

The criminalisation of coercive control: Implications for defendants with neurodevelopmental and cognitive disorders

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Abstract

New South Wales and Queensland have recently criminalised coercive control. Scholarship surrounding these reforms highlights the potentially negative effects on different sections of the community, with a focus on victim-survivors. However, the implications of the reforms for defendants with neurodevelopmental and cognitive disorders has been neglected. This article describes some of the issues the courts may face in dealing with defendants with neurodevelopmental and cognitive disorders, as a result of the criminalisation of coercive control. Further, it reinforces the importance of adequate disability education and training for all key justice system stakeholders, to improve the effectiveness of the reforms in practice.

Keywords

Access to the law, Australia, criminal justice, criminology, domestic violence, disability rights, family violence

‘Coercive control’ is a pattern of behaviour within an intimate relationship that aims to deprive the victim-survivor of their liberty and personal autonomy through the physical, emotional, social and/or economic micro-regulation and domination of their lives.¹ There is increasing recognition that coercive control is detrimental

to the health and wellbeing of victim-survivors.² Several high-profile cases involving coercive control have also tragically culminated in intimate partner homicide, particularly the 2020 killing by Rowan Baxter of his former partner Hannah Clarke and their three children.³ As a result, there is increasing academic debate and

¹See, eg, Hayley Boxall and Anthony Morgan, *Experiences of Coercive Control among Australian Women* (Australian Institute of Criminology, 2021); Evan Stark and Marianne Hester, ‘Coercive Control: Update and Review’ (2019) 25(1) *Violence Against Women* 81.

²Sascha Griffing et al, ‘Exposure to Interpersonal Violence as a Predictor of PTSD Symptomatology in Domestic Violence Survivors’ (2006) 21(7) *Journal of Interpersonal Violence* 936.

³See, eg, Jane Bentley, *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, 2022).

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mounting political pressure on how the law – particularly the criminal law – might best respond to this form of abuse in Australia.⁴

We recognise the negative impacts of behaviours that may be experienced as controlling by victim-survivors. Nevertheless, the present article considers the potential implications of criminalisation for defendants with neurodevelopmental and cognitive disorders, as they are particularly vulnerable and overrepresented within the criminal legal system.⁵ In this article, our primary focus is men with neurodevelopmental and cognitive disorders who engage in behaviours that may be experienced as abusive or controlling. However, we recognise that women with such conditions may also engage in such behaviours.

The criminalisation of coercive control in Australia

Tasmania was the first jurisdiction, in 2004, to criminalise some non-physical forms of family violence, such as economic and emotional abuse.⁶ As discussed below, two Australian jurisdictions – New South Wales (NSW) and Queensland – have now created a stand-alone offence to criminalise coercive control. The introduction of legislation is also under consideration in South Australia,⁷ Western Australia,⁸ and the Australian Capital Territory (ACT).⁹

New South Wales

New provisions in the *Crimes Act 1900* (NSW)¹⁰ (the NSW Act) came into effect on 1 July 2024, making NSW the first Australian jurisdiction to formally criminalise coercive

control as a stand-alone offence.¹¹ Under the NSW Act, an adult commits an offence if:

- 1) they engage in a course of conduct against their current or former intimate partner that consists of abusive behaviour;¹²
- 2) they intend the course of conduct to coerce or control the other person; and
- 3) a reasonable person would consider the course of conduct would be likely, in all the circumstances, to cause:
 - a) fear that violence will be used against the other person or another person or
 - b) 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.

Significantly, there is no requirement that such fear or impact is in fact caused. The offence carries a maximum penalty of seven years' imprisonment, although most matters are likely to be resolved summarily.¹³ It is a defence if the course of conduct was reasonable in all the circumstances.¹⁴

The Coercive Control Implementation and Evaluation Taskforce was established in NSW in 2022, to provide advice to the Minister on training and education, legislative commencement dates and stakeholder consultation.¹⁵ Now that the legislation has commenced, the role of the Taskforce includes annual advice to the Minister, as well as several legislative reviews. This will include consideration of the impact of the reforms 'on Aboriginal people, culturally and linguistically diverse people and LGBTQI+ people',¹⁶ whether the offence should apply to a greater number of relationship types, whether the offence should be extended to cover recklessness, and whether (and to what extent) the legislation has contributed to victim-survivors being

⁴See, eg. 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 & Criminal Justice* 115; Lucy Williams and Sandra Walklate, 'Policy Responses to Domestic Violence, the Criminalisation Thesis and "Learning from History"' (2020) 59 *Howard Journal of Crime and Justice* 305; Jane Wangmann, 'Law Reform Processes and Criminalising Coercive Control' (2022) 48 *Australian Feminist Law Journal* 57; Attorney-General's Department (Cth), *The National Principles to Address Coercive Control in Family and Domestic Violence* (22 September 2023).

⁵Eileen Baldry et al, 'Reducing Vulnerability to Harm in Adults With Cognitive Disabilities in the Australian Criminal Justice System' (2013) 10(3) *Journal of Policy and Practice in Intellectual Disabilities* 222.

⁶See *Family Violence Act 2004* (Tas) s 8 (economic abuse offence) and s 9 (offence of emotional abuse or intimidation).

⁷Criminal Law Consolidation (Coercive Control) Amendment Bill 2024 (SA).

⁸Office of the Commissioner for Victims of Crime (WA), *Legislative Responses to Coercive Control in Western Australia: Consultation Outcomes Report* (2023).

⁹Crimes (Coercive Control) Amendment Bill 2024 (ACT). This Bill was introduced by the Opposition and did not pass before Parliament was prorogued.

¹⁰*Crimes Act 1900* (NSW) s 54D, introduced by the *Crimes Legislation Amendment (Coercive Control) Act 2022* (NSW). For a critique, see Helen Gibbon and Emma Buxton-Namisnyk, 'The New Coercive Control Offence in NSW: (How) Will It Work?' (2024) *Current Issues in Criminal Justice* doi: 10.1080/10345329.2024.2388958.

¹¹For data on the first three months of the new offence, see NSW Bureau of Crime Statistics and Research, *Coercive Control Monitoring Report – Quarterly Report: September 2024* (November 2024). However, this does not contain any information on disability.

¹²'Abusive behaviour' is defined in s 54F and includes threats, financial and economic abuse, behaviours that shames, degrades or humiliates, harassment, monitoring and stalking, property damage, social isolation and interfering with relationships, spiritual abuse, animal cruelty and behaviours that deprive a person of liberty or control and regulates their day-to-day activities.

¹³See *Criminal Procedure Act 1986* (NSW) s 260(1). For a critique of this, see Gibbon and Buxton-Namisnyk (n 10).

¹⁴*Crimes Act 1900* (NSW) s 54E(1).

¹⁵Ibid s 54I; see also Department of Communities and Justice (NSW), *Coercive Control Implementation and Evaluation Taskforce* (Web Page, 6 September 2024) <https://dcj.nsw.gov.au/children-and-families/family-domestic-and-sexual-violence/police-legal-help-and-the-law/criminalising-coercive-control-in-nsw/coercive-control-implementation-and-evaluation-taskforce.html>.

¹⁶*Crimes Act 1900* (NSW) ss 54J(2)(c).

misidentified as primary perpetrators.¹⁷ Despite the extensive preparatory work of the Taskforce,¹⁸ some critics have suggested that the NSW approach was too rushed, with insufficient time allocated for training and education for key stakeholders (eg, police, judiciary).¹⁹

Queensland

The need for careful planning, community consultation and judicial education was raised by the Women's Safety and Justice Taskforce,²⁰ when considering Queensland's response to coercive control. As a result, Queensland is taking a staged, four-year approach to this issue.²¹ The *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023* (Qld) (the 2023 Queensland Act) was assented to in February 2023 and 'lays the foundation to create a standalone offence of coercive control'.²² In October 2023, the government introduced the Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023. This Bill (referred to hereafter as the 2024 Queensland Act) was passed by the Queensland Parliament on 6 March 2024 and is expected to commence in May 2025.

The offence introduced by the 2024 Queensland Act is similar to NSW, in that it applies to an adult who intends their course of conduct to coerce or control another person. However, this can be anyone they are in a domestic relationship with (not only an intimate partner) and a course of conduct is defined as 'occurring on more than 1 occasion'.²³ In addition, the relevant threshold is that the 'course of conduct would, in all the circumstances, be reasonably likely to cause the other person harm' and a broader range of behaviours is included in the definition of abuse, including making a person dependent on or subordinate to another person, and threats to self-harm. The Queensland offence particularises specific behaviours, while NSW provides higher-level categories of behaviour (although both are non-exhaustive). Notably, the Queensland offence carries a maximum penalty of 14 years' imprisonment, although it

must be dealt with summarily, if the prosecutor chooses this where the defendant pleads guilty.²⁴ Unlike the NSW offence, there are no specific guidelines relating to the review of the 2024 Queensland Act.

Defendants with neurodevelopmental and cognitive disorders

When considering the effects of law reform, it is of course vital to pay attention to the implications for vulnerable populations.²⁵ In this article, our focus is on people with neurodevelopmental and cognitive disorders. This encapsulates a number of conditions associated with effects on brain development or cognition, which may affect executive functioning, make it difficult for individuals to learn new things, concentrate, retain information, make decisions and/or exhibit cognitive flexibility.²⁶ This includes, but is not limited to, intellectual disabilities, Attention-Deficit/Hyperactivity Disorder (ADHD), Autism Spectrum Disorder (ASD) and Obsessive-Compulsive Disorder (OCD).²⁷ While this list is by no means exhaustive of neurodevelopmental and cognitive disorders, the current article will focus on these conditions, to highlight the impact of the criminalisation of coercive control. It should be noted, however, that many people with neurodevelopmental and cognitive disorders experience comorbidities across these conditions,²⁸ although they are discrete conditions, as well as other disabilities. Some conditions may also fit different classifications; for example, OCD is typically classified as a psychiatric disorder but is included in the current discussion as it is also associated with cognitive dysfunction.²⁹

It is difficult to estimate the prevalence of neurodevelopmental and cognitive disorders in Australia, due to a lack of standardised definitions and available data. However, it is estimated that ADHD affects between two and six per cent of Australian adults,³⁰ while three per cent of Australians will experience OCD in their lifetime.³¹ The

¹⁷It is beyond the scope of this article to explore why victim-survivors with neurodevelopmental and cognitive disorders may be disproportionately likely to be misidentified as perpetrators.

¹⁸See NSW government Department of Communities and Justice (n 15) for an overview of the Taskforce's reports in the lead-up to the implementation of the NSW Act.

¹⁹See, eg, Heather Douglas, 'Commentary and Response to the remarks of the Hon Margaret McMurdo AC: The Criminalisation of Coercive Control' (Current Legal Issues Seminar, 10 November 2022).

²⁰Women's Safety and Justice Taskforce (Qld), *Hear Her Voice – Report One: Addressing Coercive Control and Domestic and Family Violence in Queensland* (2021).

²¹Douglas (n 19).

²²Annastacia Palaszczuk and Shannon Fentiman, 'First Stage in Legislating Against Coercive Control Passes Parliament' (Media Release, 22 February 2023).

²³Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 (Qld) cl 20, introducing *Criminal Code 1899* (Qld) s 334C(1).

²⁴Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 (Qld) cl 21, amending *Criminal Code 1899* (Qld) s 552A.

²⁵Reg Graycar and Jenny Jane Morgan, 'Law Reform: What's In It for Women?' (2005) 23(2) *Windsor Yearbook of Access to Justice* 393; Wangmann (n 4).

²⁶Shafali Spurling Jeste, 'Neurodevelopmental Behavioral and Cognitive Disorders' (2015) 21(3) *Behavioral Neurology and Neuropsychiatry* 690.

²⁷*Ibid.*

²⁸Tara Stevens, Lei Peng and Lucy Barnard-Brak, 'The Comorbidity of ADHD in Children Diagnosed with Autism Spectrum Disorder' (2016) 31 *Research in Autism Spectrum Disorders* 11.

²⁹See, eg, Nabil Benzina et al, 'Cognitive Dysfunction in Obsessive-Compulsive Disorder' (2016) 18 *Current Psychiatry Reports* 80; Ian Freckelton, 'Obsessive Compulsive Disorder and Obsessive Compulsive Personality Disorder and the Criminal Law' (2020) 27(5) *Psychiatry, Psychology and Law* 831.

³⁰Tamara May et al, 'The Australian Evidence-Based Clinical Practice Guideline for Attention Deficit Hyperactivity Disorder' (2023) 57(8) *Australian & New Zealand Journal of Psychiatry* 1101.

³¹Centre for Mental Health, *Obsessive Compulsive Disorder*, Swinburne University of Technology (Web Page) <https://www.swinburne.edu.au/research/centres-groups-clinics/centre-for-mental-health/our-research/obsessive-compulsive-disorder-ocd/>.

Australian Institute of Health and Welfare (AIHW)³² estimates that three per cent of the Australian population has some form of intellectual disability and that 0.7 per cent has ASD, however more recent estimates suggest that ASD may occur within 1.3 per cent of the Australian population.³³

People with neurodevelopmental and cognitive disorders are overrepresented and entrenched in Australia's criminal legal system.³⁴ Research estimates that nearly 30 per cent of the Australian prison population has some form of intellectual disability.³⁵ A study of four correctional centres in NSW revealed that 35 per cent of the sample screened positive for ADHD.³⁶ People with ASD are also likely to be overrepresented in the criminal legal system.³⁷ However, these figures must be considered within the context of underdiagnosis of many neurodevelopmental and cognitive disorders and, as such, are likely to underestimate the actual prevalence of these conditions within criminal justice populations.³⁸

In part, the overrepresentation of people with neurodevelopmental and cognitive disorders in criminal justice populations is likely due to the lack of appropriate/early diagnosis and support/intervention, which contributes to and exacerbates the communicative, behavioural and social needs of individuals with neurodevelopmental and cognitive disorders, when interacting with the courts.³⁹ ADHD, ASD and intellectual disability may make it difficult for defendants to follow proceedings, understand nonverbal or non-literal communication and social cues, maintain concentration to provide evidence in the witness box, comprehend and retain information, limit impulsive/emotional verbal responses, and uphold appropriate courtroom decorum (eg, not talking unless spoken to, addressing court professionals using honorifics).

Freckelton's analysis of Australian case law reveals that the presence of ADHD is generally not considered as an issue of accessibility in the courts and adjustments are typically not made to court practice.⁴⁰ In Bartels' analysis of

cases involving ADHD in the ACT Supreme Court, judges mentioned the defendant's previous or current domestic violence offences in eight of the 32 (25 per cent) cases analysed.⁴¹ However, the nexus between ADHD and domestic violence was only (implicitly) acknowledged in one of these cases. Wolf found a growing consideration of ASD in sentencing cases, although she acknowledged there are still gaps in understanding of ASD and limited considerations of its relevance.⁴² Examination of NSW court processes reveals that Community and Court Liaison Services support defendants with intellectual disability or ASD in navigating court processes, but a lack of screening and awareness may limit the effectiveness of these measures.⁴³ Similarly, Freckelton noted that, despite the significance of OCD to assessments of criminal culpability and responsibility, due to the pervasive effect of the condition on a person's functioning, little scholarship or legal education exists surrounding its relevance.⁴⁴

The implications for defendants with neurodevelopmental and cognitive disorders

Scholars and activists have identified that the criminalisation of coercive control may have negative effects on vulnerable populations, such as individuals with neurodevelopmental and cognitive disorders.⁴⁵ However, the overwhelming majority of this discourse has focussed on the potential unintended consequences on *victim-survivors* with neurodevelopmental and cognitive disorders, who are particularly vulnerable to certain forms of domestic violence, such as coercive control.⁴⁶ In contrast, there has been no research focusing on the implications of the reforms on *defendants* with neurodevelopmental and cognitive disorders, and how this may influence the effectiveness of this reform in practice. Further, there has been little research into the effects of this reform on people with neurodevelopmental and cognitive disorders

³²AIHW, 'Disability in Australia: Intellectual Disability' (2008); AIHW, 'Autism in Australia' (2017).

³³Timothy Nielsen et al, 'Estimating the Prevalence of Autism Spectrum Disorder in New South Wales, Australia: A Data Linkage Study of Three Routinely Collected Datasets' (2024) 54 *Journal of Autism and Developmental Disorders* 1558.

³⁴Ruth McCausland and Eileen Baldry, "'I Feel like I Failed Him by Ringing the Police': Criminalising Disability in Australia' (2017) 19 *Punishment & Society* 290; *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report: Criminal Justice and People with Disability, September 2023) vol 8; Calum A F Henderson and Melissa Bull, 'Sentencing and the Over-Representation of People with Cognitive Disability in the Australian Criminal Justice System' (2024) 36(1) *Current Issues in Criminal Justice* 81.

³⁵Baldry et al (n 5) 222–4; Royal Commission Final Report (n 34).

³⁶Elizabeth Moore et al, 'Adult ADHD Among NSW Prisoners: Prevalence and Psychiatric Comorbidity' (2016) 20(11) *Journal of Attention Disorders* 958.

³⁷Senate Select Committee on Autism, Parliament of Australia, *Services, Support and Life Outcomes for Autistic Australians* (Report, March 2022).

³⁸Moore et al (n 36).

³⁹Baldry et al (n 5); McCausland and Baldry (n 34).

⁴⁰Ian Freckelton, 'Attention Deficit Hyperactivity Disorder (ADHD) and the Criminal Law' (2019) 26(6) *Psychiatry, Psychology and Law* 817.

⁴¹Lorana Bartels, 'Paying Attention to Attention Deficit Hyperactivity Disorder: An Analysis of Cases in an Australian Supreme Court' (2022) 46 *Criminal Law Journal* 245.

⁴²Gabrielle Wolf, 'Growing Enlightenment: Sentencing Offenders with Autism Spectrum Disorder in Australia' (2021) 44(4) *UNSW Law Journal* 1701.

⁴³Jane McCarthy et al, 'Defendants with Intellectual Disability and Autism Spectrum Conditions: The Perspective of Clinicians Working across Three Jurisdictions' (2022) 29(5) *Psychiatry, Psychology and Law* 698.

⁴⁴Freckelton (n 29).

⁴⁵Pam Rugkhla and Tina Dixon, *Criminalisation of Coercive Control*, Australian Women Against Violence Alliance (Issues Paper, January 2021); Women's Safety and Justice Taskforce (Qld), *Options for Legislating Against Coercive Control and the Creation of a Standalone Domestic Violence Offence: Discussion Paper 1* (2021).

⁴⁶Cartrine Anyango, Isabel Goicolea and Fredinah Namatovu, 'Women with Disabilities' Experiences of Intimate Partner Violence: A Qualitative Study from Sweden' (2023) 23 *BMC Women's Health* 381; Boxall and Morgan (n 1); Women's Safety and Justice Taskforce (n 45); Clare Ringland, Stewart Boiteux and Suzanne Poynton, 'People with Disability and Offending in NSW: Results from the National Disability Data Asset Pilot' (NSW Bureau of Crime Statistics, 2023).

in places such as the United Kingdom, where coercive control is already criminalised. There is therefore a limited evidence base to inform Australian law reform initiatives, which risks unintended adverse consequences on such populations and may limit the effectiveness of law reform.⁴⁷ We will therefore aim to identify the potential challenges that the NSW and Queensland courts may face, as a result of the criminalisation of coercive control, in relation to defendants with neurodevelopmental and cognitive disorders.

Applying a disability lens to culpability

Understanding domestic violence in the context of neurodevelopmental and cognitive disorders

The academic literature indicates that, for some individuals with neurodevelopmental and cognitive disorders, the risk of using violence against family members and intimate partners may be elevated, because of the symptoms associated with the neurodevelopmental and cognitive disorder.⁴⁸ For example, research focussing on individuals with relationship OCD (ROCD, a dimension of OCD focussed on intimate relationships) has found that this may be characterised by obsessive jealousy, which may manifest as monitoring partners' behaviours and interactions. In turn, this may lead to the onset of physical assault and sexual coercion within the relationship.⁴⁹ Similarly, qualitative research with parents of adolescents with OCD has found that parents and siblings of the adolescent were often subjected to aggressively imposed coercive patterns of behaviour, including prohibition of specific behaviours and acts and rules driven by OCD.⁵⁰ Although these studies do not directly measure coercive control, they highlight behaviours that are consistent with the introduced coercive control offences, such as monitoring, threats and control of choices.

Similarly, research has suggested that the risk of violence is elevated among people with some intellectual disabilities, particularly when co-occurring with ADHD.⁵¹ People with

ADHD may also struggle to maintain healthy romantic relationships and are overrepresented as perpetrators of intimate partner violence (IPV).⁵² In addition, research suggests that women whose partners have diagnosed or suspected ASD, experience psychological abuse at a significantly higher rate than those whose partners do not have ASD.⁵³ Again, although psychological abuse is a commonly reported dimension of coercive control,⁵⁴ there is a gap in the literature regarding the relationship between neurodevelopmental and cognitive disorders and coercive control specifically.

Proving intent to coerce or control in the context of neurodevelopmental and cognitive disorders

One of the primary concerns about the introduction of a stand-alone offence of coercive control is the difficulty of proving the offence beyond reasonable doubt.⁵⁵ Under both the NSW Act and the 2024 Queensland Act, the prosecution must prove that the defendant *intended* the course of conduct to coerce or control the other person. Requiring specific intent in NSW will make this a challenging charge to successfully prosecute and may minimise the practical impact of the legislation.⁵⁶

Although not stated explicitly within the legislation, the inclusion of the requirement that the abusive behaviours were intended to coerce or control is likely informed by feminist scholarship, which is the primary framework through which domestic violence, especially IPV, has generally been analysed and understood. Feminist frameworks describe IPV as a choice made by the abuser, who is primarily motivated by a desire to control and subordinate their partner. This desire for control is understood as the outcome of patriarchal systems and structures, which prioritise and support male dominance over women.⁵⁷ At an individual level, IPV is attributable to the internalisation of patriarchal systems and processes among men and women, which results in adherence to traditional gender norms (particularly hegemonic masculinities) and

⁴⁷Victorian Equal Opportunity and Human Rights Commission, 'Public Statement: Invisible Disabilities' (Web Page, 2 December 2022) <https://www.humanrights.vic.gov.au/news/invisible-disabilities>.

⁴⁸Nannet Buitelaar, Jocelyne Posthumus and Jan Buitelaar, 'ADHD in Childhood and/or Adulthood as a Risk Factor for Domestic Violence or Intimate Partner Violence: A Systematic Review' (2020) 24(9) *Journal of Attention Disorders* 1203; Brian Wymbs et al, 'ADHD Symptoms as Risk Factors for Intimate Partner Violence Perpetration and Victimization' (2017) 32 *Journal of Interpersonal Violence* 659; Amanda Holt, "'I'm His Safe Space': Mothers' Experiences of Physical Violence from their Neurodivergent Children – Gender, Conflict and the Ethics of Care' (2024) 64 *British Journal of Criminology* 811.

⁴⁹Or Brandes, Avital Stern and Guy Doron, "'I Just Can't Trust My Partner': Evaluating Associations between Untrustworthiness Obsessions, Relationship Obsessions and Couples Violence' (2020) 24 *Journal of Obsessive-Compulsive and Related Disorders* 100500.

⁵⁰Eli Lebowitz, Lawrence Vitulano and Haim Omer, 'Coercive and Disruptive Behaviors in Pediatric Obsessive Compulsive Disorder: A Qualitative Analysis' (2011) 74 *Psychiatry: Interpersonal and Biological Processes* 362.

⁵¹Antti Latvala et al, 'Association of Intellectual Disability with Violent and Sexual Crime and Victimization: A Population-Based Cohort Study' (2023) 53(9) *Psychological Medicine* 3817.

⁵²Xiangming Fang et al, 'Attention-Deficit/Hyperactivity Disorder, Conduct Disorder, and Young Adult Intimate Partner Violence' (2010) 67 *Archives of General Psychiatry* 1179; Brian Wymbs et al, 'Risk of Intimate Partner Violence Among Young Adult Males With Childhood ADHD' (2012) 16 *Journal of Attention Disorders* 373; Buitelaar, Posthumus and Buitelaar (n 48); Freckleton (n 29).

⁵³Pinna Arad, Zipora Shechtman and Tony Attwood, 'Physical and Mental Well-Being of Women in Neurodiverse Relationships: A Comparative Study' (2022) 12 *Journal of Psychology and Psychotherapy* 1.

⁵⁴Boxall and Morgan (n 1).

⁵⁵Beverly McPhail et al, 'An Integrative Feminist Model: The Evolving Feminist Perspective on Intimate Partner Violence' (2007) 13(8) *Violence Against Women* 817; Darragh Sheehy, 'Toward a New "Measuring of Harm": A Critique of the Offence of "Coercive Control" Under the Domestic Violence Act 2018' (2019) 10(1) *King's Student Law Review* 51.

⁵⁶For discussion, see Gibbon and Buxton-Namisnyk (n 10).

⁵⁷Lori Heise and Andreas Kotsadam, 'Cross-National and Multilevel Correlates of Partner Violence: An Analysis of Data from Population-Based Surveys' (2015) 3 *Lancet Global Health* 332; Attorney-General's Department (n 4).

attitudes that are supportive of violence against women, and male violence more generally.⁵⁸

Ascribing motivations to people charged with abusive behaviours is notoriously difficult. In the first instance, people who use these behaviours often find it difficult to articulate why they are abusive towards their partners, even recognising that the abusive behaviour does not make them 'happy' and is something they are ashamed of.⁵⁹ However, even in situations where someone is conscious of their motivations and believes that they are entitled to control their partner, they may be adept at creating alternative narratives to explain the behaviours to other people (eg, 'I didn't do it, but if I did I had a good reason'), and to themselves (eg, 'I didn't want to hurt her, but she made me do it'). Accordingly, someone charged with coercive control may craft a narrative that the victim 'provoked' them into using these behaviours, as a way of avoiding being convicted or to minimise their charge or sentence. Alternatively, they may be adept at creating a narrative where they are able to blame the victim for their use of abusive behaviours. Recent scholarship has noted that a significant proportion of men who kill their female intimate partners have strong and coherent victimhood narratives, where the victim is blamed for everything that is wrong in their lives, and so 'deserves' to die.⁶⁰

These narratives can be compelling and very convincing. As evidence of this, one only has to examine cases in which a man charged with murdering his female partner who dared to leave him has successfully accessed the partial defence of provocation (see, for example, *R v Butay* [2001] VSC 417; *R v Ramage* [2004] VSC 508).⁶¹ Certainly, a unique dimension of coercive control is that these behaviours may appear innocuous or even protective from an outsider's point of view. This is why coercive control needs to be understood in context, by the meanings imbued in particular (in)actions used by partners, and their impacts on the victim-survivor.

Finally, the literature has identified a range of different motivations and mechanisms that underpin people's use of what may constitute abusive behaviours within relationships (eg, tracking on mobile phones), other than a desire for control underpinned by feelings of entitlement.⁶² This includes communication deficits and poor conflict

resolution skills, as well as emotional dysregulation associated with dysfunctional attachment. For example, several studies have found that men with an insecure or anxious attachment style may become emotionally distressed and dysregulated when they perceive that their connection with their partner is being threatened.⁶³ This may include the victim-survivor attempting to leave the relationship or establishing emotional boundaries (eg, refusing to make a further commitment).⁶⁴ The distress experienced by abusers may lead to externalising behaviours that manifest as coercive control, such as making threats to harm themselves if their partner ever leaves the relationship.

The above perhaps in part explains why the test in England and Wales has not included intent as a requirement, instead requiring that the defendant *knew or should have known* that their behaviours would have a serious effect on the complainant. In Scotland, the test is *recklessness*. This had been the original model proposed for NSW, but the threshold was instead limited to intent, following stakeholder consultation, to reduce the potential risks for Indigenous peoples.⁶⁵

These considerations around determining intent are particularly relevant in cases where the defendant has a disability. Different neurodevelopmental and cognitive disorders are associated with symptoms that can manifest as controlling behaviours. However, they could also be motivated by a desire to mitigate distress and/or dysregulation associated with specific life events and their environment more generally. For example, people with ASD often have difficulty exercising goal-oriented flexibility and the ability to shift actions to achieve a goal, including accepting what are perceived as unfair conditions.⁶⁶ The inability to utilise goal-oriented flexibility could be experienced as abusive as it can lead to rigidity in expectations and behaviours, regardless of the costs for the other person (ie, the potential complainant). Further, common symptoms of OCD include a need for symmetry and order, sensory sensitivity and pickiness, and a preoccupation and fear of contamination. This means that particular behaviours and actions (eg, someone touching their things) and stimuli (eg, loud chewing), as well as changes to their physical environment (eg, clearing away belongings) can

⁵⁸Erin Nabors and Jana Jasinski, 'Intimate Partner Violence Perpetration among College Students: The Role of Gender Role and Gendered Violence Attitudes' (2009) 4(1) *Feminist Criminology* 57; Katherine McCarthy, Ruchi Mehta and Nicole Haberland, 'Gender, Power, and Violence: A Systematic Review of Measures and Their Association with Male Perpetration of IPV' (2018) 13 *PLoS One* e0207091.

⁵⁹Hayley Boxall et al, 'The "Pathways to Intimate Partner Homicide" Project: Key Stages and Events in Male-Perpetrated Intimate Partner Homicide in Australia' (ANROWS, 2022).

⁶⁰Hayley Boxall, Adelaide Bragias and Emily Corner, "'You Have Caused All of This, It's All Your Fault': An Argument for the Application of Grievance-Fuelled Violence Frameworks to the Prevention of Male-Perpetrated Intimate Partner Homicide' (2024) *International Journal for Crime, Justice and Social Democracy*.

⁶¹Santo De Pasquale and Adrian Howe, 'Reformist Tinkering, The Queensland Law of Murder and Other Disasters' (2022) 10(2) *Griffith Journal of Law & Human Dignity*.

⁶²Michael P Johnson, *A Typology of Domestic Violence: Intimate Terrorism, Violent Resistance, and Situational Couple Violence* (University Press of New England, 2010); Amy Holtzworth-Munroe and Gregory Stuart, 'Typologies of Male Batterers: Three Subtypes and the Differences among Them' (1994) 116(3) *Psychological Bulletin* 476.

⁶³Julia C Babcock et al, 'Attachment, Emotional Regulation, and the Function of Marital Violence: Differences between Secure, Preoccupied, and Dismissing Violent and Nonviolent Husbands' (2000) 15 *Journal of Family Violence* 391; James R Mahalik et al, 'The Role of Insecure Attachment and Gender Role Stress in Predicting Controlling Behaviors in Men Who Batter' (2005) 20(5) *Journal of Interpersonal Violence* 617; Ryon McDermott and Frederick Lopez, 'College Men's Intimate Partner Violence Attitudes: Contributions of Adult Attachment and Gender Role Stress' (2013) 60(1) *Journal of Counseling Psychology* 127.

⁶⁴Hayley Boxall, *Reimagining Desistance from Male-Perpetrated Intimate Partner Violence: The Role and Experiences of Female Victim-Survivors* (Springer, 2023).

⁶⁵NSW, *Parliamentary Debates*, Legislative Assembly, 12 October 2022, 9053 (Mark Speakman, Attorney-General). See also Gibbon and Buxton-Namisnyk (n 10) for discussion.

⁶⁶Shisei Tei et al, 'Inflexible Daily Behaviour Is Associated with the Ability to Control an Automatic Reaction in Autism Spectrum Disorder' (2018) 8 *Scientific Reports* 8082.

lead to strong emotional reactions, including anger, fear and disgust. In these situations, someone with OCD may use aggression, violence, emotional manipulation and threats as a way of enforcing their routine and ensuring compliance from family members.⁶⁷ While these behaviours appear abusive and controlling, and are likely experienced as such by intimate partners and family members, they are not necessarily underpinned by a motivation to coerce and control. Instead, they may be seeking to manage and mitigate the emotional and psychological distress associated with the symptoms of their neurological disorder. Lebowitz et al observed, when describing the aggressive behaviours of young people with OCD:

aggressive behavior in disruptive children may be provoked by the desire for a possession or the avoidance of a task [but], the behaviors ... were aimed at avoiding the distressing feelings and thoughts associated with OCD. In this sense, the coercive behaviors of obsessive compulsive children represent a special instance of severe interpersonal dysfunction which is at least partially secondary to a neurobiological disorder.⁶⁸

Within these contexts, it could be that the abusive behaviours are not motivated by a desire for coercion or control but are demonstrative of an underlying need or psychopathology to be mitigated.⁶⁹

Hopefully, the requirement to prove intent to control will reduce the risk of inappropriately criminalising defendants, whose behaviours are motivated by self-regulatory – rather than more nefarious – objectives. As noted above, the review of the NSW legislation will include consideration of whether to extend the fault element to include recklessness, as is the case in Scotland. If this occurs, there is a risk of inappropriately ensnaring people with neurodevelopmental and cognitive disabilities in the carceral net.

This is not to suggest that an intervention is not required in cases where an individual with a neurodevelopmental or cognitive disorder is using behaviours that are experienced by victim-survivors as controlling and abusive. The impact of controlling behaviours on victim-survivors of IPV can be significant and long-lasting, regardless of the motivations underpinning them. However, controlling behaviours that have a self-regulatory function are unlikely to be addressed or mitigated through criminalisation or mandatory participation in behaviour change programs, which are not

always suitable for people with disability.⁷⁰ People who use controlling behaviours and are neurodivergent and/or who have an intellectual disability have different support and treatment needs, which we discuss later in this article.

As a more general point, the intentionality requirement may present additional issues in relation to proving the new offence beyond a reasonable doubt. There is reason to be concerned that motivated offenders may craft alternative narratives, where they minimise their behaviours, by suggesting they were underpinned by motives other than control. This could include emotional dysregulation and distress, communication deficits and adverse childhood experiences. Court representatives need to be alive to this possibility and interrogate and challenge these narratives, when they are presented.

Ensuring appropriate responses for people with neurodevelopmental and cognitive disorders

Protection orders

Civil protection orders are the primary court response to domestic violence. In NSW, an interim apprehended violence order must be made when there is a domestic violence charge, while a final order must accompany a conviction for such an offence.⁷¹ Similarly, the 2024 Queensland Act requires the court to consider making a temporary protection order under particular circumstances, including if the court adjourns the hearing of the application and has not already made a domestic violence order.⁷² Protection orders will therefore likely accompany coercive control charges in both Queensland and NSW and their use has implications for defendants with neurodevelopmental and cognitive disorders.

Research by Legal Aid Victoria⁷³ found that clients with intellectual disability were overrepresented among those receiving multiple grants of aid for contravening family violence intervention orders. People with neurodevelopmental and cognitive disorders are also at risk of breaching their orders, due to misunderstanding the requirements of the order and/or the consequences of contravening the order. This in turn places them at a particularly high risk of incurring penalties, including imprisonment, and places both the victim-survivor and

⁶⁷Lebowitz et al (n 50).

⁶⁸Ibid 368.

⁶⁹See Nicole Renehan, 'Foregrounding Meaning and Motive in the Domestic Abuse Perpetration of and Response to Neurodivergent Men' (2024) 45 *Deviant Behavior* 1682 for further discussion.

⁷⁰Nicole Renehan and Kate Fitz-Gibbon, *Domestic Violence Perpetrator Programmes and Neurodiversity: Practitioner experiences and perspectives* (2022) doi: [10.15128/r2hx11xf281](https://doi.org/10.15128/r2hx11xf281); Nicole Renehan, *Designing from the Margins Neurodivergent-led Organisations on Domestic Abuse Perpetrator Programmes* (Durham University, 2024).

⁷¹*Crimes (Domestic and Personal Violence) Act 2007* (NSW) ss 39–40.

⁷²*Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2024* (Qld) (2024 Qld Act) pt 3 div 3.

⁷³Victoria Legal Aid, *Characteristics of Defendants Who Breach Family Violence Intervention Orders* (2015) 9–13.

community at risk of further violence.⁷⁴ Behaviours such as poor impulse control, regulation of future-directed behaviour and poor memory function, which are common among people with ADHD, are also risk factors for breaching protection orders.

Bail and remand

The new offences in both NSW and Queensland require the prosecution to establish a pattern of behaviour and include a wide range of non-physical and potentially subtle forms of abuse (eg. limiting the other person's autonomy). As a result, the prosecution is likely to have to gather more evidence, to prove the offence. This will likely lead to lengthy police investigative processes and court trial lengths.⁷⁵ Defendants may therefore spend considerable time either on bail or on remand, while awaiting trial and during the trial process.⁷⁶ These issues are particularly relevant in NSW, with recent reforms reversing the presumption of bail so that the defendant needs to 'show cause' in serious domestic violence cases and for the new coercive control offence.⁷⁷ This is likely to have a particularly deleterious effect on people with neurodevelopmental and cognitive disorders.

Sentencing outcomes

Prevalent cognitive impairments, such as executive and memory dysfunction (eg. poor planning and organisation), the inability to remember instructions, and poor impulse control can all influence sentencing outcomes for defendants with neurodevelopmental and cognitive disorders.⁷⁸ These characteristics make many community-based sentencing arrangements a poor fit for individuals with neurodevelopmental and cognitive disorders. These people may struggle to understand the requirements of their order, organise/manage time for supervision meetings and behavioural change programs etc and otherwise comply with the conditions of their sentence. However, with maximum penalties of seven and 14 years' imprisonment respectively in NSW and Queensland, viable alternatives are required to avoid exacerbating the overrepresentation of people with neurodevelopmental and cognitive disorders

in Australia's prisons.⁷⁹ This may be challenging for the courts to navigate, as the limited diversionary programs available for defendants may restrict the number of alternatives to incarceration.⁸⁰

Therapeutic service delivery

Recent research has identified that counselling and support programs for perpetrators of domestic violence do not accommodate the needs of perpetrators with ASD and/or ADHD and that understanding their experiences and learning styles is critical to the effectiveness of behaviour change programs.⁸¹ However, the dearth of practitioners with such expertise presents a significant challenge in practice.⁸² In a longitudinal study of people with ADHD who had been convicted of an IPV offence, Buitelaar et al.⁸³ found that the treatment of ADHD and IPV together significantly decreased the frequency of IPV reoffending, compared with the treatment of IPV alone. Similarly, international research has identified a gap in therapeutic service delivery for perpetrators of domestic violence (including of coercive controlling behaviours) with an intellectual disability.⁸⁴

It is worth noting that the 2024 Queensland Act will also introduce a new court-based perpetrator diversion scheme under the *Domestic and Family Violence Protection Act 2012* (Qld), as a way of intervening at an early stage in the proceedings, and supporting defendant behaviour change.⁸⁵ However, under s 135F of the 2024 Queensland Act (which is yet to come into effect), this scheme will only be only available when there is an approved provider, who can (and has capacity to) provide a suitable program for the defendant to participate in. Importantly, suitability involves a consideration of the defendant's language skills and 'any disabilities, psychiatric or psychological conditions'. While this is a promising initiative, we must acknowledge the limited practical benefit of such a response, given the gaps in service delivery of treatment programs for perpetrators of domestic violence with neurodevelopmental and cognitive disorders, which is essential to their success. Given the limited availability of behaviour change programs where practitioners have expertise working with people with neurodevelopmental and cognitive disorders who are

⁷⁴Janet Loughman, Submission to NSW Law Reform Commission, *Apprehended Violence Orders and People with Cognitive and Mental Health Impairments in the Criminal Justice System* (7 September 2012) https://www.wlsnsw.org.au/downloads/2013WLSNSW_DV_Sub_NSWLRC_AVOs&CognitiveandMentalHealthImpairments070912.pdf; Intellectual Disability Rights Service, *Defendant Incapacity and AVOs* (Issue Paper, December 2014). See also Silke Meyer and Rose Stambe, 'Increasing Compliance with Domestic Violence Protection Orders: Investing in Perpetrator Education and Support as an Investment in Victim and Family Safety' (2022) 32(9) *Policing and Society* 1071.

⁷⁵Douglas (n 19).

⁷⁶Ibid.

⁷⁷See now *Bail Act 2013* (NSW) ss 16B(1)(c1), (c2), introduced by the *Bail and Other Legislation Amendment (Domestic Violence) Act 2024* (NSW).

⁷⁸Freckleton (n 29).

⁷⁹Royal Commission Final Report (n 34); Henderson and Bull (n 34).

⁸⁰Australian Psychological Society, 'Implementation Considerations Should Coercive Control Be Criminalised in South Australia: Response to Attorney-General's Department South Australia', *Discussion Paper: Implementation considerations should coercive control be criminalised in South Australia* (29 March 2022).

⁸¹Renehan and Fitz-Gibbon (n 70).

⁸²Ibid.

⁸³Nannet Buitelaar et al, 'The Impact of ADHD Treatment on Intimate Partner Violence in a Forensic Psychiatry Setting' (2021) 25(7) *Journal of Attention Disorders* 1021.

⁸⁴Charlotte Swift, Erin Waites and Wendy Goodman, 'Perpetrators of Domestic Violence Abuse within Intellectual Disability Services: A Hidden Population?' (2018) 46(2) *British Journal of Learning Disabilities* 74.

⁸⁵2024 Qld Act (n 72) s 40, introducing *Domestic and Family Violence Protection Act 2012* (Qld) pt 4A.

charged with domestic violence offences, including coercive control, the risk remains that such defendants will not have equitable access to this diversion pathway, further contributing to their criminalisation. In any event, this diversionary scheme is targeted at those charged with contravening a protection order, not as a sentencing option for the offence of coercive control.

Conclusion

There is very little community support for coercive controlling behaviours within intimate and familial relationships.⁸⁶ However, questions remain about the extent to which the public (including victim-survivors and perpetrators) understand what is meant by coercive control and what behaviours would come under the new offences. This lack of understanding is likely to be exacerbated in relation to vulnerable and marginalised groups in our community, including those experiencing neurodevelopmental and cognitive disorders. Our analysis has highlighted some significant potential issues for defendants with such disorders, as a result of the criminalisation of coercive control in NSW and Queensland. Other issues in this context include the implications of the NSW provisions relating to the 'reasonable person' test and defence of 'reasonable ... in all the circumstances' also need to be considered. There is also a risk that there will be inappropriate guilty pleas in Queensland, to avoid the prospect of matters being transferred to the higher courts.

Our analysis demonstrates the importance of assessing the practical implications of law reform through a disability lens. Despite the relationship between neurodevelopmental and cognitive disorders and domestic violence described above, this issue has not been discussed in the Australian academic or political discourse surrounding the criminalisation of coercive control. This is concerning, because people with such conditions are likely to be overrepresented as defendants charged under the new legislation. We therefore suggest the need for further consideration of the relationship between neurodevelopmental and cognitive disorders and the perpetration of coercive control.⁸⁷

Our analysis does not seek to minimise the negative impacts of controlling behaviours on victim-survivors. Nor are we suggesting that the conditions discussed in this article cause

or excuse such behaviour. However, the issues highlighted here reinforce the importance of disability education and training, to ensure cases involving apparent instances of coercive control are understood in their full context and appropriate decisions can be made about their investigation, prosecution and resolution. Judicial education and awareness-raising may also create the potential for courts to provide an opportunity for diagnosis and referrals to be made to the appropriate support services, to facilitate the identification and treatment of neurodevelopmental and cognitive disorders.⁸⁸ By embedding disability education and support into Australia's courts, the participation of defendants with disabilities will be improved, along with the quality of outcomes for these individuals.⁸⁹ If this is combined with service delivery expansion and improvement, the courts could function as a space for defendants with neurodevelopmental and cognitive disorders to be referred to disability-informed therapeutic services that may promote behavioural change and community safety, rather than further entrenching their overrepresentation in the 'justice' system.

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⁸⁶Carolyn Strange et al, *Public Attitudes Towards Coercive Control: Evidence from a Nationally Representative Population Survey* (Australian National University, 2023).

⁸⁷Erica Bowen and Charlotte Swift, 'The Prevalence and Correlates of Partner Violence Used and Experienced by Adults with Intellectual Disabilities: A Systematic Review and Call to Action' (2019) 20(5) *Trauma, Violence, & Abuse* 693.

⁸⁸Baldry et al (n 5); Bartels (n 41).

⁸⁹Baldry et al, *ibid*; Bartels, *ibid*; Royal Commission Final Report (n 34).