrrery (eds), *Criminalising Coercive Control: Family Violence and the Criminal Law* (Springer, 2020) <<https://doi.org/10.1007/978-981-15-0653-6>>; Sandra Walklate, Kate Fitz-Gibbon and Jude McCulloch, ‘Is More Law the Answer? Seeking Justice for Victims of Intimate Partner Violence through the Reform of Legal Categories’ (2018) 18(1) *Criminology and Criminal Justice* 115 <<https://doi.org/10.1177/1748895817728561>>; Julia R Tolmie, ‘Coercive Control: To Criminalize or Not to Criminalize?’ (2018) 18(1) *Criminology and Criminal Justice* 50 <<https://doi.org/10.1177/1748895817746712>>.
- 16 In Queensland, the Women’s Safety and Justice Taskforce recommended that coercive control be criminalised: Women’s Safety and Justice Taskforce, *Hear Her Voice: Addressing Coercive Control and Domestic and Family Violence in Queensland* (Report No 1, 2021) (*‘Hear Her Voice’*). Legislation passed the Queensland Parliament on 6 March 2024 and is expected to commence in 2025 as the *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2024* (Qld) (*‘CL(CC&AC) Act’*). In South Australia (*‘SA’*), there have been several consultation processes with the

better respond to coercive control. Early in 2020, the NSW Domestic Violence Death Review Team ('DVDRT') released its report which found that almost all of the intimate partner homicides examined over the period 10 March 2008 to 30 June 2016 were 'characterised by the abuser's use of coercive and controlling behaviours towards the victim' (111 of the 112 homicides).<sup>17</sup> Despite this finding, the DVDRT did not recommend a new offence; instead it recommended that the NSW Department of Communities and Justice ('DCJ') monitor the experience overseas with similar offences as part of its examination of how well NSW laws respond to non-physical forms of DFV and its patterned nature.<sup>18</sup> In its substantive discussion supporting this recommendation, the DVDRT noted the need for more community and professional education, and drew attention to the lack of a definition of DFV in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ('*C(D&PV) Act*') – the legislation governing the making of civil protection orders in NSW (known as 'Apprehended Domestic Violence Orders' ('ADVOs') in NSW).<sup>19</sup>

Around the same time, there were several DFV homicides which attracted widespread media attention.<sup>20</sup> In these cases the non-physical forms of abuse used by the perpetrator, and the patterned and cumulative nature of the abuse experienced by the victim/s, were highlighted. Three homicides dominated the discussions: the murder of Hannah Clarke and her three children by her former partner Rowan Baxter in Queensland on 19 February 2020;<sup>21</sup> the murder of Dr Preethi Reddy by her former partner Harshwardhan Narde in NSW on 3 March 2019;<sup>22</sup> and the murder of Jack and Jennifer Edwards by their father John Edwards in NSW on

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most recent being focused on draft legislation – the Criminal Law Consolidation (Coercive Control) Amendment Bill 2023 (SA). In Western Australia ('WA'), an inquiry was conducted by the Commissioner for Victims of Crime which recommended that the WA Government 'consider the introduction of a new criminal offence addressing coercive control': Office of the Commissioner for Victims of Crime, Department of Justice (WA), *Legislative Responses to Coercive Control in Western Australia: Consultation Outcomes Report* (Report, 2023) 4. In the Northern Territory, the *Justice Legislation Amendment (Domestic and Family Violence) Act 2023* (NT) inserts a new definition of 'coercive control' in its civil protection order legislation: at pt 2 item 7. See also Domestic Violence Prevention Council Advisory Board (ACT), 'Joint Discussion Paper on Criminalising Coercive Control' (Discussion Paper) <[https://www.act.gov.au/\\_data/assets/pdf\\_file/0008/2380580/DVPC-Joint-Discussion-Paper-on-Criminalising-Coercive-Control.pdf](https://www.act.gov.au/_data/assets/pdf_file/0008/2380580/DVPC-Joint-Discussion-Paper-on-Criminalising-Coercive-Control.pdf)>.

17 NSW Domestic Violence Death Review Team, *2017–2019 Report* (Report, 2020) 154 ('*DVDRT Report 2017–19*').

18 Ibid xx.

19 Ibid 68–72. Other Australian jurisdictions use different language for civil protection orders: see Australasian Institute of Judicial Administration, 'National Domestic and Family Violence Bench Book' (Bench Book, 2022) [3.3] <<https://dfvbenchbook.aija.org.au/contents>>.

20 One of the issues in this area has been the extent to which some homicides attract considerable media attention, and others do not. This has been particularly emphasised in the context of murdered Aboriginal and Torres Strait Islander women: see Bronwyn Carlson, 'No Public Outrage, No Vigils: Australia's Silence at Violence against Aboriginal Women', *The Conversation* (online, 16 April 2021) <<https://theconversation.com/no-public-outrage-no-vigils-australias-silence-at-violence-against-indigenous-women-158875>>.

21 *Inquest into the Death of Hannah Ashlie Clarke, Aaliyah Anne Baxter, Laianah Grace Baxter, Trey Rowan Charles Baxter, and Rowan Charles Baxter* (Coroners Court of Queensland, Deputy State Coroner Bentley, 29 June 2022) ('*Clarke Inquest*').

22 *Inquest into the Death of Preethi Reddy* (Coroners Court of New South Wales, Deputy State Coroner Forbes, 24 June 2020).

5 July 2018.<sup>23</sup> The inquests into these homicides took place over 2020–22 and ensured that attention remained on the nature of violence and abuse experienced by the victims in these matters.

In response to this heightened awareness, two private member's bills designed to address coercive control were introduced in the NSW Parliament in 2020. One of these was named in honour of Dr Preethi Reddy.<sup>24</sup> There was also considerable media interest in this area following the publication of journalist Jess Hill's book, *See What You Made Me Do: Power, Control and Domestic Abuse*<sup>25</sup> and accompanying television series,<sup>26</sup> and a high-profile media campaign advocating for the criminalisation of coercive control.<sup>27</sup>

These developments were followed by more formal law reform processes. On 13 October 2020, the Attorney-General, Mark Speakman, announced that he was establishing a parliamentary inquiry to examine coercive control in domestic relationships. On the same day, the DCJ released a discussion paper on coercive control.<sup>28</sup> The NSW Joint Select Committee on Coercive Control was established one week later with a broad remit to 'inquire and report on coercive control in domestic relationships', however this was significantly narrowed by its terms of reference which directed it to have regard to the DCJ discussion paper which was largely framed around the criminal law.<sup>29</sup> There was considerable debate within and outside this process about whether to introduce a new offence into the current criminal legal system. Concern centred on the inadequate response to currently available criminal offences, the misidentification of victims as offenders, and the over incarceration of Aboriginal and Torres Strait Islander peoples more generally. At the same time there was considerable support for an offence that was seen to better reflect and address the harm of DFV.<sup>30</sup> The Joint Select Committee received 156 written submissions, heard evidence from key stakeholders, and conducted a site visit to Narrandera (a regional town in south-western NSW). In June 2021, the Committee tabled its final report recommending, amongst other matters, the creation of a criminal offence of coercive control.<sup>31</sup> The Committee emphasised that the proposed offence 'should not' commence 'without a considerable prior

23 *Inquest into the Deaths of John, Jack and Jennifer Edwards* (Coroners Court of New South Wales, State Coroner O'Sullivan, 7 April 2021) ('*Edwards Inquest*').

24 Crimes (Domestic and Personal Violence) Amendment (Coercive and Controlling Behaviour) Bill 2020 (NSW), introduced by Abigail Boyd (Greens) in the Legislative Council on 18 November 2020; Crimes (Domestic and Personal Violence) Amendment (Coercive Control – Preethi's Law) Bill 2020 (NSW), introduced by Anna Watson (Labor) in the Legislative Assembly on 24 September 2020.

25 Jess Hill, *See What You Made Me Do: Power, Control and Domestic Abuse* (Black Inc, 2019).

26 *See What You Made Me Do* (SBS, 2021).

27 'It's Time to Make Coercive Control a Crime', *marie claire* (online, 12 January 2021) <<https://www.marieclaire.com.au/coercive-control-campaign>>.

28 New South Wales Government, 'Coercive Control' (Discussion Paper, October 2020).

29 For a discussion of the limitations of these terms of reference and other aspects of the work of this Committee, see Jane Wangmann, 'Law Reform Processes and Criminalising Coercive Control' (2022) 48(1) *Australian Feminist Law Journal* 57 <<https://doi.org/10.1080/13200968.2022.2138186>> ('Law Reform Processes').

30 For discussion of these differing views, see *ibid.* For arguments for and against criminalisation, see Tolmie (n 15); Walklate, Fitz-Gibbon and McCulloch (n 15); McMahon and McGorry (n 15).

31 *Coercive Control Report* (n 15) xiv.

program of education, training and consultation with police, stakeholders and the frontline sector'.<sup>32</sup> The Committee also recommended that a definition of 'domestic abuse' be inserted in the *C(D&PV) Act* and that this should take place prior to the introduction of the proposed offence.<sup>33</sup> On the 17 December 2021, the NSW Government indicated that it supported these recommendations, and many others.<sup>34</sup>

The government commenced work on drafting a Bill in response to these two recommendations. In the early stages a 'Cabinet-in-confidence exposure draft Bill [was released] to around 20 restricted legal and government stakeholders to identify any technical legal matters prior to public release'.<sup>35</sup> Notably, that confidential consultation did not involve any of the peak DFV services. An exposure bill was publicly released on 20 July 2022 with a short time frame for submissions – six weeks. Despite multiple calls for this time to be extended, it was refused.<sup>36</sup> Consultation around the exposure Bill included written submissions (almost 200 were received), and roundtables and meetings with key stakeholders.<sup>37</sup> Following this process, another Cabinet-in-confidence draft of the Bill was circulated to key stakeholders, this time including key DFV services.

The final revised Bill was introduced to Parliament on 12 October 2022. This Bill differed from the public exposure Bill in several significant ways, most notably the removal of recklessness as part of the mental element for the offence. In his second reading speech, Speakman explained in detail the drafting decisions made by the government designed to respond to the 'unique' communities<sup>38</sup> and legal environment of NSW concluding that the government 'strongly believe[s] that this bill strikes the best balance for initial major reform and gets it right for the people of [NSW] and the diverse communities we serve'.<sup>39</sup> The Bill was subject to a brief upper house inquiry,<sup>40</sup> and a number of amendments were made to it as it passed through both Houses, particularly in relation to its implementation oversight and statutory review provisions. Almost every aspect of the Bill was the subject of considerable debate through its development, and many of the drafting choices (inclusions and exclusions) that resulted from this debate have been identified as

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32 Ibid.

33 Ibid. This recommendation was supported 'in principle': 'NSW Government Response to the NSW Joint Select Committee on Coercive Control' (Government Response) 3 <<https://www.parliament.nsw.gov.au/ladocs/inquiries/2626/Government%20response%20-%20Joint%20Select%20Committee%20on%20Coercive%20Control%20-%2017%20December%202021.pdf>> ('Government Response').

34 Recommendations were supported in full, in part, or noted: 'Government Response' (n 33) 3–6.

35 New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 October 2022, 9045 (Mark Speakman, Attorney-General).

36 Letter from NSW Women's Alliance to Natalie Ward, Minister for Women's Safety and the Prevention of Domestic and Sexual Violence, 26 July 2022 <[https://justicesupportcentre.org.au/wp-content/uploads/2022/12/Open\\_letter\\_on\\_Coercive\\_Control\\_legislation.pdf](https://justicesupportcentre.org.au/wp-content/uploads/2022/12/Open_letter_on_Coercive_Control_legislation.pdf)>. The government refused to extend the time frame: Letter from Natalie Ward to Elise Phillips, 15 August 2022 (copy on file with author).

37 New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 October 2022, 9045 (Mark Speakman, Attorney-General).

38 Ibid 9044.

39 Ibid 9055.

40 Standing Committee on Social Issues, Parliament of New South Wales, *Crimes Legislation Amendment (Coercive Control) Bill 2022* (Report No 62, November 2022).

questions to be considered in the statutory review of the offence.<sup>41</sup> The Bill passed both Houses and received royal assent on 23 November 2022.

### III THE *CRIMES LEGISLATION AMENDMENT (COERCIVE CONTROL) ACT 2022 (NSW)*

The *Crimes Legislation Amendment (Coercive Control) Act 2022 (NSW)* (*Amendment Act*) inserts a new section 54D in the *Crimes Act 1900 (NSW)* (*Crimes Act*) creating an offence of ‘abusive behaviour towards current or former intimate partners’ (the coercive control offence). It also inserts a definition of ‘domestic abuse’ in the *C(D&PV) Act*, as well as other consequential amendments. The new offence commenced operation on 1 July 2024,<sup>42</sup> while the new definition of ‘domestic abuse’ commenced on 1 February 2024.<sup>43</sup>

#### A The Coercive Control Offence

The new offence makes it a crime for an adult to engage in a course of conduct consisting of abusive behaviour against their current or former intimate partner that was intended to coerce or control that person. In addition the prosecution must prove that a reasonable person ‘in all the circumstances’ would consider that the course of conduct would cause the victim to fear violence would be used against them, or that the behaviour would have had a ‘serious adverse impact on the capacity of [the victim] ... to engage in some or all of [their everyday] activities’, regardless of whether that fear or impact was in fact caused.<sup>44</sup> It is also possible for a defendant to raise a defence against this charge that the course of behaviour ‘was reasonable in all the circumstances’.<sup>45</sup> If found guilty, a person may be subject to a maximum sentence of seven years’ imprisonment. However, if charges are dealt with at the local court level, they can only attract a maximum sentence of two years.<sup>46</sup>

Many of the narrow features of this offence were explained by the government in terms of the need to proceed ‘with great care and caution’ to ensure that this novel offence does not have any unintended consequences, including the misidentification of victims as offenders, or the exacerbation of the over-criminalisation of Aboriginal and/or Torres Strait Islander peoples.<sup>47</sup> The limitation to adults and the exclusion of other familial relationships was justified in this context, despite a number of stakeholders expressing concern about the message that this might send that coercive control in one relational context or age group will be against the law,

41 *Crimes Act* (n 7) s 54J.

42 See above n 2 and accompanying text.

43 *Amendment Act* (n 1) s 2.

44 *Crimes Act* (n 7) s 54D.

45 *Ibid* s 54E.

46 In Scotland, the vast majority of offences have been dealt with at the lower court level: Scottish Government, *Domestic Abuse (Scotland) Act 2018: Interim Reporting Requirement* (Interim Report, January 2023) 17.

47 New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 October 2022, 9044 (Mark Speakman, Attorney-General).

but acceptable and beyond the reach of the law in another. These stakeholders (eg, some Aboriginal and Torres Strait Islander services,<sup>48</sup> disability services,<sup>49</sup> and others<sup>50</sup>) pointed to the fact that many young people may be involved in intimate relationships involving violence and abuse, and that coercive control may also be used by adult children against their elderly parents, by carers against a person with a disability, and within a range of wider relational and kinship contexts. The restriction to intimate partner relationships was also justified by the government based on available homicide data which has highlighted the extent to which coercive control is an issue within this relationship context,<sup>51</sup> and that the existing research on coercive control and power and control is based on an exploration and understanding of the way violence functions in intimate partner relationships.<sup>52</sup>

In the following sections of the article, I explore some of the key elements of the offence – namely, the course of conduct involving abusive behaviour, the mental element of intent to coerce or control, and the inclusion of a reasonableness test. In some areas we see progressive elements that will assist in ensuring that the new offence is able to respond to the lived experience of coercive control, however in other areas I suggest that there are possible tensions and misunderstandings that may impact on how the new offence is practised.

### ***1 Course of Conduct Involving Abusive Behaviour***

The offence requires a ‘course of conduct’ involving ‘abusive behaviour’.<sup>53</sup> ‘[C]ourse of conduct’ is defined as ‘engaging in behaviour ... repeatedly or continuously’, however it is made clear that this does not have to involve an unbroken series of events, nor are the acts and behaviours required to be perpetrated in immediate succession.<sup>54</sup> The focus is on the totality of behaviours. These are important provisions that seek to shift us away from looking at incidents and instead look at patterns of behaviour and their cumulative impact.

48 See, eg, Wirringa Baiya Aboriginal Women’s Legal Centre, Submission to Attorney-General, *Inquiry into Crimes Legislation Amendment (Coercive Control) Bill 2022* (31 August 2022).

49 See, eg, People with Disability Australia, Submission to Department of Communities and Justice (NSW), *Inquiry into Crimes Legislation Amendment (Coercive Control) Bill 2022* (31 August 2022).

50 See, eg, Domestic Violence NSW, *Crimes Legislation Amendment (Coercive Control) Bill 2022* (Report, September 2022); Australia’s National Research Organisation for Women’s Safety, Submission to Department of Communities and Justice (NSW), *Inquiry into Crimes Legislation Amendment (Coercive Control) Bill* (15 September 2022); Community Legal Centres NSW, Submission to Parliament of New South Wales, *Inquiry into Crimes Legislation Amendment (Coercive Control) Bill 2022*; ACON, Submission to Parliament of New South Wales, *Inquiry into Crimes Legislation Amendment (Coercive Control) Bill 2022*; Economic Abuse Reference Group, Submission to Department of Communities and Justice (NSW), *Inquiry into Crimes Legislation Amendment (Coercive Control) Bill 2022* (30 August 2022); No to Violence, Submission to Parliament of New South Wales, *Inquiry into Crimes Legislation Amendment (Coercive Control) Bill 2022*. Other groups recommended greater consultation on this narrow framing: Kingsford Legal Centre, Submission to Department of Communities and Justice (NSW), *Inquiry into Crimes Legislation Amendment (Coercive Control) Bill 2022* (31 August 2022).

51 For example, the homicide data reported by the DVDRT: see above nn 13, 17.

52 See, eg, Evan Stark, *Coercive Control: The Entrapment of Women in Personal Life* (Oxford University Press, 2007) <<https://doi.org/10.1093/oso/9780195154276.001.0001>>.

53 *Crimes Act* (n 7) s 54D.

54 *Ibid* s 54G.

There were pushes by various legal groups to specify a minimum number of incidents – for example, two or more.<sup>55</sup> Some overseas jurisdictions, such as Scotland, do this,<sup>56</sup> while others, like England and Wales, do not. NSW followed the latter approach where it has been suggested that not specifying a minimum number might facilitate the move away from an incident-driven focus.<sup>57</sup> If a minimum number were required, then the police and prosecution may approach the offence by ascertaining that they have ‘one incident here ... and the second there’ rather than considering the pattern or totality of the behaviour. Despite this aim, emerging evidence from England and Wales suggests that this reorientation has not necessarily been successful and that police are still responding within an incident framework, and usually with a focus on the most recent incident.<sup>58</sup> The experience in England and Wales is, however, coloured by the lack of preparatory work prior to the introduction of the offence for police, and the lack of resources (particularly in the context of ongoing austerity measures), which creates a number of difficulties for police to be able to operationalise such a complex offence.<sup>59</sup>

The course of conduct must involve ‘abusive behaviours’ which are defined as behaviours that consist of:

- violence or threats against, or intimidation of, a person; or
- coercion or control of the person against whom the behaviours are directed.<sup>60</sup>

The *Crimes Act* then proceeds to set out a non-exhaustive list of the types of behaviours that might be captured by the offence. This ‘list’ went through multiple iterations during the consultation phases for the Bill. As the Attorney-General recognised, it is not possible to list all the permutations of behaviours as many perpetrators often tailor their behaviour ‘to the unique and dynamic circumstances of the particular relationship’.<sup>61</sup> Perpetrators can be incredibly creative, and the law needs to be able to respond to that. The non-exhaustive list refers to behaviours that:

- cause harm to a child or another person, if the victim fails to comply with the perpetrator’s demands;
- are economically or financially abusive;
- shame, degrade or humiliate the victim;

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55 Law Society of New South Wales, Submission to Department of Communities and Justice (NSW), *Inquiry into Crimes Legislation Amendment (Coercive Control) Bill 2022* (29 August 2022) 2; Legal Aid NSW, Submission to Department of Communities and Justice (NSW), *Inquiry into Crimes Legislation Amendment (Coercive Control) Bill 2022* (August 2022) 8.

56 *DASA* (n 4) s 10(4).

57 New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 October 2022, 9044, 9047 (Mark Speakman, Attorney-General).

58 Andy Myhill et al, ‘“A Genuine One Usually Sticks out a Mile”: Policing Coercive Control in England and Wales’ (2023) 33(4) *Policing and Society* 398, 408–9 <<https://doi.org/10.1080/10439463.2022.2134370>>; Charlotte Barlow et al, ‘Putting Coercive Control into Practice: Problems and Possibilities’ (2020) 60(1) *British Journal of Criminology* 160, 170–2 <<https://doi.org/10.1093/bjc/azz041>>.

59 Myhill et al (n 58) 407–8.

60 *Crimes Act* (n 7) s 54F(1).

61 New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 October 2022, 9048 (Mark Speakman, Attorney-General).

- harass, monitor or track the victim by a variety of means;
- involve damage or destruction to property;
- serve to isolate the victim from family or friends or from engaging in cultural or spiritual activities;
- cause harm to pets; or
- deprive the victim of liberty or control or regulate aspects of their lives.<sup>62</sup>

Some of these acts and behaviours were able to be addressed by existing offences,<sup>63</sup> however, others were not and certainly not as a ‘package’ or ‘course of conduct’. As a list of behaviours that form part of the repertoire of coercive control it performs a useful illustrative and educative function. There are, however, notable silences. While the focus on non-physical forms of abuse is welcome, the offence is meant to address the full pattern of behaviour which may include physical and sexual forms of violence and coercion. While this is covered under the general clause that abusive behaviour means behaviour that consists of ‘violence’,<sup>64</sup> the absence of explicit mention of sexual violence and coercion is a missed opportunity given that sexual violence tends to get lost in legal responses to DFV more generally. While studies with victim-survivors indicate a high level of co-occurrence of sexual violence, physical violence, and other acts and behaviours that form coercive control,<sup>65</sup> studies that have sought to unpack the visibility of this co-occurrence in legal proceedings have generally found few allegations about sexual violence.<sup>66</sup> In addition, the proportion of DFV incidents involving sexual violence reported to the police or the subject of charges remain very small.<sup>67</sup>

62 *Crimes Act* (n 7) s 54F(2).

63 See, eg, *ibid* ss 195, 530; *C(D&PV) Act* (n 7) s 13; *Criminal Code Act 1995* (Cth) s 474.17.

64 *Crimes Act* (n 7) s 54F(1).

65 See Hayley Boxall and Anthony Morgan, ‘Experiences of Coercive Control among Australian Women’ (Statistical Bulletin No 30, Australian Institute of Criminology, March 2021); Peta Cox, ‘Sexual Assault and Domestic Violence in the Context of Co-occurrence and Re-victimisation’ (State of Knowledge Paper No 13, Australia’s National Research Organisation for Women’s Safety, October 2015); Raleigh Blasdel, ‘The Co-occurrence of Physical and Sexual Intimate Partner Violence among US College Females’ (2021) 16(1) *International Journal of Criminal Justice Sciences* 97.

66 For studies that have sought to identify where allegations about sexual violence are included within DFV cases, see Jane Wangmann, ‘Gender and Intimate Partner Violence: A Case Study from NSW’ (2010) 33(3) *University of New South Wales Law Journal* 945, 958 (‘Gender Violence’); Lawrie Moloney et al, ‘Allegations of Family Violence and Child Abuse in Family Law Children’s Proceedings: A Pre-reform Exploratory Study’ (Research Report No 15, Australian Institute of Family Studies, May 2007) 69; Alesha Durfee, ‘The Gendered Paradox of Victimization and Agency in Protection Order Filings’ in Venessa Garcia, Janice E Clifford and Roslyn Muraskin (eds), *Female Victims of Crime: Reality Reconsidered* (Prentice Hall, 2010) 243, 249–51. More recent studies of allegations in family law proceedings have coded physical and sexual violence allegations together under ‘physical violence’: see Rachel Carson et al, ‘Direct Cross-examination in Family Law Matters: Incidence and Context of Direct Cross-examination Involving Self-Represented Litigants’ (Research Report, Australian Institute of Family Studies, June 2018) 28; Rae Kaspiew et al, ‘Court Outcomes Project: Evaluation of the 2012 Family Violence Amendments’ (Research Report, Australian Institute of Family Studies, October 2015) 44.

67 In a study that examined domestic violence incidents reported to the police (from 1 January 2009 to 31 March 2020) only 2% were characterised as involving a sexual offence: Min-Taec Kim and George Karystianis, ‘Text Mining Police Narratives of Domestic Violence Events to Identify Coercive Control Behaviours’ (Crime and Justice Bulletin No 260, NSW Bureau of Crime Statistics and Research, September 2023) 17. In nationwide data, the ‘most common principal offence categories among FDV defendants’ in 2021–22 included acts intended to cause injury (just under 50%), and sexual assault

This failure to specifically mention sexual violence stands in contrast to Scotland where it is explicitly stated that violent behaviour ‘includes sexual violence as well as physical violence’.<sup>68</sup> This is an important notation. The Attorney-General explained that the government was guided by the definition of ‘family violence’ in the *Family Law Act 1975* (Cth) (‘FLA’)<sup>69</sup> and the findings of some coronial inquests, including that of Hannah Clarke and her children<sup>70</sup> – yet in both of these instances, sexual violence and coercion is mentioned. The absence is also incongruous in an offence that is ostensibly designed to widen understandings about the full range of acts and behaviours that together form part of coercive control within an intimate relationship. Not mentioning sexual violence and coercion within the criminal offence potentially means that any inclusion here remains in the context of those acts and behaviours already defined as sexual violence in criminal law, and not the full range of behaviours that women experience as sexually coercive.

What is perhaps most troubling about this definition of ‘abusive behaviour’ is not its content, but rather the difference between it and the definition of ‘domestic abuse’ that has been inserted in the *C(D&PV) Act* by the same *Amendment Act*.<sup>71</sup> While the Attorney-General explained this difference in terms of the functions of these two legislative regimes – one being criminal and the other civil – the differences arguably undermine one of the clear functions of reform in this area which is its potential educative function. This confusion is compounded by the recently launched website to provide community education to support the coercive control offence which refers to coercive control as ‘domestic abuse’.<sup>72</sup> To have two similar, but slightly different, definitions seems incredibly odd. Notably, the definition inserted into the *C(D&PV) Act* specifically refers to ‘behaviour that is sexually abusive, coercive or violent’.<sup>73</sup> One would imagine that the silence in one definition compared to the other, inserted by the same *Amendment Act*, may take on some significance in terms of statutory interpretation of the coercive control offence. Other concerns with the new definition of ‘domestic abuse’ in the *C(D&PV) Act* are discussed in Part III(B).

## 2 Intent

The offence requires that the prosecution establish that the defendant intended to ‘coerce or control’ the alleged victim. Intent is a high mental element to satisfy. The exposure Bill had included recklessness, but this was removed by the time the

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and related offences (under 5% of principal charges): Australian Bureau of Statistics, *Criminal Courts, Australia, 2021–22 Financial Year* (Catalogue No 4513.0, 3 March 2023), cited in ‘Family, Domestic and Sexual Violence’, *Australian Institute of Health and Welfare* (Web Page, 12 April 2024) <<https://www.aihw.gov.au/family-domestic-and-sexual-violence/responses-and-outcomes/legal-systems>>.

68 *DASA* (n 4) s 2(4).

69 *Family Law Act 1975* (Cth) s 4AB (‘FLA’).

70 *Clarke Inquest* (n 21).

71 The *CL(CC&AC) Act* (n 16) section 20 also provides for similar but slightly different definitions of domestic violence for the purpose of the offence to those contained in the *Domestic and Family Violence Protection Act 2012* (Qld) section 8 (‘DFVPA’).

72 See ‘What Is Coercive Control?’ (n 7).

73 *C(D&PV) Act* (n 7) s 6A(2)(b).

Bill was introduced to Parliament. The key reason for its removal was to minimise the risks of misidentification of victims as offenders and concerns about the high incarceration rate of Aboriginal and Torres Strait Islander peoples. The reasons why recklessness is an important inclusion for an offence of this kind is the very hidden nature of DFV, the individually targeted nature of many forms of abuse, and the way in which perpetrators of domestic violence frequently minimise, excuse, and deflect responsibility for their behaviours.<sup>74</sup> Whether or not ‘recklessness’ should be included in the future as part of the mental element for the offence is one of the specific issues to be addressed in the statutory review.<sup>75</sup>

The appropriate mental element for an offence of this kind was debated in the United Kingdom (‘UK’) and Ireland with almost all these jurisdictions including some lesser mental element as part of their respective offences. In England and Wales, this is that the defendant ‘knows or ought to know’ that the behaviour would have a serious effect on the victim,<sup>76</sup> and in Scotland and Northern Ireland the standard is reckless as to whether the behaviour causes that harm.<sup>77</sup> In her research on the English and Welsh offence, Cassandra Wiener found that the judicial officers she interviewed considered it important to have included an objective mens rea otherwise the prospect of being able to secure a conviction on intent only would have been incredibly difficult.<sup>78</sup>

The Scottish consultation process canvassed the question of the appropriate mens rea in detail and discussed a number of concerns and benefits associated with the inclusion of recklessness.<sup>79</sup> While some people were concerned about the way that recklessness, in combination with the wide range of behaviours that might be captured by the offence, might cause it to have an expansive reach and lead to potential uncertainty about what was covered and what was not, others pointed to the fact that some perpetrators ‘abuse with complete disregard to the consequences of their actions’, and that ‘recklessness reflects the perpetrator’s indifference to, and lack of responsibility for, the consequences of their actions and the harm they are causing’.<sup>80</sup> Other submissions also pointed out that ‘many perpetrators will argue that they did not intend to cause the harm and therefore a recklessness alternative will avoid the offence failing’.<sup>81</sup> Ultimately, Scotland included ‘recklessness’ in its domestic abuse offence.

There are few reported decisions from the UK which facilitate an understanding of the benefits of including a lesser mental element in their respective offences.

74 See Liz Kelly and Nicole Westmarland, ‘Naming and Defining “Domestic Violence”: Lessons from Research with Violent Men’ (2016) 112(1) *Feminist Review* 113 <<https://doi.org/10.1057/fr.2015.52>>; Kate Cavanagh et al, ‘“Remedial Work”: Men’s Strategic Responses to Their Violence against Intimate Female Partners’ (2001) 35(3) *Sociology* 695 <<https://doi.org/10.1177/S0038038501000359>>.

75 *Crimes Act* (n 7) s 54J(2)(a).

76 *SCA* (n 3) s 76(1)(d).

77 *DASA* (n 4) s 1(2)(b); *DACPA* (n 5) s 1(2)(b).

78 Cassandra Wiener, *Coercive Control and the Criminal Law* (Routledge, 2023) 148–9 <<https://doi.org/10.4324/9780429201844>>.

79 Lucy Robertson, *Criminal Offence of Domestic Abuse: Analysis of Consultation Responses* (Report, August 2016) 18–19.

80 *Ibid* 18.

81 *Ibid*.

Most reported decisions relate to sentencing appeals rather than the substantive offence, and those that concern the substantive offence turn on different issues.<sup>82</sup> *Walker (Scotland) v Procurator Fiscal, Dunoon*<sup>83</sup> does raise the issue of the mental element, however the unique facts of that case and the lack of detail in the decision mean that it does not assist in understanding the benefits or weaknesses of including a lesser mental element.

### 3 ... to Coerce or Control

It is not just that the requirement to prove intent will make this offence challenging to prosecute, but the way it is tied to ‘coerce or control’. While it might seem initially attractive to use the language of the behaviour that the offence is concerned with, the use of these terms rests on a number of assumptions. It is also notable that the offence does not use the term ‘coercive control’, but rather ‘coerce or control’ which is arguably a different concept that potentially fragments understandings about this harm.<sup>84</sup> Despite this construction, the use of this language assumes that these terms are well understood particularly by the key professionals who will engage with the offence.<sup>85</sup> Yet it has been clear from media discussions, political debates, and other documents that there is widespread misunderstanding about what coercive control is, and there have been multiple slippages in language – coercive control, coerce or control, coercive or controlling behaviours – that illustrate complexity of understanding in this area. This problem is discussed in more detail in Part III(A).

Despite this widespread misunderstanding, the terms ‘coerce or control’ are not defined for the purposes of the offence. The Attorney-General explained this absence by asserting that the terms are ordinary words that are well understood and therefore do not require definition instead relying on their ordinary dictionary definitions.<sup>86</sup> To support this approach, the Attorney-General noted that other jurisdictions (for example, England and Wales) have also left these terms undefined.<sup>87</sup> However, the ‘lack of definitional clarity’ in England and Wales has been highlighted as problematic, particularly in the early implementation period.<sup>88</sup> In England and Wales, this absence has been seen as creating difficulties for legal actors and other service providers who are meant to identify and act on this harm and undermines the potential educative function of the law.<sup>89</sup> England and

82 For example, in an appeal against conviction in *CA v Her Majesty's Advocate* [2022] HCJAC 33, the central issue concerned the applicability of the Scottish corroboration requirements in the context of the *DASA* (n 4) offence. See also *Procurator Fiscal, Livingston v H (J)* 2021 SLT (Sh Ct) 415.

83 [2022] SAC (Crim) 9.

84 See discussion of this issue in the context of the English and Welsh offence in Wiener (n 78) 132–8. Note that the *CL(CC&AC) Act* (n 16) section 334C also relies on this fragmented language within the text of the offence (although the offence itself is called ‘coercive control’).

85 New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 October 2022, 9049 (Mark Speakman, Attorney-General).

86 *Ibid.*

87 *Ibid* 9054. See, eg, *SCA* (n 3) s 76; *DVA* (n 4) s 39.

88 Wiener (n 78) 133. See also Iain R Brennan et al, ‘Service Provider Difficulties in Operationalizing Coercive Control’ (2019) 25(6) *Violence Against Women* 635 <<https://doi.org/10.1177/1077801218797478>>.

89 Wiener (n 78) 133.

Wales does at least support its offence with statutory guidance,<sup>90</sup> which not only provides definitions but also wider guidance about the behaviours that might be encapsulated by the offence. What is significant about that statutory guidance is that the definitions included there reflect, to some degree, the research literature on which it is based, or at the very least the context of DFV:

The cross-Government definition of domestic violence and abuse outlines controlling or coercive behaviour as follows:

- Controlling behaviour is: a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour.
- Coercive behaviour is: a continuing act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim.<sup>91</sup>

In comparison, the ordinary dictionary definitions, advocated by the Attorney-General and that ground the traditional statutory interpretation approach, are disconnected from this context. The *Macquarie Dictionary* provides the following definitions of ‘coerce’ and ‘control’:

coerce

1. to restrain or constrain by force, law, or authority; force or compel, as to do something.
2. to compel by forcible action: *coerce obedience*.

control

1. to exercise restraint or direction over; dominate; command.
2. to hold in check; curb.

...

The ‘Statement of Public Interest’ that accompanied the NSW Bill cited two English cases to support not including a definition. One is a criminal case and the other a family law case. In the criminal case dealing with an offence under section 76 of the *Serious Crimes Act 2015* (UK), the trial judge is quoted as directing the jury that

controlling behaviour, well, that is an ordinary term, it is a part of ordinary language; it requires no additional definition from me. Coercive behaviour, ladies and gentlemen, is behaviour that involves one person forcing or compelling another to do or not to do something or to act or not to act in a certain way. Examples of coercive behaviour include the use of violence, threats and intimidation. The defendant’s behaviour could be described as controlling or coercive if it was behaviour that was designed or intended to force or compel [the victim] to behave in a particular way herself or to maintain control over her.<sup>92</sup>

Once again, we see slippages in language and the fragmentation of coercive control. The English and Welsh offence, like in NSW, criminalises behaviour

90 The provision of statutory guidance is set out in the *SCA* (n 3) s 77.

91 Home Office (UK), ‘Controlling or Coercive Behaviour in an Intimate or Family Relationship: Statutory Guidance Framework’ (Statutory Guidance, December 2015) 3 [12] (citations omitted) (emphasis omitted) <[https://assets.publishing.service.gov.uk/media/64c28b02331a650014934d11/Controlling\\_or\\_coercive\\_behaviour\\_-\\_statutory\\_guidance.pdf](https://assets.publishing.service.gov.uk/media/64c28b02331a650014934d11/Controlling_or_coercive_behaviour_-_statutory_guidance.pdf)>.

92 *Macquarie Dictionary* (online at 12 May 2024) ‘coerce’, ‘control’.

93 *R v Chilvers* [2022] 1 WLR 1089, 1100 [45] (Fulford LJ, Goose J, Sir Roderick Evans).

that is ‘coercive or controlling’, here the trial judge deals with these separately – controlling behaviour and coercive behaviour – rather than as coercive control or as behaviour that ‘coerces or controls’ a person. This is an approach that arguably loses sight of the overall function of the alleged behaviours on the victim, instead focusing on their immediate effect. In the family law case,<sup>94</sup> Hayden J also asserted that ‘coercive and controlling behaviour’ requires no legal definition.<sup>95</sup> Importantly, Hayden J continues and emphasises that ‘understanding the scope and ambit of the behaviour’ requires more and that the ‘[k]ey to both behaviours is an appreciation of a “pattern” or “a series of acts”, the impact of which must be assessed cumulatively and rarely in isolation’ and that this ‘requires greater awareness and ... more focused training for the relevant professionals’.<sup>96</sup> In England and Wales, the *Children Act 1989* (UK) which governs parenting following the breakdown of a relationship, domestic abuse and coercive and controlling behaviour are not defined. They are, however, defined in *Practice Direction 12J – Child Arrangements and Contact Orders: Domestic Abuse and Harm* to which Hayden J refers, and Hayden J also draws on the approach contained in section 76 of the *Serious Crimes Act 2015* (UK) to determine how the evidence around the coercive and controlling behaviours should be understood, viewed and assessed.<sup>97</sup> It is significant that Hayden J draws on work taking place in the criminal law jurisdiction and in particular the statutory guidance to support section 76,<sup>98</sup> guidance that is absent in NSW.

The Attorney-General also asserted that ‘coerce or control’ were familiar terms given that they are relied on in the definition of family violence in the *FLA* and the *C(D&PV) Act*.<sup>99</sup> The suggestion that all legal actors are familiar with the provision in the *FLA* is perhaps misplaced: to what extent are police prosecutors and lawyers employed in the NSW Office of the Director of Public Prosecutions familiar, in a well-developed sense, with doctrinal developments in the family law arena? Are there also potential questions about the extent to which legal practitioners’ work may be divided along doctrinal lines, and whether DFV knowledge is embedded in this work?<sup>100</sup> As the Queensland Women’s Safety and Justice Taskforce noted, while a lawyer can be accredited in either family law or criminal law, there is no accreditation as a domestic violence practitioner practising across multiple areas

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94 *F v M* [2021] EWFC 4 (Fam).

95 *Ibid* [4].

96 *Ibid*.

97 *Ibid* [103]–[105].

98 *Ibid* [60].

99 New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 October 2022, 9048, 9052 (Mark Speakman, Attorney-General).

100 See Jane Wangmann et al, ‘What Is “Good” Domestic Violence Lawyering? Views from Specialist Legal Services in Australia’ (2023) 37(1) *International Journal of Law, Policy and the Family* ebac034:1–23 <<https://doi.org/10.1093/lawfam/ebac034>>, which found that having cross-jurisdictional knowledge was an important attribute of good DFV lawyering but that lawyers did not necessarily have this knowledge: at 18. It is however acknowledged that many lawyers working in general practice are likely to work across areas of law, and that within some legal aid commissions there are lawyers who are known as ‘hybrid’ working across legal areas related to domestic violence: see ‘Domestic Violence Unit’, *Legal Aid New South Wales* (Web Page) <<https://www.legalaid.nsw.gov.au/my-problem-is-about/my-family-or-relationship/domestic-and-family-violence/domestic-violence-unit#accordion-e7c0112a24-item-70ac3922d1>>.

of law.<sup>101</sup> The Attorney-General also pointed to the fact that ‘coerce or control’ is language that has been used in the *C(D&PV) Act* since 2016.<sup>102</sup> However the provision in the *C(D&PV) Act* that used these terms was a highly limited and technical provision that appears to have been rarely relied on in practice.<sup>103</sup> It merely provided for the inclusion of other criminal offences not already incorporated in the definition of ‘domestic violence offence’ (fear of a ‘domestic violence offence’ being the basis on which an ADVO is granted) when they have been perpetrated with intent to coerce or control the victim of the offence.

I am not necessarily suggesting that the terms ‘coerce or control’ should be defined in the *Crimes Act*, but rather that these terms are not currently well understood in the context of DFV and that this will have implications for how the offence is practised, and that if the legislation had used the concept of ‘coercive control’ legal actors might have been encouraged to consider this as something akin to a ‘technical term’ that requires an understanding of the DFV literature from which it is derived. The multiple slippages in language between coercive control, coerce or control, controlling behaviours and coercive behaviours add to potential confusion and potentially limit and shape how the offence will be practised rather than enhancing understanding within the legal framework. The approach taken in NSW and England and Wales can be usefully contrasted to Scotland where the language of coercive control was not used in its offence. Instead, the decision was made to continue to rely on the well understood and long-used language of ‘domestic abuse’ in that jurisdiction. In addition, Scotland avoided providing a list of indicative behaviours – as is the case in the NSW offence, and in the statutory guidance for the English and Welsh offence – instead focusing on the impacts and effects of the course of behaviour.<sup>104</sup>

#### **4 Inclusion of a Reasonable Person Test (and a Reasonable Defence)**

In addition to the above elements, the prosecution must also prove that ‘a reasonable person would consider the course of conduct would be likely, in all

101 *Hear Her Voice* (n 16) 604.

102 New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 October 2022, 9052 (Mark Speakman, Attorney-General). This provision has been completely removed and replaced by a new section 11(1)(c) that links to the new definition of ‘domestic abuse’: *Amendment Act* (n 1) sch 2 item 4, amending *C(D&PV) Act* (n 7).

103 There are very few cases on *C(D&PV) Act* (n 7) section 11, which defines a ‘domestic violence offence’, and most are concerned with whether the offence should be recorded as a ‘domestic violence offence’ rather than any other wide function within the *Act*. There were two cases involving an offender who had used violence against their former intimate partner’s suspected new partner – as a suspected partner they do not fall within the definition of a domestic relationship: see *R v Conway* [2019] NSWDC 891 (‘*Conway*’); *R v Bucca* [2021] NSWDC 394 (‘*Bucca*’). In the former case, Bright DCJ found that the offence with which the defendant was charged could be characterised as a ‘domestic violence offence’ for the purposes of sentencing noting that ‘the offending was motivated by a desire to exercise control over’ his former partner: *Conway* (n 103) [32]. However, in the other case Wilson DCJ found that the offending did not fall within a ‘domestic violence offence’ given that the victim and offender were not in a relationship and that while the woman (the ex-partner of the offender) ‘was also impacted ... by the offending’ this did ‘not warrant’ recording it as a ‘domestic violence offence’: *Bucca* (n 103) [101]–[105].

104 *DASA* (n 4) s 2(3).

the circumstances, to cause' the victim to 'fear that violence will be used against' them or someone else, or that the behaviour had 'a serious adverse impact on the capacity of the [victim] ... to engage in some or all of [their] ... ordinary day-to-day activities'.<sup>105</sup>

The notion of reasonableness and whether and how it includes an understanding of women and gender-based harms, has been the subject of considerable academic discussion, particularly in the context of women's self-defence claims.<sup>106</sup> The way in which the new offence includes reasonableness raises continuing concerns about the extent to which the harms women experience in their lives and their impact are well understood (particularly in the context of coercive control), and whether there is an adequate understanding of the wide range of ways in which women may respond and react to their victimisation which may not look like a 'serious adverse impact' to others, but certainly plays out that way in terms of their own personal agency. In this regard it is significant that the NSW offence does not require the prosecution to establish that such fear of violence or adverse impact happened (as is the case in England and Wales<sup>107</sup>). This is progressive. However, it is likely that evidence will still be led in this area to support successful prosecutions. This may be relatively straightforward in cases that include allegations of physical violence or threats to use such violence within the coercive control charge providing an easy connection to 'fear ... that violence will be used against' them. However, it may be more challenging in cases that centre on non-physical forms of abuse where it is unclear the extent to which those who have little understanding of the lived reality of victims of DFV<sup>108</sup> understand how denigration or financial abuse might impact victims. Noting that, it is not simply that such behaviours have a 'serious adverse impact' on victims but a 'serious adverse impact on [their] capacity' to do ordinary things. The reason for this very narrow framing was again to avoid the risk of victims being identified as possible offenders under this offence,<sup>109</sup> but it also potentially represents a difficult test for the prosecution to satisfy. Intersecting with this are perceptions of victims: who victims are, how they respond, and how they cope. In England and Wales, where this impact is required to be established, there have been difficulties in establishing the charge where the victim is 'resilient ... who, against the odds, manages to continue with her roles at work and/or in the home without displaying visible signs of distress'.<sup>110</sup> And as a result there have

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105 *Crimes Act* (n 7) s 54D(1)(d).

106 See, eg, Elizabeth M Schneider, *Battered Women and Feminist Law Making* (Yale University Press, 2000) 79–83; Emma Roff and Patricia Easteal, 'Engaging with the Survivor's Reality of Domestic Violence: A Discourse Analysis of Judicial Understanding in Survivor-Perpetrated Homicides' (2021) 47(1) *Monash University Law Review* 252; Stella Tarrant, Julia Tolmie and George Giudice, 'Transforming Legal Understandings of Intimate Partner Violence' (Research Report No 3, Australia's National Research Organisation for Women's Safety, June 2019); Anthony Hopkins, Anna Carline and Patricia Easteal, 'Equal Consideration and Informed Imagining: Recognising and Responding to the Lived Experiences of Abused Women Who Kill' (2018) 41(3) *Melbourne University Law Review* 1201.

107 *SCA* (n 3) s 76(4).

108 Roff and Easteal (n 106) 253.

109 New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 October 2022, 9049 (Mark Speakman, Attorney-General).

110 Wiener (n 78) 142.

been cases where the defendant has been acquitted, not because their behaviour was not ‘disgraceful’ but that the victim was ‘a strong and capable woman’ and as a result the court was unable to find that there had been a serious adverse impact of the kind required by the legislation.<sup>111</sup>

Much here depends on the nature and content of the educative work undertaken in preparation for the operation of the NSW offence, and in turn the way in which ‘serious adverse impact’ and its connection to ‘capacity to engage in daily activities’ is operationalised. The reports of the Coercive Control Implementation and Evaluation Taskforce provide broad brush information about the training and education that has been undertaken, with the detail provided increasing over time for some professional groups.<sup>112</sup> What will potentially shape the reasonable person test for this offence is the extent to which any understanding of coercive control is connected to understanding how coercive control is itself connected to gendered structural inequalities in our society.<sup>113</sup> Without this deeper understanding it may be difficult to distinguish between ‘an old-fashioned man – one who expects certain standards in his home and in relation to his children’ or who seeks to control the money, compared to a man who uses these behaviours and demands to oppress and control his partner.<sup>114</sup> Will a reasonable person understand the way in which some of these tools of ‘hyper-regulation’<sup>115</sup> render a woman fearful or change the way in which she orders and engages in her daily life?

## B Amendments to the Apprehended Domestic Violence Order Scheme

As noted above, at the same time as introducing a new criminal offence to address coercive control, the *Amendment Act* also introduced a definition into the legislation that provides for the making of ADVOs. It is perhaps these provisions that are the most confusing and anomalous.

While other Australian jurisdictions have modernised their civil protection order legislation by including a comprehensive definition of DFV,<sup>116</sup> NSW has retained the approach, adopted in 1983, of relying on the notion of a ‘domestic violence offence’ with no definition of DFV until this amendment. The absence of a definition has long been criticised. It was first raised by the NSW Law Reform Commission (‘NSWLRC’) in 2003 which recommended that a definition be inserted, however a statutory review of the *C(D&PI) Act* by the then NSW Department of Justice was against the inclusion of such a definition, then in 2010 the Australian Law Reform

111 Ibid 142–3.

112 *Amendment Act Report Dec 2023* (n 2). Department of Communities and Justice (NSW), *Crimes Legislation Amendment (Coercive Control) Act 2022: Statutory Report* (Report, 1 June 2024) (‘*Amendment Act Report June 2024*’).

113 See Stark (n 52) 230–2; Tolmie (n 15) 56.

114 Tolmie (n 15) 56. See discussion of *Ackerman v Ackerman* [2013] FMCAfam 109, which illustrates this potential problem in 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* (Springer, 2020) 219, 232 <[https://doi.org/10.1007/978-981-15-0653-6\\_11](https://doi.org/10.1007/978-981-15-0653-6_11)> (‘Context for Violence’).

115 Stark (n 52) 230.

116 See, eg, *DFVPA* (n 71) s 8; *Family Violence Protection Act 2008* (Vic) s 5 (‘*FVPA*’).

Commission and NSWLRC in their joint report on family violence drew attention to this ‘notable’ absence in NSW.<sup>117</sup> The need for a definition of DFV was again raised before the NSW Joint Select Committee on Coercive Control, having been commented upon by the DVDRT in its 2020 report.<sup>118</sup> One of the key arguments put to the Joint Select Committee was that the first step in the movement towards criminalisation of coercive control should be the introduction of a definition of DFV in the *C(D&PV) Act* to prepare legal actors for the change. While some concern was expressed about net-widening before the Joint Select Committee, the Committee did recommend that such a definition be inserted and that it should be introduced prior to the new offence of coercive control.

While this new definition did commence prior to the offence (on 1 February 2024, while the offence commenced on 1 July 2024) this is arguably insufficient time to provide for the educative work envisioned by the Joint Select Committee. In addition, there are several aspects of the new definition which undermine any of its stated aims to be educative to either the community or to key professionals working in the system.

First the new definition of ‘domestic abuse’ does almost no work within the *C(D&PV) Act*.<sup>119</sup> Most bizarrely the new definition does not ground the making of an ADVO as is the case in other Australian jurisdictions which have included broad inclusive definitions of DFV in their protection order legislation.<sup>120</sup> Instead, the only role provided for the new definition is to expand the scope of offences deemed ‘domestic violence offences’ to include ‘[a]n offence, other than a personal violence offence, in which the conduct that constitutes the offence is domestic abuse’.<sup>121</sup> Few offences sit outside the broad range of offences already included within the existing definition of a domestic violence offence (which is a list of prescribed personal violence offences, and offences committed in the same circumstances).<sup>122</sup> Rather than a definition of DFV being the key animating factor in the *C(D&PV) Act*, instead it is all orientated around a ‘domestic violence offence’; that is to say when the court is deciding whether to grant an ADVO it is concerned with whether a person in need of protection has fears of a ‘domestic violence offence’, and those fears are reasonable.<sup>123</sup> The limitation of the operation of the domestic abuse definition to the notion of an offence means that this expansive definition, while it looks good, does nothing to expand the scope and responsiveness of the ADVO scheme to the

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117 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response* (Final Report, October 2010) vol 1, 236 [5.175]. Interestingly, when the previous section 11(1)(c) was included in the *C(D&PV) Act* (n 7) in 2016, one of the reasons asserted by the government of the day as the reason for this amendment was to act on the recommendation of this report: see New South Wales, *Parliamentary Debates*, Legislative Assembly, 5 May 2016, 3 (Gabrielle Upton, Attorney-General).

118 *DVDRT Report 2017–19* (n 17) 68–72.

119 See above n 103 and accompanying text.

120 In comparison, in Queensland a protection order may be made by a court when it is satisfied that the ‘respondent has committed domestic violence against the aggrieved’: *DFVPA* (n 71) s 37.

121 *C(D&PV) Act* (n 7) s 11(1)(c).

122 *Ibid* s 11. For a list of some of the offences that sit outside those already identified as personal violence offences, see *Amendment Act Report June 2024* (n 112) 80–1.

123 *C(D&PV) Act* (n 7) s 16.

full range of abusive behaviours that victims may experience. In addition, tying the definition back to an ‘offence’ makes it difficult to understand the purpose of including the provision that states that ‘behaviour ... may constitute domestic abuse even if the behaviour does not constitute a criminal offence’.<sup>124</sup> This type of clause is included in the Victorian legislation,<sup>125</sup> but in that jurisdiction the making of an order is based on the court being ‘satisfied ... that the respondent has committed family violence against the affected family member’,<sup>126</sup> where the definition of ‘family violence’ plays a clear and important role in the making of the order.

Given these limitations, it is difficult to understand the purpose of inserting this new definition as it does almost no work within the *C(D&PV) Act*; it does not ground an ADVO and it does not link to any of the actions and responses required of any key professional (for example police officers or judicial officers) under the *C(D&PV) Act*. If a definition is not used and does not need to be referred to in any way in day-to-day practice then any educative purpose is entirely lost.

#### IV MISUNDERSTANDINGS AND MISAPPREHENSIONS THAT UNDERPIN AND FRAME THE NSW APPROACH

In the previous Part, I have outlined several issues with how the new offence of coercive control has been constructed and its relationship with the new definition of domestic abuse in the ADVO legislation. In this Part, I explore various misunderstandings and misapprehensions that appear to underpin the approach taken in NSW. The purpose of this discussion is to think about implementation in a deeper and more complex way – one that is not only shaped by the reform itself, and the law reform debates that generated the reform, but that is also shaped by the social and legal environment in which it is to be practised.

##### A Coercive Control Is Not a New Understanding of Domestic Violence, nor Is It a Distinct Form of Domestic Violence/Abuse

Perhaps the most critical misunderstanding which appears to underpin the approach taken in NSW, and I would argue elsewhere,<sup>127</sup> has been to conceive

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124 Ibid s 6A(5).

125 *FVPA* (n 116) s 5(3).

126 Ibid s 74.

127 Recent work at the federal level has defined coercive control as separate and distinct from domestic and family violence, with domestic violence now defined without reference to power and control. For example, compare the definitions of domestic violence included within the most recent plan, Department of Social Services (Cth), *National Plan to End Violence against Women and Children 2022–2032* (Report, 2022) 37, with the preceding plan, Department of Social Services (Cth), *National Plan to Reduce Violence against Women and Their Children 2010–2022* (Report, 2010) 2. In the new plan, domestic violence (intimate partner violence) is no longer defined in the context of power or control, rather an act-based definition is provided, with the context of control and patterns of behaviour only discussed in the definition of coercive control. By way of contrast, in the earlier plan it was stated that ‘the central element of domestic violence is an ongoing pattern of behaviour aimed at controlling a partner through fear’: at 2. While not all violence and abuse used in intimate and other relationships is DFV or coercive control, to use this language and shift previously adopted definitions is confusing and has not been explained.

of coercive control as a new and distinct form of DFV. While the language of coercive control may be new to many people, it is not a new understanding of domestic violence within the sector, research or in policy and some legislation. Understanding DFV as being about control and patterns of behaviour beyond physical violence is long-standing and this contextual understanding has been critical to work from the 1970s, 1980s, and beyond.<sup>128</sup> It is also an understanding of DFV that has long been reflected in Australian policy documents/guides<sup>129</sup> and some legislation (although not necessarily acted upon).<sup>130</sup> For example, in 2006, the objects clause in the NSW legislation providing for ADVOs was amended to include a statement that Parliament recognised that ‘domestic violence extends beyond physical violence and may involve the exploitation of power imbalances and patterns of abuse over many years’.<sup>131</sup>

This implicit discussion about coercive control as a ‘new thing’ is integrally connected to misunderstandings that coercive control is a separate and distinct form of intimate partner violence. In NSW, this distinction is evident on the face of the legislation which not only creates this new offence of coercive control, but also inserts a definition of domestic abuse in the *C(D&PV) Act*. As is argued above, these similar but slightly different definitions are confusing and appear to set up some kind of unarticulated distinction. While the Attorney-General explained this difference in approach as necessitated by the fact that one is criminal and the other civil, this is difficult to understand and instead appears to set up some distinction between coercive control and other forms of violence and abuse used in intimate partner relationships. Given the extent to which Scotland is held up as a model approach in terms of the criminalisation of coercive control (called ‘domestic

128 See, eg, R Emerson Dobash and Russell Dobash, *Violence against Wives: A Case against the Patriarchy* (Free Press, 1979); Ellen Pence and Michael Paymar, *Education Groups for Men Who Batter: The Duluth Model* (Springer, 1993) <<https://doi.org/10.1891/9780826179913>>; James Ptacek, *Battered Women in the Courtroom: The Power of Judicial Responses* (Northeastern University Press, 1999); Susan Schechter, *Women and Male Violence: The Visions and Struggles of the Battered Women's Movement* (South End Press, 1982); Stark (n 52).

129 See, eg, NSW Police Force, ‘Code of Practice for the NSW Police Force Response to Domestic and Family Violence’ (Code of Practice, 1 June 2018) 2 <[https://www.police.nsw.gov.au/\\_data/assets/pdf\\_file/0016/165202/Code\\_of\\_Practice\\_for\\_the\\_NSWPF\\_response\\_to\\_Domestic\\_and\\_Family\\_Violence.pdf](https://www.police.nsw.gov.au/_data/assets/pdf_file/0016/165202/Code_of_Practice_for_the_NSWPF_response_to_Domestic_and_Family_Violence.pdf)>. See also the statement by Assistant Commissioner Mark Jones APM, Corporate Sponsor for Domestic and Family Violence in NSW Police Force, ‘Domestic and Family Violence Policy’ (Policy Statement, February 2018) 7 <[https://www.police.nsw.gov.au/\\_data/assets/pdf\\_file/0006/477267/Domestic\\_and\\_Family\\_Violence\\_Policy\\_2018.pdf](https://www.police.nsw.gov.au/_data/assets/pdf_file/0006/477267/Domestic_and_Family_Violence_Policy_2018.pdf)>; Judicial Commission of New South Wales, ‘Equality before the Law Bench Book’ (Bench Book, 2024) [7.5], [7.5.3] <<https://www.judcom.nsw.gov.au/publications/benchbks/equality/section07.html#p7.5>>. While this was updated in June 2023, earlier iterations included similar content: see Jane Wangmann, Submission No 116 to the Joint Select Committee on Coercive Control, Parliament of New South Wales, *Inquiry into Coercive Control in Domestic Relationships* (8 February 2021) 6–7 <<https://www.parliament.nsw.gov.au/ladocs/submissions/70567/Submission%20-%2020116.pdf>>.

130 See, eg, the definition of ‘family violence’ in the *FLA* (n 69) section 4AB introduced in 2012, and definitions of family or domestic violence contained in some civil protection order legislation: see, eg, *FVPA* (n 116) s 5; *DFVPA* (n 71) s 8.

131 Previously *Crimes Act* (n 7) s 562E(3)(d), inserted by the *Crimes Amendment (Apprehended Violence) Act* 2006 (NSW) sch 1. These provisions have since been moved to stand-alone legislation: *C(D&PV) Act* (n 7) s 9(3)(d).

abuse' in that jurisdiction), it is of interest that Dr Marsha Scott, Chief Executive Officer of Scottish Women's Aid, highlighted this separation as possibly a 'mistake that we made early on in Scotland'.<sup>132</sup>

As jurisdictions move to adopt and build on this deeper understanding of the nature of DFV, reflected in work on coercive control, we need to be careful around language and definitions, not because we necessarily have to use the same language, but because we need to be attentive to the ways in which language and definitions include, exclude, and shape responses to DFV. There are a number of potential risks that might attend to this implied distinction between coercive control and other forms of intimate partner violence: it might lead to two different responses – one for the perceived more serious harm of coercive control and some lesser response for what is seen as other forms of intimate partner violence; key actors might be attentive to misidentification in the context of coercive control, but misidentification remains an issue in other criminal and civil actions which necessarily remain incident-focused; and the distinction appears to implicitly draw on typologies of intimate partner violence without considering the various risks associated with the use of typologies particularly within a legal environment.<sup>133</sup>

The framing of coercive control as a new understanding also means that we fail to ask questions about why this contextual understanding of the nature of DFV, which has been long-standing, has not translated into effective responses before. This framing facilitates the notion that the new offence will 'fill a gap' rather than potentially representing a deeper and more accurate understanding of the harm of DFV that should be brought to bear on all legal responses.<sup>134</sup> Julia Quilter has outlined the limitations of the 'gap' analysis in this context and its powerful rhetorical function in law reform efforts.<sup>135</sup> Conceiving of the new offence as a 'gap-filler' may imply that 'physical family violence is currently well policed and adequately addressed by the criminal law';<sup>136</sup> this is simply not the case, as is well demonstrated in the system gaps revealed in the work of the DVDRT and various coronial inquests into DFV homicides.<sup>137</sup> For example, the inquest into the murder of Jack and Jennifer Edwards by their father John Edwards revealed multiple police failures to respond to the reports made by Olga Edwards. These failures included not complying with their own Standard Operating Procedures, relying

132 Marsha Scott, 'Coercive Control and NSW Legislation' (Presentation, DVNSW and Wirringa Baiya, Customs House, 20 July 2022) (copy on file with author).

133 See discussion of the use of typologies in the family law context: Jane Wangmann, 'Different Types of Intimate Partner Violence: What Do Family Law Decisions Reveal?' (2016) 30(2) *Australian Journal of Family Law* 77; Zoe Rathus, 'Shifting Language and Meanings between Social Science and the Law: Defining Family Violence' (2013) 36(2) *University of New South Wales Law Journal* 359; Joan S Meier, 'Dangerous Liaisons: A Domestic Violence Typology in Custody Litigation' (2017) 70(1) *Rutgers University Law Review* 115.

134 See Wangmann, 'Context for Violence' (n 114); Janet Mosher et al, Submission to Justice Canada, *Inquiry into Criminalization of Coercive Control* (30 October 2023).

135 Julia Quilter, 'Evaluating Criminalisation as a Strategy in Relation to Non-physical Family Violence' in Marilyn McMahon and Paul McGorrrery (eds), *Criminalising Coercive Control: Family Violence and the Criminal Law* (Springer, 2020) 111, 124–6 <[https://doi.org/10.1007/978-981-15-0653-6\\_6](https://doi.org/10.1007/978-981-15-0653-6_6)>.

136 Ibid 126.

137 See *DVDRT Report 2017–19* (n 17).

on myths about DFV and victims, failing to undertake an adequate investigation (or indeed any investigation) into Olga's allegation that John Edwards had stalked her,<sup>138</sup> recording the assaults against her children as 'domestic violence – no offence detected',<sup>139</sup> and incorrectly identifying Olga as the victim of those assaults rather than the children,<sup>140</sup> noting that they thought Olga's report was an attempt to influence family law proceedings;<sup>141</sup> and failing to record the 'correct' answers to the NSW risk assessment tool,<sup>142</sup> amongst other matters. The inadequacies of current policing of DFV were also documented in the report of the NSW Joint Select Committee on Coercive Control which 'is replete with examples that point to failures in the policing of current criminal offences, rather than gaps that can simply be filled by a new offence'.<sup>143</sup> As Julia Tolmie, Rachel Smith and Denise Wilson have powerfully argued, while understanding coercive control is an important step forward it needs to be considered within a social entrapment lens that also brings to attention the way in which various systems operate (or fail to operate) to keep victims trapped within relationships, and the need to ensure that we are also attentive to the wide range of structural inequalities that also impede victims' ability to take action and be responded to appropriately.<sup>144</sup>

## **B The Need to Include the 'Everyday' Experience of Coercive Control within the Frame**

Much of the rhetoric around the NSW offence was about saving lives, as the Attorney-General stated in the opening paragraph of his second reading speech: 'This bill could literally mean the difference between life and death.'<sup>145</sup> The Hansard debate was replete with references to the DVDRT data,<sup>146</sup> and the high-profile homicides mentioned in Part II.<sup>147</sup> While domestic violence homicides do involve coercive control, I suggest that this rhetoric overpromises what a criminal offence, on its own, can do. It may also lead to legal actors orientating their responses to

138 *Edwards Inquest* (n 23) 26 [97].

139 *Ibid* 25 [96].

140 *Ibid* 48 [229].

141 *Ibid* 46 [218]. Interestingly, John Edwards made a report to the police that he insisted be recorded that he had recently separated from his wife and anticipated that she might make 'false accusations' against him to gain advantage in family law property proceedings: at 42–3 [203].

142 *Ibid* 48 [231]. The NSW risk assessment tool is the Domestic Violence Safety Assessment Tool.

143 Wangmann, 'Law Reform Processes' (n 29) 81.

144 Julia Tolmie, Rachel Smith and Denise Wilson, 'Understanding Intimate Partner Violence: Why Coercive Control Requires a Social and Systemic Entrapment Framework' (2024) 30(1) *Violence Against Women* 54 <<https://doi.org/10.1177/10778012231205585>>.

145 New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 October 2022, 9043 (Mark Speakman, Attorney-General).

146 *Ibid* 8709; New South Wales, *Parliamentary Debates*, Legislative Assembly, 19 October 2022, 8713 (Jodie Harrison), 8718 (Leslie Williams), 8726 (Jenny Aitchison), 8748 (Trish Doyle), 8750 (Majorie O'Neill), 8752 (Hugh McDermott), 8755 (Jihad Dib), 8757 (Edmond Atalla), 8766 (Julia Finn), 8769 (Wendy Tuckerman), 8770 (Peter Sidgreaves).

147 With one exception – the death of Blair Dalton which was mentioned by one member of parliament (*Parliamentary Debates*, Legislative Assembly, 19 October 2022, 8476 (Liesl Tesch)) – the explicit naming of homicides was limited to those named in above nn 21–3. See above n 20 for the failure to draw attention to homicides of Aboriginal and Torres Strait Islander women.

the exceptional, exemplar cases rather than the more prosaic experience of many women trapped in coercive control.<sup>148</sup>

In relying on the DVDRT data and high profile homicides, politicians and other commentators pointed to the presence of coercive control as a defining feature of these cases and a ‘red flag’ and ‘proven precursor ... to domestic violence deaths’.<sup>149</sup> While it is accurate that coercive control is a feature of almost all domestic violence homicides, this framing mischaracterises the nature of coercive control and in turn misses the point that coercive control is present in these cases *because* they are DFV cases. What is surprising about the DVDRT data is not that 111 of 112 cases involved coercive and controlling behaviours,<sup>150</sup> but that it was not 100% of cases, given the work of the DVDRT. Talking about coercive control in these terms – as a red flag, as a precursor – fails to recognise that coercive control is not something that exists on its own separate to or from DFV, but rather is the core contextual frame for the experience of DFV. In addition, this framing of the offence as potentially preventing homicides fails to pay attention to the depth of work conducted by the DVDRT which continues to document and expose systems and service failures, inappropriate responses, and missed opportunities to intervene around currently available laws.

The emphasis on saving lives, and the repeated reliance on high profile homicide cases, potentially leads to a view of coercive control as the ‘exceptional’ rather than the ‘every day’. This is linked to the implied distinction between coercive control and other forms of DFV (discussed above). Recent research conducted by Andy Myhill et al in England and Wales evidences this concern, with some police officers in that study drawing on stereotypical ideas about how a victim of coercive control is expected to behave and using exemplar cases to shape and frame their responses.<sup>151</sup> Some police explained to the research team that they saw coercive control as only involving the cases they identified as the most serious often referring to these as ‘exemplars’, or the ‘genuine’ ones.<sup>152</sup> The researchers identified several cases in which the everyday experience of coercive control was not identified or was dismissed as normal parts of relationships.<sup>153</sup> In the Myhill et al study, some police officers were found to hold views about women as being too ‘fiery’ to be a victim of coercive control and asserting that victims are usually ‘more timid’ and submissive.<sup>154</sup> We see echoes of this stereotypical expectation of how victims present in the Edwards case discussed above. In evidence before the coronial inquest, one of the police officers to whom Olga Edwards had reported that she was being stalked by her former partner, stated that Olga ‘seemed angry but was not afraid’.<sup>155</sup>

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148 See Myhill et al (n 58).

149 New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 October 2022, 9043 (Mark Speakman, Attorney-General).

150 *DVDRT Report 2017–19* (n 17) 154.

151 Myhill et al (n 58).

152 *Ibid* 405.

153 *Ibid* 406. See also the discussion in Barlow et al (n 58) about missed opportunities.

154 Myhill et al (n 58) 406.

155 *Edwards Inquest* (n 23) 56–7 [271].

### C Misidentification as an Offender/Identification as a Victim

One of the most prominent concerns raised about the creation of the new offence of coercive control was the risk that victims of DFV might be misidentified as DFV offenders. This issue has become prominent in Australian research,<sup>156</sup> DFV advocacy work,<sup>157</sup> and various agency reports.<sup>158</sup> Particular concern has focused on the risk of Aboriginal and Torres Strait Islander women and other marginalised women being criminalised for their responses to the violence that they experience in their intimate and familial relationships.<sup>159</sup>

At the outset I suggested that ‘misidentification’ is a potentially unhelpful term given the range of ways in which victims come to be identified as DFV offenders or face criminal action.<sup>160</sup> It can include the way in which some perpetrators misuse the legal system (for example, by applying for civil protection order cross-applications<sup>161</sup>) or manipulate legal system actors (such as the police) into taking action against the predominant victim.<sup>162</sup> It can include when the police and other legal actors fail to recognise the victim’s use of force or other behaviour against the predominant perpetrator as acts of self-defence, resistance, or simply in response

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- 156 See, eg, Ellen Reeves, ‘“I’m Not at All Protected and I Think Other Women Should Know That, That They’re Not Protected Either”: Victim-Survivors’ Experiences of “Misidentification” in Victoria’s Family Violence System’ (2021) 10(4) *International Journal for Crime, Justice and Social Democracy* 39 <<https://doi.org/10.5204/ijcjsd.1992>>; Ellen Reeves, ‘A Culture of Consent: Legal Practitioners’ Experiences of Representing Women Who Have Been Misidentified as Predominant Aggressors on Family Violence Intervention Orders in Victoria, Australia’ (2023) 31(3) *Feminist Legal Studies* 369 <<https://doi.org/10.1007/s10691-022-09506-5>>; Balawyn Jones and Akuch Kuol Anyieth, ‘CALD Communities as “Collateral Damage” in the Criminalization of Coercive Control: An Argument for Prioritizing Civil System Reform over Further Criminalization in Victoria’ (2023) *Violence Against Women* (advance) <<https://doi.org/10.1177/10778012231214775>>.
- 157 See, eg, inTouch, ‘The Causes and Consequences of Misidentification on Women from Migrant and Refugee Communities Experiencing Family Violence’ (Position Paper, February 2022) <<https://intouch.org.au/wp-content/uploads/2022/11/inTouch-Position-Paper-Misidentification-February-20221.pdf>>.
- 158 Family Violence Reform Implementation Monitor (Vic), *Monitoring Victoria’s Family Violence Reforms: Accurate Identification of the Predominant Aggressor* (Report, December 2021); Law Enforcement Conduct Commission (NSW), *Review of NSW Police Force Responses to Domestic and Family Violence Incidents* (Report, June 2023).
- 159 Heather Nancarrow et al, ‘Accurately Identifying the “Person Most in Need of Protection” in Domestic and Family Violence Law’ (Research Report No 23, Australia’s National Research Organisation for Women’s Safety, November 2020); Heather Nancarrow, *Unintended Consequences of Domestic Violence Law: Gendered Aspirations and Racialised Realities* (Palgrave Macmillan, 2019); Courtney Hobson, Michael Salter and Jennifer Stephenson, ‘The Contributions of First Nations Voices to the Australian Public Debate over the Criminalisation of Coercive Control’ (2023) 53(8) *British Journal of Social Work* 3761 <<https://doi.org/10.1093/bjsw/bcad140>>.
- 160 See above n 14.
- 161 Wangmann, ‘Gender Violence’ (n 66); Heather Douglas and Robin Fitzgerald, ‘Legal Processes and Gendered Violence: Cross-applications for Domestic Violence Protection Orders’ (2013) 36(1) *University of New South Wales Law Journal* 56.
- 162 Ellen Reeves et al, ‘Incredible Women: Legal Systems Abuse, Coercive Control, and the Credibility of Victim-Survivors’ (2023) *Violence Against Women* (advance) <<https://doi.org/10.1177/10778012231220370>>. In the Edwards case, whilst no formal action was taken against Olga Edwards, John Edwards did try to assert in discussions with the police and in family law proceedings that he was the victim of abuse in the relationship and that Olga was the one who was stalking him, that she had ‘destructive tendencies’, and that she had exhibited ‘rude and abusive’ behaviour towards him: *Edwards Inquest* (n 23) 57 [273], 152–3 [771], 155 [780].

to the wider context of their victimisation. It includes when the police and other legal actors simply focus on who used violence in a particular incident as opposed to considering the incident in context and asking: ‘Who is the predominant DFV aggressor?’ The term may also be (incorrectly) applied to victims who are simply criminalised for their actions outside of, but connected to, the experience of DFV (for example, being charged with resisting arrest, or assaulting a police officer).<sup>163</sup> The term ‘misidentification’ is also a term that suggests a ‘mistake’ or ‘error’ that is amenable to correction via ‘training and education’ rather than something that is more intrinsically embedded within current systems and the way in which they operate. Taking a more complex view of why and how victims of DFV come to find themselves facing legal action as DFV offenders, or more generally, may assist us in looking past legislative drafting and the rhetorical recommendations of education and training to consider, for example, the role of ‘systemic prejudice, bias and racism ... in the justice system’ for Aboriginal and Torres Strait Islander peoples.<sup>164</sup>

What is striking about the approach adopted in NSW is that it appears that the government has largely seen this as a concern that is able to be addressed by narrowly drafting the offence, rather than as issues related to entrenched cultural practices about the implementation, not only of the new offence, but currently available criminal offences and ADVOs. While how the offence is drafted is clearly important, more attention needs to be paid to the fact that it is the legal actors who facilitate and enact such misidentification, not merely the words of the law; that is to say, it is about how the law is practised and implemented. The adoption of the narrow drafting approach to prevent misidentification for this offence may be successful, but it may also have the effect of preventing cases of victimisation from being prosecuted because they fall outside the narrow scope of the offence. It may also mean that while there may be few cases of misidentification for this new offence, the problem of misidentification documented in earlier Australian work<sup>165</sup> remains for existing incident-based offences and ADVO matters.

The considerable attention that has been placed on the very real problem of misidentification has meant that far less attention has been focused on the problem of not being identified as a victim worthy of the attention of the law. Identification and misidentification are intersecting and interrelated problems that require us to be far more attentive to the way in which the police and the criminal legal system respond to reports of gender-based harm. The very narrow drafting of the offence to avoid the risk of misidentification brings to the fore the challenge of being identified as a victim of coercive control. This is particularly the case for victims who do not fit the idealised image of a victim of DFV. Heather Nancarrow et al have noted the ‘continuing influence of the ideal victim stereotype on police assessments of whether someone was in need of protection’ for civil protection

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163 See the detailed discussion of the charges that were laid against Tamica Mullaley, and the context in which the police laid those charges, the initial convictions and later pardon: National Justice Project, Submission to the Senate Standing Committee into Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Missing and Murdered Indigenous Women and Children* (12 December 2022).

164 *Ibid* 4.

165 See above nn 156–9.

orders.<sup>166</sup> This has particular negative impacts for Aboriginal and Torres Strait Islander women seeking assistance from police who face the interaction of racist and racialised assumptions with conceptions about ‘ideal’ victims, that mean that they are not seen as victims and are potentially seen as offenders.<sup>167</sup>

Research by Charlotte Barlow, Sandra Walklate and Emma Finnegan in a police area in England found that misidentification for the English and Welsh offence was not necessarily an issue; while there were cases where men had reported their female partner to the police, in all of these the woman ended up being identified as the victim.<sup>168</sup> However, there were continuing issues with being identified as a victim worthy of a legal response – factors such as perpetrator manipulation, the use of alcohol and other drugs, and suggestions of mental health issues were ‘intertwined’ and impacted on their status as victims. Like previous studies, notions of ideal victims and how they are expected to respond and react to their own victimisation was prominent and led to the police taking no action. This research also found a continuation of an incident-based approach which was seen to prevent the police from seeing the ‘bigger picture’ of victimisation,<sup>169</sup> something that the coercive control offences are ostensibly designed to encourage.<sup>170</sup>

## V CONCLUDING DISCUSSION

The moves to criminalise coercive control represent an attempt to craft a legal response that better responds to the lived experience of victims of DFV. It does this by designing an offence that seeks to capture a pattern of behaviour involving a wide range of forms of violence and abuse that are deployed by a perpetrator to control a victim and limit their freedom. Given the way in which the law, and particularly the criminal law, has traditionally failed to adequately address the harms that women, and others who experience harms that do not fit within the traditional masculinised approach of the criminal law, this is to be commended. In this article, I have explored some of the key elements of approach adopted in NSW

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166 Nancarrow et al (n 159) 76.

167 Ibid. See also Chelsea Watego et al, ‘Carceral Feminism and Coercive Control: When Indigenous Women Aren’t Seen as Ideal Victims, Witnesses or Women’, *The Conversation* (online, 25 May 2021) <<https://theconversation.com/carceral-feminism-and-coercive-control-when-indigenous-women-arent-seen-as-ideal-victims-witnesses-or-women-161091>>; Sandra Walklate and Kate Fitz-Gibbon, ‘Why Criminalise Coercive Control? The Complicity of the Criminal Law in Punishing Women through Furthering the Power of the State’ (2021) 10(4) *International Journal for Crime, Justice and Social Democracy* 1, 8–9 <<https://doi.org/10.5204/ijcjsd.1829>> (see discussion about ‘responsible subjects’ and ‘blameless victims’).

168 Charlotte Barlow, Sandra Walklate and Emma Finnegan, *Who Is the Victim? Identifying Victims and Perpetrators in Cases of Coercive Control* (Final Project Report, August 2023) 8. The data available from England and Wales and Scotland also provide evidence that misidentification has not been an issue in those jurisdictions with well over 90% of victims of their respective offences being women: see Home Office (UK), *Review of the Controlling or Coercive Behaviour Offence* (Report, March 2021) 14; Scottish Government, *Domestic Abuse (Scotland) Act 2018: Interim Reporting Requirement* (Report, January 2023) 10.

169 Barlow, Walklate and Finnegan (n 168) 10–11.

170 Other studies in England and Wales have also documented a continuation of an incident framework in the policing of these new offences: Barlow et al (n 58); Myhill et al (n 58).

pointing to some of the strengths and limitations of the approach that has been adopted, and highlighted more complex implementation considerations that draw attention to the environment in which the law reform is to be enacted.

It is important in this context to recognise that this new offence will be subject to an extensive and comprehensive statutory review requirement. Section 54J of the *Crimes Act* requires the government to not merely report on whether the 'policy objectives' of the reform remain valid and whether the provisions 'remain appropriate' to meet those objectives on a single occasion (the standard statutory review provision), instead requiring it to address multiple issues that were of concern and debated through the development and finalisation of the Bill. This includes whether the mens rea should include recklessness, whether it should extend to other familial relationships, the impact on marginalised groups, whether victims are being misidentified under this offence, whether the penalty should be extended, the types of behaviours that are the subject of charges for this offence, whether the offence is being charged on its own or with other offences, the use of the defence, variations in the use of the offence across the state, the operation of the definition of 'domestic abuse' in the *C(D&PV) Act*, and the number of prosecutions and outcomes.<sup>171</sup> In reporting on these matters, regard must be had to transcripts of criminal trials, and the effectiveness of any training provided.<sup>172</sup> This statutory review is not required once, but three times over the course of approximately six years.<sup>173</sup> This is a comprehensive review provision and it positions NSW as being required to deeply consider how this novel offence operates in practice. It provides real potential to extensively inform any further law reform or practice refinements needed in NSW to ensure effective implementation, but also for other jurisdictions that are considering criminalising coercive control.

While this new offence of coercive control is designed to better address the full spectrum of behaviours experienced by victims (in all their diversity), whether it achieves this is potentially undermined by continuing misunderstandings about what coercive control is, who experiences it, and how victims respond to their own victimisation, including using violence. Rather than building on longstanding understandings of DFV as being about control, NSW has instead implicitly crafted its offence as though this is a new understanding. This means we fail to ask questions about the current and past practices of legal system actors, and instead view training and education as the answer to longstanding issues with how the legal system responds to women's reports of victimisation, reports that might also lead them to be criminalised. This is not meant to suggest that training and education is not important, but that we need to critically examine what has gone before to understand why this deeper understanding of DFV has not translated into practice separate from any new offence. The effectiveness of the new offence may also be undermined by a failure to deal extensively with the environmental and institutional context in which there are continuing documented problems with policing practices (including misidentification), and continuing issues about

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171 *Crimes Act* (n 7) s 54J(2).

172 *Ibid* s 54J(3).

173 *Ibid* s 54J(4).

how victims experience the criminal legal process. It is notable that while the Joint Select Committee on Coercive Control made 23 recommendations, no recommendation addressed problems with how the criminal legal system is experienced by victims. It is interesting to note here that in research undertaken as part of the review of the Scottish offence, the striking findings were not necessarily about the new offence, but rather the continuation of long recognised problems with the practice of the criminal legal system, including the lack of communication from police, the stress and trauma involved in a criminal trial, court delays, and that victim safety was not consistently ensured.<sup>174</sup>

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174 C Houghton et al, *Domestic Abuse Court Experiences Research: The Perspectives of Victims and Witnesses in Scotland* (Report, September 2022).