

Submission to the Statutory Review of NSW Coercive Control Reform

28 August 2026

Centre for Law and Social Justice,
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University of Newcastle,
Level 5, 409 Hunter Street,
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Dear committee members and secretariat staff,

The Centre for Law and Social Justice ('CLSJ') was established in 2022 as a dynamic hub for social justice research, policy engagement and law reform. Based in the School of Law and Justice at the University of Newcastle, we draw on an extensive history of clinical legal education and community engagement with justice issues.

The CLSJ provides the following submission to the Statutory Review of New South Wales ("NSW") Coercive Control Reform ("Statutory Review"). The submission provides responses with respect to Consultation Questions 2, 4, 6, 7, 9 and 10.

Consultation Question 2 - Impact on First Nations People, CALD People and LGBTQIA+ People

Are there any adverse impacts from the criminalisation of coercive control on First Nations people, CALD Communities and LGBTQIA+ people which have not been identified by the current monitoring mechanisms?

The current monitoring mechanism, as the Statutory Review Discussion Paper identifies, is limited by the administrative data.¹ As overseas experience has demonstrated, implementing a coercive control offence first requires criminal justice professionals to have the resources and training to identify the conduct as a crime and record it as such.² An inherent weakness in the current administrative data is that police continue to record intimate partner abuse as individual incidents, often without context, rather than in a problem-oriented sense of establishing a pattern of abuse over time.

Police adherence to the single incident-model not only impacts recording of the crime, but the way coercive control investigations are undertaken. This ongoing problem was highlighted last year in a thematic study by the NSW Bureau of Crime Statistics and Research ("BOCSAR") of 194 intimate partner abuse incidents logged in the NSW Computerised Operational Policing System ("COPS").³ The study stated that "while a history of violence between partners was often mentioned in the narratives to add

¹ NSW Government, *Statutory Review of Coercive Control Reform* (Discussion Paper, July 2026) 21.

² Vanessa Bettinson, Vanessa Munro and Mandy Burton, 'Going for gold: Professionals' perspectives on the design and implementation of transformative coercive control offences in Scotland and England and Wales' (2024) *Criminology & Criminal Justice*, 5.

³ Sindy Wang and Ilya Klauzner, 'The nature and extent of cross-intimate partner violence' (Bureau Brief No 178, NSW Bureau of Crime Statistics and Research, 2025).

context to an incident, it was not always clear how this was factored into the police decision to charge an individual”.⁴

Victims misidentified as the perpetrator/primary aggressor of intimate partner abuse is an ongoing problem with the operationalisation of domestic abuse laws, with many of those most at risk of coercive control—Aboriginal and Torres Strait Islander women, women in CALD communities and LGBTQIA+ people—also being those most at risk of misidentification.⁵ By failing to record context, the current data collection disguises the prevalence of misidentification because it suggests a false equivalence in the use of violence/abuse between intimate partners.⁶ As Professor Jane Wangmann has previously identified, this commonly occurs when a victim who retaliates is charged with a domestic violence offence alongside the perpetrator despite the culpability of the victim “not [being] supported by a close examination of the complaint narrative”.⁷

For numerous cultural and historical reasons, including mistrust of calling the police, Aboriginal and Torres Strait Islander women are more likely than non-Indigenous women to use violent resistance against an abusive partner.⁸ Aboriginal and Torres Strait Islander women are now the fastest growing subset within Australian prison populations, representing 48% of all women incarcerated compared with 34% a decade ago,⁹ with many in prison for acts of domestic violence, where they are regularly misidentified as the primary perpetrator of the abuse.¹⁰

A 2025 study of UK police and criminal justice professionals identified that almost a decade after the introduction of the England and Wales coercive control offence, adherence to the single incident-model meant evidential opportunities were missed and, consequently, not investigated. Where they are investigated, police are expecting to respond to an incident that will evidence a course of conduct, rather than understanding that evidence of coercive control emerges from bringing together previous incidents recorded about the suspect against the victim.¹¹

BOCSAR has correctly concluded that going forward there is a “need for nuanced, trauma-informed responses that consider both incident-level evidence and broader patterns of abuse.”¹² The CLSJ submits that this an area for urgent reform. It is essential to move beyond the incident-model in investigating coercive control offending as individual acts are likely to be part of a wider pattern of abuse as elaborated in the statutory definitions of “course of conduct” and “abusive behaviour” for the s 54D offence.

⁴ Ibid 13.

⁵ Heather Nancarrow et al, 'Accurately identifying the "person most in need of protection" in domestic and family violence law' (Research Report, Australia's National Research Organisation for Women's Safety, 2020).

⁶ Charlotte Barlow et al, 'Putting Coercive Control into Practice: Problems and Possibilities' (2020) 60(1) *British Journal of Criminology* 160-179, 170.

⁷ Jane Wangmann, '“She said...” “He said...”: Cross Applications in NSW Apprehended Domestic Violence Order Proceedings' University of Sydney, 2009) 179.

⁸ Heather Douglas and Robin Fitzgerald, 'The Domestic Violence Protection Order System as Entry to the Criminal Justice System for Aboriginal and Torres Strait Islander People' (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 41-57; Hayley Boxall, Christopher Dowling and Anthony Morgan, 'Female perpetrated domestic violence: Prevalence of self-defensive and retaliatory violence' (2020)(584) *Trends and Issues in Crime and Criminal Justice* 1-17.

⁹ Australian Bureau of Statistics (2025), *Prisoners in Australia*, ABS Website, accessed 2 June 2026.

¹⁰ Heather Nancarrow, 'Domestic violence law: When good intentions go awry in practice' in Heather Nancarrow and Heather Douglas (eds), *International Women's Rights Law and Gender Equality* (Routledge, 2021) 37-53, 48.

¹¹ Amanda Robinson et al, 'Project Bright Light: Transforming the police response to domestic abuse', (Avon & Somerset Office of the Police and Crime Commissioner, 2025) 39.

¹² Sindy Wang and Ilya Klauzner (n 3) 13.

Consequently, data quality and recording methods need to be tightened to ensure that contextual information is accurately recorded.

Consultation Question 4 - Mental element

Should the mental element of the coercive control offence be extended to include recklessness? If yes, should it be extended as recklessness in relation to coercion or control, recklessness in relation to causing mental and physical harm or recklessness in relation to another impact?

With respect to Consultation Question 4, our submission is that for at least three reasons, the answer is “No; The mental element for the coercive control offence should not be extended to include recklessness.” Although it may appear superficially attractive as a means to improving conviction rates, we submit the answer is “no” because:

1. introducing recklessness may increase uncertainty in the offence as currently drafted;
2. the general principle of recklessness is difficult to apply to the offence as currently drafted; and,
3. there is a real possibility that different abusive behaviours in the same alleged course of conduct might require different “types” of recklessness to be proven, creating practical difficulties at the trial stage of proceedings on indictment.

Instead, we recommend that the Statutory Review considers the addition of “knowledge” as an alternative form of subjective mental element which might better achieve the outcomes underpinning the creation of the coercive control offence. Knowledge is the mental element for comparable offences in England and Wales¹³ and Ireland,¹⁴ and has proven a manageable and workable alternative in those jurisdictions when undertaken in conjunction with a significant resourcing across the whole of the criminal justice system.¹⁵ (This recommendation is addressed further in our response to Consultative Question 9 below.)

Recklessness in the criminal law of NSW

In most instances, a recklessness fault element requires the prosecution to prove beyond reasonable doubt that the accused foresaw the possibility that a particular type of harm might result from their actions and nevertheless proceeded to undertake the relevant criminal conduct.¹⁶ Although legal definitions often depart from the ordinary meaning of the word, the description of an accused person as having an intention to commit an act “willy-nilly”¹⁷—that is, with conscious disregard with respect to the possible circumstances or consequences—usefully illustrates the type of mental state that must be proven where recklessness is alleged. Sometimes labelled “advertent recklessness”,¹⁸ this general

¹³ “Knows or ought to know” is the mental element of s 76 of *Serious Crimes Act 2017* (UK). The mental element of the s 76 offence is considered (somewhat controversially) ‘objective recklessness’ under the doctrinal tradition of English law. For the purposes of the law of NSW, that same language would likely be interpreted as importing an objective mental state of knowledge. In the civil context, this would introduce the normative standard of a reasonable person in the accused’s position (see, eg, *Jones v State of New South Wales* [2020] NSWSC 830, 38).

¹⁴ Knowledge (‘the accused acted knowingly’) is the mental element required for a conviction under s 39(1) of the *Domestic Violence Act 2018* (Ireland).

¹⁵ Charlotte Barlow and Sandra Walklate, ‘Learning Lessons from the Criminalisation of Coercive and Controlling Behaviour Ten Years On: The Implementation Journey in England and Wales’ (2025) *International Journal for Crime, Justice and Social Democracy*; Womens Aid Ireland, ‘Review of Publicly Reported Enforcement of the Coercive Control Offence in Ireland 2019 – 2024’.

¹⁶ *Blackwell v R* [2011] NSWCCA 93 (‘*Blackwell v R*’); *Michael Aubrey v R* [2017] HCA 18 (‘*Michael Aubrey v R*’).

¹⁷ *Banditt v R* (2005) 223 ALR 633, 637 (‘*Banditt v R*’).

¹⁸ *Lee v R* [2023] NSWCCA 203, [149]–[150] (‘*Lee v R*’).

understanding presumably is the “type” of recklessness that has been referred to in relation to the coercive control offence since the circulation of the exposure draft in 2021.¹⁹

Since the late 1980s, the NSW Court of Criminal Appeal has repeatedly affirmed that “non-advertence” is also available as an alternative form of recklessness in relation to sexual offences. In its classic formulation, non-advertent recklessness requires proof that “the accused has not considered the [absence of consent] and a risk that [consent was absent] would have been obvious to someone with the accused’s mental capacity if they had turned their mind to it”.²⁰ In the context of the sexual offences, Kirby P observed that to exculpate an accused because they failed to consider the absence of consent “would simply reaffirm the view that our criminal law, at crucial moments, fails to provide principled protection to the victims of unwanted sexual intercourse, most of whom are women. Our law is not unprincipled or inadequate in this regard”.²¹ Although non-advertence has only been available in relation to recklessness in sexual offences, the principled reason for its articulation and retention in the criminal law is relevant to the context of offending potentially amounting to coercive control.²²

In most offence groups where recklessness is an alternative mental element,²³ the proscribed harm is an outcome which the accused considers possible, but they proceed with their conduct anyway—e.g. aggravated assaults,²⁴ choking, suffocation and strangulation,²⁵ or destroying or damaging property.²⁶ However, in coercive control offending, irrespective of what “lawful” purpose might be ascribed to the conduct by the accused (“she’s just not good with money”; “I was looking out for her safety”), the harm is not an outcome the accused considers “possible”, but is rather a virtual certain consequence of their action—what in English law is known as oblique intention.²⁷

We submit there are three reasons not to extend the mental element to include recklessness:

1. Recklessness may increase uncertainty in the coercive control offence

It is not immediately clear how the general principle with respect to recklessness applies to the coercive control offence as currently drafted. The application of the general principle to offences where the “state of mind of another” (i.e. the victim/survivor) is an element of the alleged offence is not without controversy. In the 2016 case of *Castle v R*, the NSW Court of Criminal Appeal was divided on the definition of recklessness to be applied to the offence of kidnapping.²⁸ Relevantly, that offence requires the prohibited interference with the victim/survivor’s liberty to have taken place “without their consent”.²⁹ Both Bathurst CJ and Hall J concluded that the prosecution could secure a conviction by proving advertent recklessness beyond reasonable doubt, but that non-advertent recklessness was not a pathway available to the prosecution in relation to the kidnapping offence. Justice R A Hulme wrote separately and concluded that non-advertence was also a pathway to proving recklessness for the kidnapping offence. The effect of *Castle v R* is that non-

¹⁹ NSW Government, *Parliamentary Debates*, Legislative Assembly, 16 October 2022 (Mark Speakman, Attorney-General).

²⁰ *R v Tolmie* (1995) 37 NSWLR 660, 672 (Kirby P).

²¹ *R v Kitchener* (1993) 29 NSWLR 696, 697 (Kirby P).

²² The place of non-advertent recklessness in relation to the sexual offences was again affirmed in *Lee v R* (n 18).

²³ The word reckless (or its derivatives) now appears in at least 35 offences, where its meaning is shaped by the application of the general principles to the particular statutory context.

²⁴ *Crimes Act 1900* (NSW) Part 3, Division 6 (see, eg, s 35).

²⁵ *Crimes Act 1900* (NSW) s 37(1)(b).

²⁶ *Crimes Act 1900* (NSW) s 195(1).

²⁷ Glanville Williams, ‘Oblique Intention’ (1987) 46(3) *Cambridge Law Journal* 417-438.

²⁸ *Castle v R* [2016] NSWCCA 148 (*‘Castle v R’*).

²⁹ *Crimes Act 1900* (NSW) s 86(1).

advertent recklessness is available to the prosecution in relation to the mental element of sexual offences, but not in relation to the mental element of personal violence offences.³⁰

However, that apparent distinction between personal and sexual violence offences in the decided cases does not map neatly to the “abusive behaviour” element of the coercive control offence.³¹ The statutory definition of abusive behaviour includes “violence”, which would likely be interpreted to include at least physical and sexual violence.³² The non-exhaustive list of behaviours that may amount to conduct prohibited by the coercive control offence includes “behaviour that deprives a person of liberty, restricts a person’s liberty or otherwise unreasonably controls or regulates a person’s day-to-day activities” and lists interference with sexual autonomy as a relevant example of those behaviours.³³ Because a “course of conduct” for the purpose of the offence might well include more than one type of violence, it is not immediately clear that the coercive control offence can be characterized as *either* a personal or sexual violence offence for the purposes of determining the availability of non-advertent recklessness.

If these considerations are not addressed in any reforms that might introduce recklessness into the coercive control offence, a decision of an appellate court may be required to determine authoritatively the meaning of recklessness in that context. This may create uncertainty for the various agencies involved in investigating and enforcing the coercive control offence. There is also a consequential risk that protracted investigations and court proceedings might further alienate victim/survivors of coercive control.

2. The general principle of (advertent) recklessness is difficult to apply to the coercive control offence as currently drafted

There is a further related challenge in identifying the harm that must be foreseen for the purposes of recklessness in the context of the coercive control offence. In *Blackwell*, the NSW Court of Criminal Appeal unanimously held that to establish recklessness, the prosecution must establish that the accused had “the foresight of the possibility of something”, namely the “relevant consequences” of the offence.³⁴ In *CB v Director of Public Prosecutions*, (upheld on appeal)³⁵ Adamson J said: “the reference to ‘the relevant consequence’ in *Blackwell* is a reference to the physical consequences of the acts in question contemplated by the statutory provision that proscribes the conduct that amounts to the offence, as distinct from the actual consequence of the alleged offender’s conduct.”³⁶ Further applying the general principles established in *VHP*,³⁷ her Honour expressed a view that the general principle with respect to proving recklessness was that the accused had the foresight of the possibility that the particular type of harm constituting the offence (but not necessarily harm of the severity of that in fact caused) may be inflicted, yet the accused went ahead and acted.³⁸

Where the severity of the harm is not made relevant to recklessness by the offence provision itself, the foresight of relevant harm “to any degree” is sufficient to make out the relevant mental

³⁰ See, eg, *Macpherson v Brown* (1975) 12 SASR 184 with respect to the common assault offence.

³¹ *Crimes Act 1900* (NSW) s 54F(2)(i).

³² NSW Government, *Parliamentary Debates*, 16 October 2022 (n 19).

³³ *Crimes Act 1900* (NSW) s 54F(2).

³⁴ *Blackwell v R* (n 16).

³⁵ *CB v Director of Public Prosecutions* (NSW) [2014] NSWCA 214 (*‘CB v Director of Public Prosecutions (NSW)’*).

³⁶ *CB v Director of Public Prosecutions* [2013] NSWSC 618, [26] (*‘CB v Director of Public Prosecutions’*).

³⁷ *R v VHP* (Unreported, NSWCCA, 7 July 1997), cited in *CB v Director of Public Prosecutions* (n 36) at [42].

³⁸ *CB v Director of Public Prosecutions* (NSW) (n 35) [46]-[47].

element.³⁹ For example, “foresight of harm to property to *any degree* from minor damage to destruction” is sufficient to prove recklessness for the property damage offence in s 195 of the *Crimes Act*. The position is different with respect to reckless wounding, for example, where s 35(3) of the *Crimes Act* specifies that foresight of possible actual bodily harm is required for that offence to be proven.

There are a number of possibilities if this general approach were applied to the coercive control offence as currently drafted:

- The approach articulated in *CB v Director of Public Prosecutions (NSW)*, *Blackwell* and other related cases is difficult to apply to the coercive control offence as currently drafted because it does not have a clear consequence element—i.e. a physical element that specifies the result or outcome that must occur for the crime to be established;
- The “outcome” in the coercive control offence as currently drafted is rightly not limited to physical or mental harm, as that does not necessarily capture the range and nature of harm identified as the gravamen of the offence;⁴⁰
- The text of coercive control offence as currently drafted articulates the possible consequences in different ways, including that the accused “sought” to “coerce or control” the victim/survivor;⁴¹ that the prohibited conduct was either “violence” or “coercion or control”;⁴² and lists as examples of “abusive behaviour” actions that might cause harm to property, involve economic harm or involve interference with autonomy and dignity as possible consequences.⁴³

These challenges were identified in the Second Reading Speech to the 2022 Bill, where the then Attorney-General explained changes in how the specific intent element of the offence was expressed.⁴⁴ Those same challenges would be similarly relevant if the mental element of the offence was extended to include recklessness.

3. Potential practical difficulties at trial for coercive control charges

Practical problems may emerge at a trial for a coercive control offence where recklessness is in issue. Consider the possibility that an accused has been charged with both a coercive control offence and an aggravated sexual assault offence in relation to their conduct.⁴⁵ This is no mere hypothetical—in fact, this precise scenario has already arisen in up to 4 out of the 20 instances where a “coercive control” charge has already been charged alongside other offences.⁴⁶ There is at least the possibility that both coercive control and sexual assault charges might relate to one “course of conduct” directed towards the victim/survivor. If the trial on indictment was conducted before a jury, that jury may then need to be directed:

- On the meaning of recklessness in relation to the “course of conduct” particularised by the prosecution in relation to the coercive control charge, where on balance it is likely that only advertent recklessness applies;

³⁹ Ibid. [46].

⁴⁰ NSW Government, *Parliamentary Debates*, 16 October 2022 (n 19).

⁴¹ *Crimes Act 1900* (NSW) s 54D(1)(c).

⁴² *Crimes Act 1900* (NSW) ss 54F(1)(a)-(b).

⁴³ *Crimes Act 1900* (NSW) s 54F(2).

⁴⁴ NSW Government, *Parliamentary Debates*, 16 October 2022 (n 19).

⁴⁵ *Crimes Act 1900* (NSW) s 61J.

⁴⁶ Bureau of Crime Statistics & Research NSW, 'Coercive Control Monitoring Report', (December 2025) 4.

- On the extended meaning of recklessness in relation to the absence of consent in relation to the aggravated sexual assault charge, where both advertent and non-advertent recklessness might be raised on the available evidence.

If the alleged “course of conduct” included sexual intercourse, a jury would therefore need to be directed in relation to at least the following:

- In determining whether the mental element for the coercive control charge was proven beyond reasonable doubt, they must decide whether the accused turned their mind to the possibility that their conduct was coercive or controlling, but proceeded with their conduct in any event;
- In determining whether the aggravated sexual assault charge was proven beyond reasonable doubt, they must decide whether the accused was advertently reckless to consent for the purposes of the alleged sexual assault, but *for that charge only* must also consider whether the accused was non-advertently reckless as to consent to sexual intercourse;
- Any other mental element elements in relation to either of those two charges, or the mental elements of any additional charges not contemplated in this example.⁴⁷

Further, each of those directions would need to be related to the relevant evidence adduced in the course of the trial—which may mean relating different understandings of recklessness to the same conduct for the purposes of determining whether each of the two separate offences had been proven against the accused. The potential for confusion and jury misdirection then open to appeal is clearly a real possibility.

Overseas experience has shown that the psychological impact of the trauma which results from coercive control often impairs the ability of the victim-survivor to participate safely and effectively in the criminal justice process.⁴⁸ Any further uncertainty surrounding the mental element which needs to be established for a conviction and the possibility of lengthy and complex criminal appeals would result in further trauma and in all likelihood dissuade the victim-survivor from engaging with the prosecution process in the first place.

⁴⁷ See *ibid*; the NSW BOCSAR Monitoring Report implies at least three charges have been laid in some of the matters currently progressing through NSW criminal courts.

⁴⁸ Charlotte Bishop and Vanessa Bettinson, 'Evidencing domestic violence, including behaviour that falls under the new offence of 'controlling or coercive behaviour'' (2018) 22(1) *The International Journal of Evidence & Proof* 3-29, 23.

Consultation Question 6 – Maximum Penalty

Are the penalty settings under the coercive control offence suited to the behaviours captured? If no, what should the maximum penalty be?

The CLSJ submits that the Statutory Review should consider aligning the maximum penalty for s 54D offence with the similar Queensland offence contained in s 334C of the *Criminal Code* (Qld).

The Queensland offence is a crime which carries a maximum penalty of 14 years imprisonment.⁴⁹ It makes no sense that an offender in Tweed Heads should only face half the maximum penalty for undertaking the same criminal conduct two blocks west in Coolangatta. Further, a 14-year maximum sentence aligns with the maximum penalty for the similar offence in the Scottish jurisdiction⁵⁰ which is considered the “gold standard” with respect to criminal justice responses to coercive control.⁵¹

The CSLJ notes that the Queensland offence must be prosecuted on indictment, recognising that coercive control is a complex offence which is better suited to prosecution by the Office of the Department of Public Prosecution.

Consultation Question 7 - Non-exhaustive list of behaviours

Should the non-exhaustive lists of behaviours under section 54F(2) of the *Crimes Act* and section 6A(2) of the CPDVA be aligned?

The *National Plan to End Violence Against Women and Children 2022-2032* encourages nationally consistent definitions of gender-based violence and provides distinct definitions of intimate partner or domestic abuse.⁵² While differing definitions between jurisdictions is unfortunate but understandable, to have different definitions within the same statutory framework makes no sense.

The CLSJ submits that the non-exhaustive list of behaviours under s 54F(2) of the *Crimes Act* should be adopted in s 6A(2) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (“CDPVA”), and that those behaviours should be grounds for the application for an apprehended domestic violence order under s 16 of the CDPVA (See response to Consultation Question 10 below).

⁴⁹ Queensland Government, Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023, Explanatory Notes, 29.

⁵⁰ *Domestic Abuse (Scotland) Act 2018* (UK).

⁵¹ Bettinson, Munro and Burton (n 2).

⁵² Commonwealth of Australia, *National Plan to End Violence against Women and Children 2022-2032* (2022) 36.

Consultation Question 9 - Other provisions

Should any of other reviewable provisions be amended or updated?

Further to our submission with respect to Consultative Question 4 above, the CLSJ submits that the statutory language of the offence could be simplified and made more workable with the following blacklined amendments.

54D Abusive behaviour towards current or former intimate partners

- (1) An adult commits an offence if—
- (a) the adult knowingly engages in a course of conduct against another person that consists of abusive behaviour, and
 - (b) the adult and other person are or were intimate partners, and
 - ~~(c) the adult intends the course of conduct to coerce or control the other person, and~~
 - ~~(d)~~ (c) a reasonable person would consider the course of conduct would be likely, in all the circumstances, to cause any or all of the following, whether or not the fear or impact is in fact caused—
 - (i) fear that violence will be used against the other person or another person, or
 - (ii) a serious adverse impact on the capacity of the other person to engage in some or all of the person's ordinary day-to-day activities.

The CLSJ submits that the current mental element of specific intent alone likely makes securing convictions under the coercive control offence challenging, except in the most overt cases of offending. Higher functioning abusers may be more difficult to prosecute because their behaviour is generally covert and leaves little evidence.⁵³ Further, higher functioning abusers are skilled at offering alternative “lawful” purposes for their behaviour. A coercive control offence which is practically impossible to prove the mental element may result in police reluctance to choose it as a charging decision and therefore contribute to low conviction rates.

While extending the mental element to recklessness might appear superficially attractive as a means to making it easier to secure convictions of such higher functioning abusers, it would also increase the likelihood the wrongful conviction of victims of the abuse (misidentified perpetrators), particularly amongst women most at risk of coercive control and systems abuse—Aboriginal and Torres Strait Islander women, migrant and refugee women, and socially and economically marginalised women (See submission with respect to Consultation Question 2 above).

The CLSJ considers that neither specific intent alone nor with the addition of recklessness are suitable as the mental element for coercive control offences. We submit that “knowledge” (the accused acted knowingly) is a more appropriate mental element. The mental element of knowledge sits between intention and recklessness on the continuum of culpability, straddling aspects of both. In *McIlwraith v R*, Basten JA said: “Ordinary linguistic usage recognises a distinction between intention and knowledge. The same is true when the language is used in the context of the criminal law. Knowledge that a particular

⁵³ Karen Mitchell, 'Psychopaths, Narcissists, Machiavellians, Toxic Leaders, Coercive Controllers: Subsets of One Overarching 'Dark' Personality Type?' (PhD Thesis, Swinburne University of Technology, 2024) 177.

consequence is likely is distinct from an intention to cause that consequence.”⁵⁴ Acting knowingly is similar to acting recklessly in that an accused can argue that they did not act for the purpose of inflicting the harm proscribed by coercive control offence. On the other hand, the knowing offender takes a course of action which may be morally worse than the reckless offender, because the knowing offender may be proven not simply to risk a possible outcome, but to be virtually certain their act will bring about the prohibited harm.⁵⁵

A finding of actual knowledge (or wilful blindness to a fact or circumstance) is most usually satisfied directly by the evidence or as a matter of inference from the circumstances surrounding the offending.⁵⁶ Adoption of knowledge as the mental element for the coercive control offence would mean that the prosecution would not have to prove that coercion or control was the specific purpose of the abusive behaviour, but rather that the accused’s behaviour, which they undertook knowingly, was likely in all the circumstances to result in the prohibited harm—i.e. cause fear or have a serious impact on the target partner, irrespective of some otherwise lawful purpose ascribed by them for their action. For this reason, we submit that a mental element of knowledge may better achieve the purposes underpinning the creation of the coercive control offence.

Consultation Question 10 - Domestic abuse definition

Do you have any feedback or views about the application of the definition of domestic abuse under section 6A of the Crimes (Domestic and Personal Violence) Act 2007?

Yes. The CLSJ submits that the definition of “domestic abuse” under s 6A of the CDPVA should be aligned with non-exhaustive list of abusive behaviours under s 54F(2) of the Crimes Act, and for the reasons set out in the response to Consultative Question 8 above, the aligned definition needs to be grounds for an apprehended domestic violence order under s 16 of the CDPVA.

Authors

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⁵⁴ *McIlwraith v R* [2017] NSWCCA 13 ('*McIlwraith v R*').

⁵⁵ Itzhak Kugler, *Direct and Oblique Intention in the Criminal Law: An Inquiry into Degrees of Blameworthiness* (Routledge, 2017) 6.

⁵⁶ *Periera v Director of Public Prosecutions* [1988] HCA 57 ('*Periera v Director of Public Prosecutions*').

⁵⁷ Paul Loudon is a solicitor in the University of Newcastle Legal Centre and is undertaking doctoral research on the operationalisation of coercive control laws. Dr Joseph Wenta is a lecturer in law at the University of Newcastle School of Law and Justice. Professor John Anderson is a professor of criminal law and evidence at the University of Newcastle School of Law and Justice.