Submission No 89

COERCIVE CONTROL IN DOMESTIC RELATIONSHIPS

Organisation: Office of the Director of Public Prosecutions (NSW)

Date Received: 29 January 2021

ODPP
New South Wales

NSW Parliament Joint Select Committee

Coercive Control

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January 2021

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Introduction

The Office of the Director of Public Prosecution's primary function is to prosecute indictable offences in the Supreme and District Courts of NSW. Consequently, many of the cases that we prosecute featuring domestic violence involve homicide, serious sexual assault or assaults resulting in grievous bodily harm. On occasion, the ODPP will prosecute domestic violence matters in the Local Court where the Police prosecutors have a conflict of interest. The ODPP also prosecute appeals from the Local Court to the District Court, which include appeals concerning breaches of apprehended domestic violence orders (ADVO) and summary or table offences dealt with in the Local Court, including intimidation and assaults.

Currently, most domestic violence-related offences are prosecuted in the Local Court by Police prosecutors. It is not envisaged that this will change should a coercive control offence be created. As such, it is important to acknowledge that creation of a new offence will present great challenges, especially to the NSW Police, and any offence cannot be created in isolation: it must be accompanied by appropriate resources, training, support for and preparation of victims before they give evidence, as well as education and community engagement.

The ODPP is cautiously supportive of an offence of coercive control as it would send a message as to the seriousness with which the Government takes all forms of domestic violence. It would provide a clearer pathway to present evidence of coercive control to the court. It would allow victim-survivors to tell a fuller picture of the abuse they suffered, and it would ensure that domestic violence perpetrators, whether they engage in physical violence or not, may be held to account. It would act as a deterrent; and serve an important educational function, for the community in general and for domestic violence victims who may be empowered to seek help earlier than they otherwise would.

However, we have concerns that an offence of coercive control would be a very difficult offence to successfully prosecute, particularly in the absence of other offences of physical violence. Care needs to be taken to ensure that the offence is carefully crafted and defined. The offence would need to be sensitively prosecuted; as such, specialisation – investigative, prosecutorial and judicial – may need to be considered. There should also be a review process to ensure that the new offence is being used and applied correctly, although this may need to be over a lengthy period as the experience in other jurisdictions, where the offence has been adopted, is that there has been a slow uptake of the offence.

Defining coercive control

1.What would be an appropriate definition of coercive control?

We favour a definition of coercive control that reflects the following:

- A pattern of behaviour or course of conduct intended to exert or gain power, control or dominance over, and to the detriment of, a person with whom the accused has a domestic relationship, as defined in the *Crimes (Domestic and Personal Violence) Act 2007 (NSW)*.
- The behaviour/s must be such that a reasonable person would consider that the person the accused exerted control over would suffer detriment.
- The behaviour/s may be physical, sexual, psychological (including via stalking), financial, or constitute emotional abuse.

2. How should it distinguish between behaviours that maybe present in ordinary relationships with those that taken together form a pattern of abuse?

Requiring that the accused intends to "exert or gain power, control or dominance over, and to the detriment of, a person" with whom they have a domestic relationship, would militate against behaviours that are present in non-violent relationships being caught by the new offence.

Persons in a domestic relationship can agree, for example, that one person handles the finances without the nominated person seeking to exert control etc to the detriment of the other person. In these cases, there would be the expectation that the behaviour was undertaken with the full knowledge and freely given consent of the other person and is for their mutual benefit.

Even where the act/s in question involve one person seeking to change the other person's behaviour, such as trying to exert influence over the other person's "unhealthy" social contacts, or trying to limit the other person's alcohol intake, or encouraging them to remove themselves from a dysfunctional family relationship; in a non-violent domestic relationship, these behaviours will not be intended to exert control etc to the detriment of the other person.

Whilst almost all domestic violence victim-survivors report being subject to coercive control, the great majority also report being subject to physical and/or sexual violence. We envisage that there will be a relatively small number of cases where the coercive control offence is laid as a stand-alone offence; much like child grooming offences, there will usually be a triggering physical offence that will prompt a complaint to the police. Therefore, the likelihood of prosecution for behaviours present in a non-violent relationship is low.

To ensure that coercive control is correctly identified, and the offence correctly utilised, the NSW Police will need to be adequately resourced so that they are able to invest in education and training, including in relation to shifting the focus of their incident response and investigation where needed. This may require specialisation and a whole-of-policy approach so that all "branches" of the Police domestic violence response, including risk assessments, ADVO conditions, breach actions, prosecutorial policy, and victim support, operate in unison.

Current situation in NSW

3. Does existing criminal and civil law provide the police and courts with sufficient powers to address domestic violence, including non-physical and physical forms of abuse?

We will focus our comments on how the criminal law addresses domestic violence. There are several pieces of criminal legislation relevant to the area.

The *Crimes Act* 1900 is the most important piece of legislation, as it recognises and denounces domestic violence as criminal conduct. It contains the substantive criminal offences relevant to domestic violence, the most common of which are assault, sexual assault and homicide. Other relevant criminal offences that address aspects of coercive control include, for example, malicious damage, cruelty to animals, unlawful deprivation of liberty, and recording and distributing intimate images of a person without consent ("revenge porn").

When apprehended domestic violence orders (ADVOs) were first introduced into NSW they were housed in the *Crimes Act*. The law rapidly developed and in 1987, Part 15A of the *Crimes Act* was introduced to consolidate procedural and substantive provisions relating to domestic violence. However, over the years, Part 15A became unwieldly and inaccessible. Consequently, the *Crimes (Domestic and Personal Violence) Act* 2007 (the *DV Act*) was created in 2007 as a stand-alone Act to more conveniently provide for, and locate, all relevant provisions in respect of apprehended violence orders. Importantly, the *DV Act* is still under the umbrella of the *Crimes Act* legislation. The 2007 reforms have been subject to numerous amendments since enactment, and there has been continuing debate amongst stakeholders about key aspects of the *Act*, in particular the definition of a domestic relationship.

The *DV Act* includes provisions that address non-physical harm, including section 13, which criminalises stalking or intimidation with an intention to cause fear of physical or mental harm. The definitions of "intimidation" and "stalking" under ss 7 and 8 provide that the court may have regard to any pattern of violence in determining whether the conduct is stalking or intimidation. Section 13 prohibits some forms of coercive control. Section 11(1)(c) provides that existing criminal offences, when committed in the context of a domestic relationship, can constitute a domestic violence offence if it involves coercive or controlling behaviour.

The provisions of the *Evidence Act* 1995 relating to tendency and co-incidence evidence are also relevant where a prosecution involves multiple offences. The common law also applies in

respect of relationship and contextual evidence. The ability of the prosecution to adduce such evidence is vital to placing the evidence of specific offences into context.

The *Criminal Procedure Act* 1986 also makes provision to modify the way complainants in sexual assault and domestic violence cases may give evidence. Modifications to the "special measures" available to vulnerable persons, sexual assault victims and victims of domestic violence have come about by piecemeal legislative amendments, which has resulted in inconsistencies as to what measures are available for different categories of witnesses. For instance, until recently[1], a domestic violence complainant who was also the victim of a sexual assault was entitled as of right to give evidence via AVL, but this right did not extend to domestic violence victims the subject of physical assaults only.

There is also overlap between domestic violence and family and child protection laws. These areas of law do not always work in tandem. For example, a history of domestic violence may not always be appropriately recognised in court orders, as we saw with the murders of two teenagers by their estranged father in Sydney in 2018. The existence of an ADVO in the family law context may also be used to manipulate the position between the parties, for example, orders may be agreed to without admission of the facts.

We note this history to demonstrate that the laws relating to domestic violence are complex, for a variety of reasons: the piecemeal evolution, the need to cover the full gamut of modern domestic relationships, the intersection, often incompatibly, with family and child protection laws, and because of the nature of domestic violence itself and the effect such violence has on its victims.

We consider that the Police and Courts have adequate power to address criminal behaviour that involves physical/sexual violence and the more easily understood types of non-physical abuse such as stalking or intimidation, but that the existing criminal law is less well equipped to address more nuanced forms of non-physical abuse, such as behaviours amounting to coercive control.

The lack of a specific offence targeting coercive control is only part of the issue. The NSW Police Force's incident-led response to domestic violence, whilst appropriate in terms of ensuring victim safety, means that the Police are not "set-up" to investigate domestic violence that involves patterns of non-physical behaviour, even where there is an accompanying incident of physical or sexual violence to trigger Police involvement. Even if this were not the case, Police do not have adequate resources available, nor the time, to explore the dynamics of domestic relationships as part of an investigation. Not only do the Police face investigation difficulties; the Local Court's case load means that prosecutions, and Police prosecutors, are subject to time and resource pressures which do not readily allow for in-depth brief and

[1] *Stronger Communities (Domestic Violence) Amendment Bill 2020*

witness preparation or lengthy defended hearings. There are also issues with proving and admitting evidence of non-physical acts using existing legislation.

For instance, examining phone records, correspondence, social media accounts, obtaining bank documents, speaking to family members and friends, obtaining an in-depth interview with the victim-survivor is rarely done by Police outside of what is required to establish the elements of the specific offence responded to. If such evidence is available, then the prosecution may not be able to adduce that evidence unless there is also evidence of offending capable of establishing a course of conduct. If the prosecution is prepared in a timely way (most Local Court Police prosecutions do not have the luxury of adequate preparation time), then evidence of tendency and co-incidence might be adduced, however adequate notice must be provided to the accused, who can object to the admission of the evidence.

An advantage of creating an offence of coercive control is that it would allow the prosecution to adduce evidence of the controlling behaviour, without need to rely on context evidence or tendency and co-incidence evidence. However, evidence to establish an offence would still need to be identified in the investigation.

Another issue arising from the criminal law's capacity to adequately address non-physical domestic violence is a lack of recognition by the community and victim-survivors that coercive control is a form of domestic violence. This means that many victims remain silent, even where they do report physical or sexual violence. We understand that victim-survivors describe coercive control as the "worst part" of domestic violence, more damaging than physical violence and more difficult to recover from, and that coercive control is a significant predictor of intimate partner homicide. This gap in community understanding places the lives of women and children (coercive control perpetrators are almost universally male) at risk.

4. Could the current framework be improved to better address patterns of coercive and controlling behaviour? How?

In our submission, there are improvements that can be made to the current framework which would assist to address coercive control, but these will not provide a complete answer, as coercive control itself will still not be subject to criminal sanction. Nor would improvements achieve any of the wider community benefits a stand-alone, specific offence will provide.

In our experience we encounter the following issues with prosecutions, particularly on appeal from the Local Court:

- Inadequate investigation, sometimes leading to the victim undertaking her own investigation, including obtaining evidence herself;
- Inadequate resources available at the Local Court level to address complex ongoing relationship evidence, including provision of transcripts of DVEC recordings;

- Challenges to the admission of evidence and use of discretions within the *Evidence Act* to rule the evidence inadmissible (such challenges and rulings may feature less if stand-alone offence legislation is relied upon);
- Legislation that is both out-of-date, misleading/confusing, and open to a construction that ignores the reality of coercive control behaviours;
- The appeal process, where a different prosecutor is involved who needs to understand complex evidence within a short timeframe. The appeal Judge may take an entirely different view of the evidence from that taken by the Magistrate, and there can be many problems in advancing a further appeal.

In our submission, what is lacking in the current framework principally relates to the resources required to properly investigate and prepare prosecutions, and to be able to utilise the existing legislative provisions, such as those relating to tendency and co-incidence. Not only does the investigator need to take time to obtain a proper history from the complainant, but the prosecutor needs to spend time preparing the victim to give evidence. Because the ODPP is involved in the more serious cases, which normally have a detective officer-in-charge, we can issue requisitions designed to obtain evidence of coercive control and a detective has a greater ability to prepare a more detailed brief of evidence than a General Duties officer. The ODPP is also resourced to spend the time in preparation; Police prosecutors do not, in most cases, have this opportunity.

Legislative amendment to update provisions such as the references to "pattern of violence" in the *DV Act* would improve the current framework, as would consideration being given to how evidence of coercive control may be better, and more easily, led.

The courts also need better facilities, either in the court houses or elsewhere, to provide a safe place for victim-survivors to give evidence. The recent amendments[2] to allow domestic violence victim-survivors to give evidence remotely will not be possible in many cases due to high demand and a lack of AVL facilities. In our submission, consideration should be given to the creation of purpose-built hubs that bring together facilities for domestic violent victims, including legal advice, counselling and support and when they are required to give evidence, victims are able to give evidence from that safe place.

When the current framework is considered in the broader context of the community, rather than the justice system alone, raising awareness of coercive control as a feature of domestic violence would also serve a useful purpose. We understand that when armed with knowledge of what constitutes coercive control, victims are more likely to take action to seek support and advice and to leave a violent relationship earlier than they may otherwise have done. Not only does this save lives; it also saves Police and Court time and expense.

[2] ibid

5. Does the law currently provide adequate ways for courts to receive evidence of coercive and controlling behaviour in civil and criminal proceedings?

As indicated above, we do not believe that the current regime provides an adequate pathway for the admission of evidence of coercive control, at least in the criminal jurisdiction. Without a stand-alone, specific offence reliance must be had on existing evidentiary provisions which are subject to objection and exercises of discretion; these are not "purpose-built" and so provide a partial solution; and they must attach to an offence of physical/sexual violence or a related criminal offence, or to one of the very limited non-physical domestic violence offences. Also, there are difficulties with "pattern of violence" as a concept, as the word pattern has been interpreted to require a "regular and intelligible form or sequence discernible in actions or situations"[3]. Further, there is ambiguity about whether violence includes words and acts or conduct that causes emotional harm as opposed to physical injury.

The law as it currently stands also fails to adequately recognise the parallels between domestic violence and sexual assault, and not only in its failure to provide the full suite of available legislative protections to domestic violence victim-survivors when they give evidence. Both types of offending, of which, as said, there is significant overlap, can involve years of offending, delays in complaint, and non-physical offending. The criminal law has gradually recognised this in relation to sexual assault via, for example, laws targeting persistent sexual abuse of a child, and grooming, as well as in a more realistic approach to complaint evidence and a trial direction addressing delay in complaint (just recently extended to domestic violence prosecutions). A coercive control offence will address some of these areas, but it must not only be carefully drafted in order to address the inherent challenges, but to also address the reality of coercive control domestic violence offending.

6. Does the law currently allow evidence of coercive control to be adequately taken into account in sentence proceedings?

Under the current law there is very little scope for evidence of coercive control to be taken into account on sentence, absent the evidence having been led at trial or included in agreed facts.

Apart from a prosecution for stalk or intimidate where evidence of coercive control has been admitted as a pattern of violence, the only ways under the current legislative framework for the prosecution to present this type of evidence at trial is if it has been admitted as tendency or relationship evidence, or, admitted because it was relevant evidence addressing a fact in issue or perhaps the evidence was part of the factual matrix of the trigger event, that is, linked to the physical or sexual assault or related offence. Even where there is evidence available, these options will not be viable in all matters. For example, where an accused is charged with inflicting grievous bodily harm, establishing tendency relying solely on the fact that he controlled the victim's access to money and coerced her into cutting ties with her family would

[3] ODPP reference 201909338

be unlikely to be admissible. Nor would this scenario support admission of the coercive control evidence as relationship/context evidence or as part of the factual matrix.

In terms of agreed facts, we believe that it would be extremely rare for an offender to agree to include in the sentencing facts material relating to coercive control behaviour, as that behaviour is not currently criminal but may for example, add to the objective seriousness of the offence/be used in relation to considerations of rehabilitation. If, as indicated above, somehow the coercive control behaviour was intrinsically linked to the offence charged, then it may be easier to have it included in the agreed facts.

In our submission, coercive control behaviour could not be led as an aggravating factor under section 21A(2) of the *Crimes (Sentencing Procedure) Act* 1999. The aggravating factors attach to the circumstances of the offence itself (committed in the home/in front of a child/etc) or to the accused (criminal history/on conditional liberty/etc) or to the victim (police officer/work location/etc). Using the above scenario as an example, the coercive control behaviours cannot be led as aggravating factors at the offender's grievous bodily harm sentencing.

Benefits and challenges of criminalising coercive control

7. What are the advantages and/or disadvantages of creating an offence of coercive control?

We consider that there are arguments for and against creating an offence of coercive control, but the advantages ultimately outweigh the disadvantages.

The advantages include the following:

- No longer will an endemic form of domestic violence, and those of its perpetrators who do not also use physical and sexual violence, be beyond the reach of the criminal law. A stand-alone offence means that these perpetrators can be held to account.
- Evidence of specific coercive control behaviour can be readily adduced. This is one of the main advantages. As Case Study A shows, it is difficult to lead this evidence using the existing legislation, even in a matter where, in some instances, there is a direct link between some of the coercive control behaviours and the charged offending.
- Charging an offence of coercive control alongside a related physical or sexual offence/s will allow the Court to see the full extent of the accused's criminality and its true impact on the victim-survivor. As such, it will give domestic violence victims a greater voice and will allow courts to more appropriately sentence offenders, including by factoring in specific and general deterrence aimed directly at coercive control behaviours.
- It will send an important message about the Government's attitude towards domestic violence, ie, it is unacceptable in all its forms. This will contribute to the educative advantage, as a stand-alone offence will be a valuable educative tool, for the community generally, for the Police and Courts in identifying and responding to risks,

and for victims, who may not otherwise understand, or be able to articulate, what is being done to them.
- It will encourage victims to seek advice and help to leave their relationships at an earlier stage than they otherwise may have. This, in turn, will lead to resource savings.
- It will/should have a flow-on effect in terms of recognition of risk assessments and ADVO conditions and lead to earlier intervention by Police and other agencies.
- It will also, outside the sentencing regime, serve as a deterrent, specifically for those perpetrators whose violence is solely coercive control in nature, as without an offence, no legal consequences flow; and it will act as a general deterrent also.

NSW has already taken and continues to take steps to tackle domestic violence, including non-physical forms. Society has, more recently, recognised and denounced things such as disrespectful attitudes towards women (for example, the Stop it at the Start federal advertising campaign), the use of intimate images as "revenge porn" and bullying in all its forms. Contemporary standards already support creation of a coercive control offence. The reality is that the safety and welfare of victims requires that coercive control behaviour is targeted in a specific offence.

The disadvantages, or risks, of creating an offence include the following:

- A major risk is the criminalising of behaviour that should not be criminalised. Behaviour that is considered normal in one culture might be misinterpreted by another culture, or behaviour that is acceptable in a non-violent domestic relationship may be similar to coercive control behaviours within a violent relationship. A comparison can be reasonably drawn between coercive conduct and bullying. Both involve unhealthy relationships, belittling and aggressive patterns of behaviour and have a profound impact on the victim. Bullying is recognised in the workplace as misconduct; however, it is not a criminal offence.
- As can happen under present domestic violence practice and procedure, there is a risk of misidentification of the true offender or the primary abuser and therefore, charging of the wrong person. Specialist police would assist in avoiding this scenario; although, given the very gendered nature of coercive control, such misidentification is less likely. Again, general education and training will be important tools in overcoming this challenge.
- A stand-alone offence raises the risk of criminalising behaviour in certain contexts or in relation to certain cohorts only. This may have repercussions for the most vulnerable groups in society, such as Aboriginal and Torres Strait Islanders or persons who are socially and economically disadvantaged. Selective criminalisation or over-criminalisation of certain groups is a real and current risk. To ensure that it does not occur in relation to a coercive control offence requires education, training and great care in utilisation of the offence (and more generally, cultural, practice and policy shifts). As such, specialist Police and prosecutors should be available to provide advice and assist in these cases.

- Without very careful drafting and consideration of how the offence is to be used there is a significant risk that an unacceptable strain will be placed on victims, particularly during cross-examination but also when giving evidence-in-chief. The length of time in the witness box will increase substantially and the length of cases (hearing times) will increase, which will impact the resources of the Local Court.
- The offence will need to be ongoing in nature, to avoid multiple charges and therefore potential disadvantage in "over-charging" of offenders, and to also make it a realistically provable offence. If ongoing in nature, it is easier to incorporate a level of particularisation that is fair to both parties whilst not placing unrealistic demands on victims or unduly overcomplicating prosecutions and unduly extending hearing times. An offence of coercive control charged without other offences would unavoidably be a difficult offence to prosecute and prove beyond reasonable doubt.
- There is also a risk that unless adequate resources are applied to the investigation and prosecution of domestic violence more generally, the offence will be underutilised. It may be that cases will fail and then there will be reluctance to use the offence.

8. How might the challenges of creating an offence of coercive control be overcome?

As indicated in several of our above responses, creation of a coercive control offence should not be undertaken in isolation, as that is the biggest hurdle to creation of a useful and workable offence which achieves its intent. As well as what we have outlined in our previous responses, including in our response to Question 7, a package of reforms to better address the safety of domestic violence victims is needed. In our submission, consideration needs to be given to creating centres that will provide legal, financial, housing, and court support for victims of domestic violence. Community education is key, as it is training and adequate resourcing of the NSW Police, as well as specialisation where needed to ensure the offence is charged appropriately.

Constructing an offence of coercive control

9. If an offence of coercive control were introduced in NSW, how should the scope of the offence be defined, what behaviours should it include and what other factors should be taken into account?

If an offence of coercive control were introduced, the scope of the offence needs to be carefully framed. We consider that the following factors should be included (and read in conjunction with our response to Question 1):

- Use of the existing definition of a "domestic relationship" contained within the *Crimes (Domestic and Personal Violence) Act 2007* would ensure consistency between domestic violence legislation (including ADVOs) and avoid piecemeal amendments that would later require further amendment. However, we are concerned that the breadth of the

definition would capture domestic relationships where there is no basis for an offence to be charged; for instance, a woman's current partner and ex-partner are defined to be in a domestic relationship even if they have not met.

- A pattern of behaviour or course of conduct intended to exert or gain power, control or dominance over, and to the detriment of, a person with whom the accused has a domestic relationship, as defined in the *DV Act*. A pattern of behaviour or course of conduct should not be confined to a discernible sequence. The pattern (consideration will need to be given to use of the term "pattern") should be able to be constituted by the same type of behaviour, for example, by continuous isolation tactics, or by different behaviours so, for example, the pattern could include controlling of finances as well as controlling social contacts or limiting independent movement or using children or pets as "leverage". The pattern needs to be a pattern of coercive control, not directed at the type of behaviours that constitute that coercive control.
- No time limitations should be attached to the pattern of behaviour, including as to the length of time the pattern of behaviour lasts, the length of time between behaviours within the pattern period, and the length of time until complaint is made. Coercive control is insidious and most usually happens slowly over time, the individual behaviours will be separated by various time periods, and victims will delay complaint, even once they have recognised the behaviour for what it is.
- A pattern should be established by a small minimum number of individual acts or behaviours, two, or three at the most. Anymore and it may be difficult for victim-survivors to provide enough specificity, particularly where the acts represent an escalation of one type of controlling behaviour, such as gradually isolating the victim from different family members or different groups of people, or where the acts are particularly nuanced.
- To avoid multiple charges and therefore potential disadvantage in "over-charging" of offenders, the offence needs to be ongoing. The prosecution should be required to particularise the conduct, so it fairly describes the conduct without placing unrealistic demands on victims or unduly overcomplicating prosecutions and unduly extending hearing times.
- There are other examples of ongoing offences; for instance, Grooming of a Child, sections 66EB and 66EC *Crimes Act,* and Persistent Sexual Abuse of a Child, section 66EA of the *Crimes Act*. These offences have been cast to address a pattern of behaviour and the evidentiary difficulties inherent in a victim being required to give evidence about events which occurred over an extended period where memories may fade and conflate (see, for example, Case Study A). We would, however, caution that section 66EA is a complex offence to prosecute, that complexity is offset by its seriousness, carrying a maximum penalty of life. It is also an offence that requires the sanction of the Director of Public Prosecutions before it can be commenced. The formula for an offence of coercive control needs to be more straightforward to take account of the fact that it is more likely to be prosecuted in the Local Court. For that reason, we suggest that the grooming offences provide a better model.

- The prosecution should not be required to prove that the accused intended to cause a specific detriment, just that the accused knew the behaviour/s were likely to cause detriment. Intent to exert or gain power, control or dominance over a person should be inferred from the behaviours.
- No evidence of actual harm should be required.
- The defence of reasonableness should be available and the accused bear the evidentiary burden.

Other reforms

10. Could the current legislative regime governing ADVOs better address coercive and controlling behaviour? How?

We agree with the suggestion on page 32 of the Discussion Paper, ie, that the Courts could take into account evidence of coercive and controlling behaviours when deciding whether to make an ADVO, coupled with allowing Courts to make an ADVO where the PINOP has reasonable grounds to fear that they will be subject to coercive and controlling behaviours. An obvious advantage of this is that an ADVO becomes available prior to the point where it is too late (when physical assaults have started).

Section 19(1) of the *DV Act* could be expanded to include reference to coercive control – the current section refers only to intimidation or stalking. By expanding this section, it gives the Courts greater scope to impose ADVOs. The Courts are currently required to consider, on the balance of probabilities, if the accused is engaging in behaviour that amounts to stalking/ intimidation. Inclusion of reference to behaviours that are seen as coercive control allows the Court to address the problem of such behaviour by readily imposing ADVOs if coercive control is present in domestic relationships.

11. Should the common law with respect to context and relationship evidence be codified within the CPA to specifically govern its admissibility in criminal proceedings concerning domestic and family violence offences? If yes, how should this be framed?

Yes.

The ability to rely on context and relationship evidence in a matter where domestic violence has been prevalent for a period of time prior to the offences contained on an indictment gives the prosecution the ability to present the full picture of the relationship – and explain lack of complaint – to a tribunal of fact. Without context evidence, the jury are often left simply with a sanitised version given by the victim of an offence that may appear to have occurred "out of the blue". When relationships are presented in this sanitised way, it is often difficult, in our experience, for the tribunal of fact to grapple with the accused (who very often does not have a criminal history) committing often extremely serious offences.

The section could be framed in the following way:

(1) Evidence relating to the domestic relationship between the victim and the accused before, at the time of, and after the alleged offences is admissible.
(2) Evidence of conduct throughout the relationship which a reasonable person would consider likely to cause the victim to suffer physical or psychological harm is admissible. Such conduct includes, but is not limited to:

- Making the victim dependant or subordinate to the offender
- Isolating the victim
- Controlling, regulating or monitoring movements/activities (including via financial control)
- Depriving or restricting freedom
- Frightening, humiliating, degrading, punishing, gas-lighting the victim

A qualifying section would need to be included – noting the need for a connection between the commission of the alleged domestically violent conduct at or about the time of the offences contained on the indictment, and the events that are alleged to form part of a connected set of circumstances in which the alleged conduct was committed.

Further, the probative value of the evidence would need to outweigh any unfair prejudice to the accused.

12. Would jury directions specifically addressing domestic and family violence be of assistance in criminal proceedings? If so, what should a proposed jury direction seek to address?

Yes.

The current direction used by Courts for context and relationship evidence could be adapted as follows to specifically relate to coercive control/conduct:

> *Before you can convict [the accused] in respect of any charge in the indictment, you must be satisfied beyond reasonable doubt that the particular allegation occurred. That is, the Crown must prove the particular act to which [the/each] charge relates as alleged by the complainant.*
>
> *In addition to the evidence led by the Crown specifically on the count/s in the indictment, the Crown has led evidence of other acts of alleged misconduct by [the accused] towards [the complainant]. The Crown have referred to this evidence as coercive conduct or coercive control.*
>
> *The evidence of other acts is as follows:*
>
> *[Specify the evidence of other acts upon which the Crown relies].*

It is important that I explain to you the relevance of this evidence. It was admitted solely for the purpose of placing [the complainant's] evidence towards proof of the charges into what the Crown says is a realistic and intelligible context. By context I mean the history of the conduct by [the accused] toward [the complainant] as [he/she] alleges it took place.

[Recite the Crown's submission of the issue/s in the trial which justified the reception of context evidence.]

Without the evidence of these other acts the Crown says, you may wonder, for example, about the likelihood of apparently isolated acts occurring suddenly without any reason or any circumstance to link them in anyway. If you had not heard about the evidence of other acts, you may have thought that [the complainant's] evidence was less credible because it was less understandable. So the evidence is placed before you only to answer questions that might otherwise arise in your mind about the particular allegations in the charges in the indictment.

If, for example, the particular acts charged are placed in a wider context, that is, a context of what [the complainant] alleges was an ongoing history of [the accused's] conduct toward [her/him], then what might appear to be a curious feature of [the complainant's] evidence — that [she/he] did not complain about what was done to [her/him] on a particular occasion — would disappear. It is for that reason that the law permits a complainant to give an account of the domestic history between herself or himself and an accused person in addition to the evidence given in support of the charge/s in the indictment. It is to avoid any artificiality or unreality in the presentation of the evidence from the complainant. [The complainant's] account of other acts by [the accused] allows [him/her] to more naturally and intelligibly explain [her/his] account of what allegedly took place.

The Crown can therefore lead evidence of other acts of a coercive nature between [the accused] and [the complainant] to place the particular charge/s into the context of [the complainant's] account of the whole of [the accused's] alleged conduct.

However, I must give you some important warnings with regard to the use of this evidence of other acts.

Firstly, you must not use this evidence of other acts as establishing a tendency on the part of [the accused] to commit offences of the type charged. You cannot act on the basis that [the accused] is likely to have committed the offence/s charged because [the complainant] made other allegations against [him/her]. This is not the reason that the Crown placed the evidence before you. The evidence has a very limited purpose as I have explained it to you, and it cannot be used for any other purpose or as evidence that the particular allegations contained in the charges have been proved beyond reasonable doubt.

Secondly, you must not substitute the evidence of the other acts for the evidence of the specific allegations contained in the charges in the indictment. The Crown is not charging a course of misconduct by [the accused] but has charged particular allegations arising in

what [the complainant] says, was a course of physical/sexual misconduct. You are concerned with the particular and precise occasion alleged in [the/each] charge.

You must not reason that, just because [the accused] may have done something wrong to [the complainant] on some or other occasion, [he/she] must have done so on the occasion/s alleged in the indictment. You cannot punish [the accused] for other acts attributed to [him/her] by finding [the accused] guilty of the charge/s in the indictment. Such a line of reasoning would amount to a misuse of the evidence and not be in accordance with the law.

13. Should provisions with respect to sentencing regimes be amended ? If so, how?

If an offence of coercive control is created, and a conviction is obtained for that offence, then the court would sentence this as a separate offence. If the offence exists and it is not charged, then the prosecution would not be entitled to rely, as a matter of aggravation, on evidence of coercive control in the context of other offending.[4]

If an offence is not created consideration could be given to creating a circumstance of aggravation under section 21A of the *Crimes (Sentencing Procedure) Act* 1999. The aggravating factor could be that an offence occurs whilst in a domestically violent relationship. Domestically violent relationships could be defined to include coercive control.

Arguably there are already a number of aggravating factors contained in section 21A(2) that could apply to a domestically violent relationship – such as offences committed in the home of the victim, abuse by a position of trust or authority, involving threatened use of violence, etc. But a specific aggravating factor would allow the Courts to also consider the varying degrees of the behaviour when assessing the objective seriousness of an offence and when imposing an appropriate sentence with both general and specific deterrence in mind. Section 21A(2)(d) could have an additional limb that if the offender is being sentenced for a serious domestic violence offence and has a record for previous convictions for serious domestic violence offences.

The legislation in relation to Victim Impact Statements (VIS) and the content of them should be expanded to allow victims of domestic violence where coercive control has been present to include reference in the VIS to the incidents that form the contextual evidence.

In the matter of *R v LM* [5] the Sentencing Judge, in accordance with s.28 of the *Crimes (Sentencing Procedure) Act* 1999, disregarded any portion of the VIS tendered that referred to the relationship history between the victim and the offender and which did not refer specifically to the harm, suffering, distress etc that was a direct result of the offences. This was a large

[4] R v De Simoni [1981] HCA 31; 147 CLR 383
[5] Our case reference 201703532

portion of the lengthy VIS. The Crown argued for the victim to be able to read her entire VIS but accepted that the Court could not take it into account and eventually the victim was permitted to read her VIS in its entirety. Had she not been able to that would have further traumatised the victim and essentially cut off her voice once again. Expansion of this section to include context evidence would be beneficial to both the Courts and the victims for the reason that the Court is given the proper complexion of the relationship between the victim and the offender and the victim is afforded the opportunity for catharsis in terms of the impact the entire relationship may have had upon them.

14. Are there any other potential avenues for reform that are not outlines or included in the questions above ?

We submit that consideration should be given to how victims are cross-examined in these types of proceedings. Section 41 *Evidence Act* 1995 provides that the court must disallow improper questions, including questions that are harassing and intimidating, however, in our experience it is not consistently applied by the courts, and as the following example suggests, additional measures may be required to specifically address the dynamics of domestic violence.

In the case of H[6], a trial involving allegations of assault and sexual assault, the accused and victim were in an arranged marriage. After the marriage the accused demonstrated controlling behaviour, including:

- refusing to sign an Australian marriage certificate,
- he read her letters and ripped them up before she could read them,
- controlled her access to money,
- prevented her from speaking to her parents, and
- prevented her from going out without his permission.
- He would get angry if her sister rang her on the phone.
- For the first few months of the marriage, the accused prevented her visiting her parents at their home.
- There were several occasions during the victim's pregnancy where the accused became angry and aggressive in front of her family.
- On one occasion, the accused and victim were visiting her family. The accused became very angry and yelled at everyone because they had not also invited his brother. He was yelling at her parents, "I don't want this life, fuck her, take her with you, I don't want your daughter."

At the trial the victim was cross-examined for three days. The cross-examination was extensive and included irrelevant topics which were allowed over the prosecution's objection. Of note, the victim was cross-examined in detail and at length about the purchase of gold at the

[6]R v H JIRS reference 201900313997. Transcript of the cross- examination is available, non publication orders apply.

commencement of their marriage even though it is a custom, and about her bank statements and spending habits during the course of their relationship. At times, the accused's Counsel would obtain instructions from the accused in the dock and then ask questions of the complainant in cross-examination. This reflected the coercive control all over again, with the accused's counsel acting as a mouthpiece for the accused.

Conclusion

Thank you for the opportunity to make a submission on this challenging question of law reform.

We are ultimately most concerned about how domestic violence cases can be prosecuted in the most effective and productive way. We have endeavoured to highlight the complexities and difficulties for prosecutions for domestic violence offences in the current framework.

Creating an offence of coercive control could contribute to improving outcomes for victims. But care will need to be taken in creating a targeted but not unduly complex offence that can be effectively prosecuted by the Police in the Local Court. Effective prosecution for such an offence is, in our view, substantially dependent on the allocation of resources and other reforms to the way domestic violence is prosecuted in the State.

Any questions concerning this submission may be directed to [redacted], Deputy Solicitor (Legal) [redacted]

Office of the Director of Public Prosecutions
January 2021

[redacted]
29 January 2021
Peter McGrath SC
Deputy Director of Public Prosecutions

Case study A[7]

This case went to trial where the accused was represented. After the trial commenced the accused pleaded guilty to some of the offences. The accused after conviction and sentence lodged an appeal against conviction and sentence, where he represented himself.

The facts of the case are recorded in the CCA judgment. We highlight the following examples of controlling behaviour:

a. The victim practiced law in her home country prior to meeting the accused. She did not work, except with her father-in-law, when she came to Australia. She worked in her father-in-law's shop which was a Persian rug shop. She did a lot of manual labour. The accused would not let her have a day off even when unwell. The victim had no family or friends of her own in Australia.
b. The accused's behaviour towards the victim had changed when she arrived in Australia. He would speak to her in an aggressive and demanding tone.
c. After a few nights of being in Australia, the accused stopped letting the victim sleep in their bed, so she would have to find a place on the floor or on a bench in his parents' house. When the couple were living with a flatmate, the accused made the victim sleep on the floor in the bedroom with him.
d. One of the episodes of assault included ongoing verbal abuse directed towards the victim for being late to pick up the accused. This caused the victim to become distracted and to get lost (which evidently led to her being later). Once they arrived home, she stayed in the car because she did not want to be near him or to his parents as she thought they would believe it to be her fault.
e. On another occasion, the accused gave her cash for groceries which she bought and packed away. He was unhappy with what she had bought and threw the groceries around the kitchen and called her a prostitute. He further physically assaulted her on that occasion. Police were called by the victim, but he made her sit in darkness so that they did not think anybody was home and they left. When the Police returned, he made her hide in the bedroom and would not let her speak to Police.
f. The accused pulled the victim's hair so much, she cut it off. The accused then told her she looked like a man.
g. On another occasion when Police came, the accused told the victim to tell the police she was upset because her mother had died. She told them this as she was scared of the accused and he had just assaulted her. He then told her to go with him to the police station to make a complaint about the treatment by Police of him.
h. The accused made her drive the whole way to Queensland and did not want to let her stop to rest. When he eventually relented, he made her unpack the car

[7] R v Samandi [2020] NSWCCA 217 ODPP reference 201702977

by herself. He blamed her for having to spend money on the accommodation and shortly afterwards, assaulted her.

i. When the couple stayed in Queensland with the accused's father, the victim was again made to sleep on the floor. His father took the only blanket, and the accused took the only heater. The victim slept on the carpet on the floor and used a jacket to try and keep warm.
j. The accused would go through the victim's phone contacts and messages regularly. The victim would have to go to a local park or similar to make phone calls. The victim also used Instagram to communicate, as the accused was not aware she could use it to contact other people. If he was present when she rang her parents in Iran, he would yell and scream. She did not want her parents to worry so would try not to ring them if he was there.
k. He controlled the finances, including cancelling the victim's credit card but registering vehicles in her name. He kept possession of a credit card issued in her name. This resulted in the SDRO taking money from her account for fines associated with at least one of the cars.
l. Later, the accused found the victim a job as a delivery driver. However, he kept the bank card which was linked to the account into which her wage was paid.
m. The accused would tell the victim that he would have sex with other girls in Iran. He refused to wear a condom when he had sex with the victim.
n. When the victim tried to get medical attention after one assault, the accused refused to give her the $60 required for the consultation. His mother had given them money to see the doctor, but the accused used the money to buy marijuana.
o. On one occasion, after the accused had assaulted her, she asked him to take her to the doctor. While at the doctor, the accused spoke for the complainant explaining how she had sustained the injury from boxing. He also made her leave the doctor prior to obtaining the prescribed treatment for her injury.
p. On a later occasion when the victim went to the doctor in relation to an assault by the accused, he went with her and kept her mobile phone the entire time. He later smashed the phone.
q. On one occasion when the victim made her way to a DV Women's Shelter, the accused sent her messages with threats that he would kill her. She eventually asked him to come and pick her up from the shelter.

One of the difficulties in prosecuting this matter was that because there were so many instances of abusive behaviour, the victim would often conflate events. Also, there was a conflation between instances where the verbal/non-physical abuse led to physical or sexual assault and instances where it did not.

This was a matter where an additional or alternative charge of coercive control would have been appropriate. Whilst a number of incidents were charged, the ongoing nature of control and abuse (or pattern of behaviour) throughout the entirety of their relationship, was unable to be captured by an existing charge or charges. Furthermore, if the prosecution had decided to have a charge of intimidation for every instance of conduct that did fall within that category, it would have overloaded the indictment, as there were so many instances.

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