

**Legal Aid Criminal Law Conference 2021**

***Control, Consent and Respect: Sexual Assault, Domestic Violence and our criminal justice system***

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**Control, Consent and Respect: Sexual Assault, Domestic Violence and our criminal justice system\***

**The Honourable Margaret Beazley AC QC[[1]](#footnote-2)**

**Introduction**

1. In the last decade, and in the last five years in particular, there has been an increased focus on sexual assault in a number of different contexts, including the Royal Commission into Institutional Responses to Child Sexual Abuse,[[2]](#footnote-3) the *Lazarus* case,[[3]](#footnote-4) Grace Tame’s *#LetHerSpeak*[[4]](#footnote-5) campaign, which resulted in legislative changes in Tasmania, and the recent NSW Law Reform Commission Report on ‘Consent in relation to sexual offences’.[[5]](#footnote-6) The Attorney General has announced that the NSW Government will be supporting the Commission’s 44 recommendations outlined in the Report, as well as going further to adopt an ‘affirmative model of consent’,[[6]](#footnote-7) to which I will refer in more detail later in this paper.
2. Sexual assault is and always has been a serious crime and carries significant penal consequences. Notwithstanding this, it remains one of the most prevalent offences in this state and statistically is increasing. As of March 2021, sexual assaults are recorded to have increased by 14.4% in the previous 24 months.[[7]](#footnote-8) Indecent assaults and other sexual offences are reported to have remained stable, although they had increased by 3% over the previous 60 months.[[8]](#footnote-9) However, according to the NSW Bureau of Crime Statistics and Research (‘BOCSAR’) in 2020, only 17.4% of all reported sexual assault incidents involving victims aged above 16, and 12.6% of incidents involving children, resulted in criminal proceedings being commenced.[[9]](#footnote-10)
3. By way of contrast, offending in respect of murder, non-domestic violence related assault, robbery with a weapon not a firearm, and malicious damage remained stable. More notably, offending in respect of 60% of other major offences decreased significantly.[[10]](#footnote-11)
4. The principal legislative response to domestic violence seeks, in the first instance, to be protective: see the *Crimes (Domestic and Personal Violence) Act 2007.* This is undoubtedly due to the nuances of domestic relationships and the difficulties of their policing. However, their oft encountered crossover into criminal conduct, evidenced by 29 deaths in NSW attributed to domestic violence in 2020,[[11]](#footnote-12) is a signal of a problem that cannot merely be described as ‘serious’. There is, as stated in the recent Report on Coercive Control in Domestic Relationships, a ‘pandemic of domestic abuse’.[[12]](#footnote-13)
5. These figures demonstrate that there is a grave problem with both sexual assault and domestic violence, and it goes without saying that the individual and wider social consequences are significant. Accepting that to be so, I begin this paper with a reference to a story.
6. Tarana Burke, founder of the *#MeToo* Movement, was the Time Magazine Person of the Year in 2017. Her *#MeToo* hashtag has been used more than 19 million times. The founding date of the Movement is sourced back to around 2007, but it was an experience 11 years earlier, in 1996, that was the trigger for her to establish *JustBe*, a not-for-profit foundation for young African American women.
7. The 1996 experience involved an occasion when a young woman at a youth camp came to talk to her about sexual abuse to which the young woman had been subjected. Having given the young woman what comfort and advice she thought appropriate, Tarana later wondered why she had not simply said to her, ‘Me too’. That, she felt, was probably the better solace and support that she could have provided. It was that phrase, ‘Me too’, that morphed into a worldwide phenomenon in 2017. Notably, when I met with Tarana Burke in 2019, she explained to me that her concern and the work she has done in support of young women is all about ‘consent’.
8. This story provides a perfect segue into the issues of sexual assault and the proposed legislative changes to ‘consent’, as well as to domestic and family violence and the introduction of the notion of coercive control as a legislatively recognised form of domestic abuse. Ultimately, these issues are linked by a central issue – the treatment of women in our society and their experience within the justice system. Both involve deeply concerning legal and societal questions about control, consent and respect.

**Sexual Assault**

*A little by way of history*

1. At common law, ‘carnal knowledge of a woman against her will’ required proof of both penile-vaginal penetration and ‘non-consent’, understood to mean against the woman’s will. Historically, only men could commit ‘rape’ and only women could be victims of ‘rape’.
2. Two immunities existed. The first was that males under the age of 14 were deemed incapable of committing rape. The other was ‘marital immunity’, a concept propounded by Matthew Hale in the 18th century on the basis that, ‘for by their matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract’.[[13]](#footnote-14)
3. Neither concept continues to exist as an immunity. The *Children (Criminal Proceedings Act) 1987* (NSW) prescribes the age of 10 as the minimum age of criminal responsibility.[[14]](#footnote-15) However, pursuant to the rebuttable presumption of *doli incapax*, the common law presumes that a child between the ages of 10 and 14 does not possess the necessary knowledge to form a criminal intention. This presumption was applied in *RP v The Queen*,[[15]](#footnote-16) a case which involved an 11-year-old male who was convicted on two counts of sexual intercourse with his 9-year-old half-brother. The High Court found there to be insufficient evidence to prove beyond reasonable doubt that the appellant, who had intellectual limitations, understood that his conduct was seriously wrong in a moral sense.[[16]](#footnote-17) His convictions were quashed and a verdict of acquittal was entered.
4. The status and/or existence of marital immunity was clarified only relatively recently in *PGA v The Queen,*[[17]](#footnote-18) where the High Court, by majority, stated that if that immunity had ever been part of the common law of Australia, by the time of the enactment of the *Criminal Law Consolidation Act 1935* (SA) ,[[18]](#footnote-19) ‘local statute law had removed any basis for continued acceptance of Hale’s proposition’.[[19]](#footnote-20) The majority eschewed any reliance upon changes in social circumstances in reaching this conclusion; rather, their conclusion was based on the proper construction of the legislation. Nonetheless, the decision was a landmark case of great social importance for Australian women.

*Old-fashioned assumptions and procedural reforms*

1. As is well known by the profession, in the past, assumptions (perhaps better described as tactics) tended to dictate the course of trials. These included assumptions that delay in complaint evidenced consent,[[20]](#footnote-21) and that generally, women were unreliable witnesses and prone to false accusations of rape.[[21]](#footnote-22) These assumptions were the basis of jury directions cautioning the danger of convicting unless the complainant’s evidence was corroborated.[[22]](#footnote-23) Another attack on the reliability of a complainant’s testimony involved eliciting ‘sexual reputation evidence’, by way of cross-examination of a complainant’s sexual experience with the accused or others, purportedly on the basis of relevance to consent on the occasion of the charged incident.[[23]](#footnote-24)
2. Major reforms came in 1981. The *Crimes (Sexual Assault) Amendment Act 1981* (NSW) was introduced to: ‘protect complainants from further victimization under the legal process; encourage victims to report offences; facilitate the administration of justice and conviction of guilty offenders whilst preserving the traditional rights of the accused; and to serve as an educative function in further changing community attitudes.’[[24]](#footnote-25) The requirement for corroboration was removed. Instead, the trial judge was to warn the jury that ‘the absence of complaint or delay in complaining does not necessarily indicate that the allegation that the offence was committed is false’ and that there ‘may be good reasons why a victim of sexual assault may hesitate in making, or may refrain from making, a complaint about the assault’.[[25]](#footnote-26)
3. The reforms were hailed as effective. In the 18 months following their introduction, sexual offence reporting rose by 15.4% and police acceptance of reports rose by 25.3%.[[26]](#footnote-27) There was an increase of 11.5% in guilty pleas to charges.[[27]](#footnote-28) Further reforms followed in 1989, with which you will be familiar. Sexual assault offences were categorised into 3 types of offending and maximum penalties for offences were significantly increased. Notably, the penalty for the offence of sexual assault increased from eight to 14 years and the penalty for aggravated offences increased from 14 to 20 years.[[28]](#footnote-29)
4. Despite these reforms, the experience of complainants in criminal proceedings has remained an issue. Between 1994-1995, the Department for Women conducted a study of 111 sexual assault trials and 73 sentence matters in the District Court of NSW.[[29]](#footnote-30) The study revealed the following: Aboriginal women were 10 times more likely to be complainants in sexual assault hearings than non-Aboriginal women;[[30]](#footnote-31) in 65% of trials, there was an average of two interruptions because of distress suffered by complainants;[[31]](#footnote-32) 52% of complainants were accused of making false reports based on ulterior motives such as vengeance or excuses for adultery;[[32]](#footnote-33) 57% were questioned about behaving in a sexually provocative way;[[33]](#footnote-34) 59% were questioned about drinking on the day of the offence;[[34]](#footnote-35) and in 39% of trials, Judges continued to warn juries that the delay in complaint could be used to undermine the credibility of the complainant.[[35]](#footnote-36)
5. Further reforms were introduced in 2007 in response to the Criminal Justice Sexual Offences Taskforce’s Report on responding to sexual assault*.[[36]](#footnote-37)* The Taskforce wasestablished to examine why victims of sexual assault were not reporting to police or continuing with the prosecution of charges.[[37]](#footnote-38)
6. The legislative response, enacted in the *Crimes Amendment (Sexual Assault Offences) Act 2007* (NSW), sought to address changing community attitudes by introducing a definition of consent to mean: ‘if a person freely and voluntarily agrees to the sexual intercourse’.[[38]](#footnote-39) An expanded list of circumstances which automatically negate consent included: if a person does not have the capacity to consent or if the person is unconscious, forcefully detained or threatened with force or terror.[[39]](#footnote-40)
7. In his Second Reading Speech introducing this legislation to Parliament, then-Attorney General, the Honourable John Hatzistergos, stated that the reforms were to address the need to ‘[bring] about a cultural shift in the way sexual offences are investigated and prosecuted, and the attitudes of key participants within the criminal justice system’*.*[[40]](#footnote-41) The Attorney General continued: ‘some members of the community still hold the view that women often say “no” when they mean “yes”, that women who are raped often ask for it, and that rape often results from men not being able to control their need for sex, [therefore removing] responsibility for rape’.[[41]](#footnote-42)
8. Circumstances such as those outlined by the Attorney-General can be found in the case law. *Paul Upton v R*[[42]](#footnote-43)was an extreme example. The evidence of the complainant, a sex worker, was that when she accepted a lift from the appellant, she informed him and the co-accused that she only worked from home. This was ignored and she was detained in an industrial warehouse over three days, had a drill held to her temple, her jacket cut up with a 300mm long knife, a noose hung around her neck and she was threatened to be ‘chop[ped] up’.[[43]](#footnote-44) This case was before the 2007 reforms. Nonetheless it does indicate that the statutory negation of consent would not necessarily achieve the objects of the reforms.
9. More than 13 years later, debate around the meaning of consent remains. Chanel Contos has recently drawn attention to the experiences of many young women who feel that sex is expected of them.[[44]](#footnote-45) It would seem that there are many ways in which this expectation is considered to be reasonable and acceptable, or that conduct such as being out with friends at night is a sufficient indication of consent. Another example given is wearing clothing which makes the young woman ‘feel good’ as an aspect of exploring her own sexuality. Another is that ascertaining whether a person consents is irrelevant because ‘sex is what happens’.
10. Chanel Contos gained significant media coverage, particularly through her online petition for better consent education in school. However, to be properly informed, to know the nature and the extent of a problem and to know how to effectively respond, lawyers, legislators, policymakers and the community need to examine the data and understand its implications.
11. Since 2005, the Australian Bureau of Statistics has conducted a Personal SafetySurvey.[[45]](#footnote-46) The Personal Safety Survey collects information from men and women aged 18 years and over about the nature and extent of violence they have experienced since the age of 15. The Survey has been subsequently conducted in 2012 and 2016.
12. The Survey includes information about experiences of:
13. current and previous partner violence and emotional abuse since the age of 15;
14. experiences of stalking since the age of 15;
15. physical and sexual abuse before the age of 15;
16. witnessing violence between a parent and partner before the age of 15;
17. lifetime experience of sexual harassment; and
18. general feelings of safety.[[46]](#footnote-47)
19. The 2016 Survey revealed that almost 2 million Australians (approximately 8%) had experienced at least one sexual assault since the age of 15.[[47]](#footnote-48) More than 200,000 (1.1%) of Australian adults had experienced at least one sexual assault in the 12 months before the survey, an increase of just under 1% since the 2012 survey; around 639,000 Australian women experienced their most recent incident of sexual assault by a male in the last 10 years.[[48]](#footnote-49) Perhaps the most concerning statistic in the survey, however, was that 9 out of 10 women did not contact police. Although no formal correlation has been undertaken, the BOCSAR data which reveals that in NSW, in 2020, only 4,191 incidents were reported to the police, overall supports the survey results.[[49]](#footnote-50)
20. Neither the survey results nor the BOCSAR data paint a picture of a physically and emotionally safe community. It is against that background that the Attorney General’s announcement of sweeping reforms to sexual consent laws, following upon the recommendations of the Law Reform Commission’s Report on consent, is of particular importance.[[50]](#footnote-51) The Report recommends the adoption of the ‘communicative model of consent’, which is described as comprising three underlying principles: every person has a right to choose whether or not to participate in a sexual activity; consent is not to be presumed; and consensual sexual activity involves ongoing and mutual communication, decision making and free and voluntary agreement.[[51]](#footnote-52)
21. The Report’s recommendations include: that the absence of physical resistance is not, by reason only of that fact, to be taken as consent;[[52]](#footnote-53) consent to one sexual activity should not be taken as consent to another form of sexual activity;[[53]](#footnote-54) and consent on one occasion is not to be taken as consent to another occasion.[[54]](#footnote-55) Other important recommendations are that sexual activity is non-consensual if the person is too intoxicated to consent[[55]](#footnote-56) or is overborne by abuse of a relationship of authority, trust or dependence.[[56]](#footnote-57)
22. The Report also made recommendations as to knowledge of consent, most notably recommendation 7.3, which provides:
23. ‘”Actual knowledge” and “recklessness” should remain part of the mental element of knowledge of non-consent.
24. The reference to “knows” in s 61HE(3)(a) should be replaced with “actually knows”.
25. “Recklessness” should not be defined in the legislation.
26. A test of “indifference” should not replace “recklessness”’.[[57]](#footnote-58)
27. These recommendations are a response to the *Lazarus* decision, which turned on whether the accused had knowledge of consent, whether the accused had actual knowledge of lack of consent, or was reckless or had ‘no reasonable grounds’ for believing there was consent. The accused was acquitted on the basis that he had reasonable grounds for believing there was consent, as the complainant had not asked the accused to stop and ‘did not take any physical action to move away’, even though in her own mind she was clear that she was not consenting.[[58]](#footnote-59)
28. Another important recommendation is that new jury directions should be introduced to address misconceptions about consensual and non-consensual activity,[[59]](#footnote-60) and about how different people react to different circumstances.[[60]](#footnote-61) Recommendation 8.6 provides an example of what is required in this respect:

‘The *Criminal Procedure Act* should include a direction stating that:

1. trauma may affect people differently, which means that some people may show obvious signs of emotion or distress when giving evidence in court about an alleged sexual offence, but others may not, and
2. the presence or absence of emotion or distress does not necessarily mean that a person is not telling the truth about an alleged sexual offence.’[[61]](#footnote-62)
3. The overall effect of the Report’s recommendations is that significant legislative change is necessary to ensure that popular conceptions and misconceptions about social behaviour and sexual norms do not distract the jury from the task as to whether there has been a sexual assault within the meaning of the law. The Report also recognises that education around questions of consent is required. Chanel Contos’ advocacy attests that this is so.
4. Concern has been expressed that the legislation will criminalise behaviour when the answer should be for education around issues of consent and respect. Some argue that there are fears of ‘some men being overly punished for minor transgressions’ or ruinous false accusations.[[62]](#footnote-63) On the other hand, there is anecdotal evidence that even where a report of abuse is accepted, a woman’s career may nonetheless be adversely affected.
5. The question of how the law should best deal with questions of consent is not straightforward and there is, and should be, informed debate as to whether the proposed reforms are necessary and whether, if introduced, they will be effective. It is significant that the profession itself has not spoken with one voice on the issue. The initial response of the NSW Bar Association, made through its President, was that the Association strongly opposed the reforms ‘as fundamentally misguided and likely to criminalise many respectful consensual sexual behaviours’.[[63]](#footnote-64)
6. 23 barristers, including 20 Senior Counsel, in an open letter, publicly disagreed.[[64]](#footnote-65) The letter stated: ‘Recent years have confirmed that the current balance struck by sexual assault laws is not satisfactory. Something needs to be done. While the rights of the accused should not be lost, the interests of victim need better protection’.[[65]](#footnote-66)
7. The Bar Association subsequently clarified its position noting that ‘sexual assault is an abhorrent crime’ and stating that the Association’s position was that ‘the criminal law must respond with clear and unambiguous rules regarding lack of consent’.[[66]](#footnote-67) The statement noted that the Association had supported certain aspects of the proposed reforms but had expressed its concerns in relation to other matters to the Law Reform Commission. The Association observed that ‘[c]onsent is an extremely important position’ and that ‘widespread and informed community discussion’ was ‘necessary and appropriate’.[[67]](#footnote-68)
8. If I could conclude on this issue with a reference – this time to popular culture – Suzie Miller’s play *Prima Facie*, which played at the Griffin Theatre in 2019. Although exceptionally good drama, amongst the hardened lawyers in the audience, the view was that the matter, involving a consensual office romance and a late night unexpected visit with sexual activity to which the young female said she did not consent, would never have been taken to trial: word against word - always a tough gig. Amongst the responses of young women to the play that I heard are anything from, ‘OMG, it was so tense’ to the more definitive, ‘Of course it was sexual assault’. Those responses point to a likely disconnect between the law as it operates in practice and what should be accepted as consensual sexual activity.
9. The Attorney General’s position recognises that to this point, the law has not sufficiently protected women and men from sexual abuse. The position taken by young people such as Chanel Contos indicates that there needs to be much better understanding of consent and that it should not be a matter of social expectation.

**Domestic Violence and Coercive Control**

1. At the start of this paper, I referred to the observation made in the recent Report on Coercive Control in Domestic Relationships that the statistics reveal a ‘pandemic of domestic abuse’.[[68]](#footnote-69) This is clearly borne out in the 2016 Personal Safety Survey results:
2. ‘More than one in three Australians experienced violence by a male perpetrator since the age of 15 (36% or 6.7 million), compared to one in ten by a female perpetrator (11% or 2 million)’ [[69]](#footnote-70) - but in either case, a disturbing figure.
3. ‘Approximately one in four women (23% or 2.2 million) experienced violence by an intimate partner, compared to one in thirteen men (7.8% or 703,700)’.[[70]](#footnote-71)
4. ‘More than one in four men (27% or 2.5 million) experienced violence by a stranger, compared to one in eleven women (9.4% or 880,800)’.[[71]](#footnote-72)
5. The principal legislation relating to domestic abuse is the *Crimes (Domestic and Personal Violence) Act 2007.* In accordance with its legislative objects, the Act seeks ‘to ensure the safety and protection of all persons, including children, who experience or witness domestic violence’, and ‘to ‘reduce and prevent violence … where a domestic relationship exists’.[[72]](#footnote-73) It is also an object of the Act to enact provisions that are consistent with the *United Nations Convention on the Rights of the Child* and the *Declaration on the Elimination of Violence against Women*.[[73]](#footnote-74)
6. Notwithstanding the stated objects of the legislation, as the statistics reveal, the prevalence of domestic violence is disturbing, and it is well known that its societal impact is huge and often devasting. In *Munda v Western Australia,*[[74]](#footnote-75)the High Court, in the context of a violent domestic murder stated:

‘A just sentence must accord due recognition to the human dignity of the victim of domestic violence and the legitimate interest of the general community in the denunciation and punishment of a brutal, alcohol-fuelled destruction of a woman by her partner. A failure on the part of the state to mete out a just punishment of violent offending may be seen as a failure by the state to vindicate the human dignity of the victim; and to impose a lesser punishment by reason of the identity of the victim is to create a group of second-class citizens, a state of affairs entirely at odds with the fundamental idea of equality before the law.’[[75]](#footnote-76)

1. These observations have been taken up in other decisions,[[76]](#footnote-77) including observations as to ‘the need to maintain public confidence in the administration of justice’ if domestic violence is not treated seriously within the legal system.[[77]](#footnote-78) In this regard, one hears anecdotally that lower courts do not always endorse the objects of the legislation in the cases before them. For example, practitioners speak of magistrates who refuse to order that a man leave the home because, quoting the magistrate: ‘A man’s home is his castle’. If that is the perspective of any judicial officer, perhaps one should ask how will complaints of ‘coercive control’ fare?

*Coercive Control*

1. Domestic abuse, frequently, if not usually, is spoken of in terms of ‘power’ and ‘control.’ This was evidenced in the 2016 Victorian Royal Commission into Family Violence, which reported that the hundreds of submissions it received had a common theme: ‘that [domestic] violence is a tool used to gain control over [the other person]’.[[78]](#footnote-79) The Commission found that police are inclined not to treat coercive behaviour as serious because the abuse is not visible.[[79]](#footnote-80) However, a 2009 UK study found that controlling behaviour can be a significant factor in child homicides, and concluded that: ‘It is the extent of control over the whole family rather than the frequency of physical violence that indicates that such fathers are at high risk of killing children’.[[80]](#footnote-81) Recent experience in this state and Queensland bears that out – the Edwards[[81]](#footnote-82) and Hannah Clarke[[82]](#footnote-83) cases are two of the more recent notorious examples.
2. However, if abuse by way of coercive control is to have a legislative base, the concept needs to be amenable to definition. This requires a clear understanding of what is meant by coercive control. The 2015 UK Home Office report *Statutory Guidance Framework: Controlling or Coercive Behaviour in an Intimate or Family Relationship* describes coercive behaviour as not relating to a ‘single incident’; rather, ‘it is a purposeful pattern of behaviour which takes place over time in order for one individual to exert power, control or coercion over another’.[[83]](#footnote-84)
3. In October 2020, the NSW Government released its Discussion Paper on coercive control. In his foreword, Attorney General Mark Speakman SC, after referring to the statistics of men and women killed by a current or former partner – one woman every nine days and one man every 29 days – said:

‘A lesser-known statistic is this: between 10 March 2008 and 30 June 2016 there were 150 intimate partner homicides in NSW. Of these 150 homicides, 135 (90%) were classified by the Domestic Violence Death Review Team as having occurred in a domestic violence context, with 112 cases included in this dataset for in-depth review. 111 of the primary domestic violence perpetrators were men. One was a woman who was classified as both a victim and a perpetrator. But here’s the clincher: in 111 of the 112 cases [referenced in the Domestic Violence Death Review report] the relationship between the domestic violence victim and the domestic violence perpetrator was characterised by the use of coercive and controlling behaviours.’[[84]](#footnote-85)

1. The Discussion Paper described coercive control as ‘involving repeated patterns of abusive behaviour – which can include physical, sexual, psychological, emotional or financial abuse – the cumulative effect of which is to rob victim-survivors of their autonomy and independence’.[[85]](#footnote-86)
2. Various conduct has been identified as indicative of coercive control: controlling access to money; using debt as a control lever; controlling what a person wears, how a person dresses, the person’s general appearance; cutting off access to phones; cyber bullying; forbidding contact with outsiders; threatening to reveal personal information; and using the justice system against the victim by making false or vexatious allegations.[[86]](#footnote-87) In migrant communities, coercive behaviour can include refusing to allow a person to attend English language classes.[[87]](#footnote-88) In general terms, it is conduct which prohibits normal activities, often with the effect of isolating a person from normal forms of social intercourse.
3. That coercive control is a serious issue is underscored by the fact that an overwhelming percentage of domestic violence murders are preceded, not necessarily by a history of violence, but by a history of coercive control.[[88]](#footnote-89) Put another way, ‘coercive control is a significant predictor of partner homicide’.[[89]](#footnote-90) The statistics also reveal that whilst domestic violence can be experienced by persons of all sexual orientations, it is predominantly a crime against women, ‘in line with gendered power dynamics’.[[90]](#footnote-91)
4. The 2020 NSW Government Discussion Paper notes that within the existing domestic violence legislation, there are tools at the disposal of the courts to minimise ongoing coercive control, including orders that the perpetrator not approach or contact the victim. The question for us here in NSW, however, is whether coercive control should be criminalised, as it has been in Scotland,[[91]](#footnote-92) England and Wales;[[92]](#footnote-93) Ireland;[[93]](#footnote-94) and most recently in Tasmania.[[94]](#footnote-95)
5. The legislative response in the United Kingdom in criminalising coercive control followed advocacy and survey results from focus groups, local councils, academics and the community, which indicated an overwhelming belief that the criminal justice system was failing to protect women. In England and Wales, 85% of responses to its inquiry were that legislation was needed.[[95]](#footnote-96) Legislative intervention followed. In the following five years, there were 10 cautions, 516 proceedings and 308 convictions for the offence of coercive control, with 65% of those convicted receiving a jail sentence of an average length of just over 20 months.[[96]](#footnote-97)
6. When the matter was under consideration in Scotland, 96% of respondents were of the view that the creation of an offence of coercive control would be an improvement in the law.[[97]](#footnote-98) As was the case in the UK, since its introduction there has been ‘a comparatively high uptake of the offence’, nearly 1700 convictions in total.[[98]](#footnote-99) Experience in the other jurisdictions also demonstrates that criminalisation is workable.
7. The model of legislation varies in the different jurisdictions, including whether the required intent should be subjective or objective, or a combination of both. Objective and subjective aspects of criminal intent are not unfamiliar to NSW Lawyers – or indeed Australian lawyers generally. So that factor, together with a clear definition, and an understanding by law enforcement authorities of the conduct that may constitute coercive behaviour, should not be an impediment to the introduction of legislation. Rather, the question for us as a legal community, as it is for the wider community, is whether criminalisation of coercive conduct will enhance the protection of those subjected to such conduct and, importantly, see a decrease in such behaviour.
8. As the Attorney General pointed out in his foreword, any proposal to criminalise coercive behaviours will excite divergent responses, ranging from pleas that action is necessary, to the stark statement that, ‘You cannot legislate a narcissist to respect others’.[[99]](#footnote-100) The Honourable Kate Warner AC, Governor of Tasmania, made a similar point, considering that the problem is significantly attitudinal, and said that the law cannot fix everything.[[100]](#footnote-101)
9. Concern has also been expressed that legislation will adversely impact marginalised groups. A Queensland study revealed that 69% of women sentenced to serve a period of imprisonment for contravention of a domestic violence order between 2013-14 were Indigenous.[[101]](#footnote-102) This reflects the starkly disproportionate representation of Indigenous peoples in prison, a serious concern which goes across all forms of offending by Indigenous males and females and young people.
10. Interestingly, of the 153 submissions received by the Joint Select Committee on Coercive Control, there is a close to even split between those who support criminalisation and those who consider that the existing domestic violence legislation is adequate.[[102]](#footnote-103) However, there is a recognition by the proponents of the latter view that there is a need for greater training of agencies and funding for police and social services.
11. The Law Society of NSW supports criminalisation but argues that ‘compulsory training for all police officers and the availability of comprehensive social services are vital components to the success of introducing a new offence’, [[103]](#footnote-104) being the approach taken in Scotland.
12. The Public Defenders (NSW),[[104]](#footnote-105) Aboriginal Legal Service (NSW/ACT)[[105]](#footnote-106) and Legal Aid NSW[[106]](#footnote-107) do not support criminalisation, at least at this time. They stress that there is already an existing legislative framework for domestic violence, which has its own complexities. They also point to: difficulties in prosecuting such an offence; retraumatising of victims in lengthy court proceedings; victimisation of communities who adhere to more traditional gender norms and divisions of household tasks; as well as Aboriginal and Torres Strait Islander communities ‘who are already over-policed and who experience layers of intergenerational disadvantage and trauma’.[[107]](#footnote-108)

**Conclusion**

1. Whatever position the Government takes on the criminalisation of coercive control, the statistics, decided cases, anecdotal stories and conversations demonstrate that there is an enormous social issue of domestic violence that calls out desperately for a solution. Sadly, the 1981 second reading speech to which I referred earlier could still be read today.
2. There is also a community lesson in all of this. In asking a Mayor of a country town how the community was faring in the drought and during COVID-19, I also asked, ‘What about domestic violence?’ His reply was telling: ‘It’s a mongrel of a thing’. He continued, ‘We have become quite good at asking someone we come across in the street: “R U OK?” We just don’t say to the fella in the pub who we know bashes up his wife, “Hey mate, you need help”’.
1. \* Originally delivered as an address for the 2021 Legal Aid Criminal Law Conference held on 2 June 2021. The address has been edited for publication.

 With thanks to my Research Assistant, Ms Elizabeth Chapman, for her assistance in the preparation of this address. [↑](#footnote-ref-2)
2. *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, 15 December 2017) vols 1-17. [↑](#footnote-ref-3)
3. *Lazarus v R* [2016] NSWCCA 52; *R v Lazarus* [2017] NSWCCA 279. [↑](#footnote-ref-4)
4. See, eg, Lorna Knowles, ‘Finally, she can speak’, *ABC* (online, 12 August 2019) <<https://www.abc.net.au/news/2019-08-12/grace-tame-speaks-about-abuse-from-schoolteacher/11393044?nw=0>>; Australian of the Year Awards 2021, ‘Grace Tame’, <<https://www.australianoftheyear.org.au/recipients/grace-tame/2297/#:~:text=TASNational%20RecipientAustralian%20of,and%20jailed%20for%20his%20crimes>>. [↑](#footnote-ref-5)
5. New South Wales Law Reform Commission, *Consent in relation to sexual offences* (Report No 148, September 2020). [↑](#footnote-ref-6)
6. Mark Speakman, Attorney General, Minister for the Prevention of Domestic Violence and Minister for Families, Communities and Disability Services, Sarah Mitchell, Minister for Education and Early Childhood Learning, Bronnie Taylor, Minister for Mental Health, Regional Youth and Women, ‘Consent Law Reform’ (Media Release, Tuesday 25 May 2021) <<https://inbrief.nswbar.asn.au/posts/08b347d11316f1372f3414b4c466afe4/attachment/AG%20media%20release.pdf>>. [↑](#footnote-ref-7)
7. NSW Bureau of Crimes Statistics and Research (‘BOCSAR’), *NSW Recorded Crime Statistics Quarterly Update March 2021* (Report, March 2021) 16. [↑](#footnote-ref-8)
8. Ibid. [↑](#footnote-ref-9)
9. BOCSAR, ‘Sexual assault offences: Progress through the CJS’ (online, 2020) <<https://www.bocsar.nsw.gov.au/Pages/bocsar_pages/Sexual-assault.aspx>> [↑](#footnote-ref-10)
10. BOCSAR, *NSW Recorded Crime Statistics Quarterly Update March 2021* (n 7) 16. [↑](#footnote-ref-11)
11. BOCSAR, ‘Domestic violence statistics for NSW: DV Murder’ (online, 2020) <<https://www.bocsar.nsw.gov.au/Pages/bocsar_pages/Domestic-Violence.aspx>>. [↑](#footnote-ref-12)
12. Joint Standing Committee on Coercive Control, Parliament of New South Wales, *Coercive Control in Domestic Relationships* (Report 1/57, 30 June 2021). [↑](#footnote-ref-13)
13. Matthew Hale, *Historia Placitorum Coronae* vol 1 (1736) ch 58, 629, in Brown et al, *Criminal Laws* (Federation Press, 2014) 662. [↑](#footnote-ref-14)
14. *Children (Criminal Proceedings Act) 1987* (NSW) s 5. [↑](#footnote-ref-15)
15. (2016) 259 CLR 641. [↑](#footnote-ref-16)
16. Ibid at [32]-[36] (Kiefel, Bell, Keane and Gordon JJ). [↑](#footnote-ref-17)
17. (2012) 245 CLR 355. [↑](#footnote-ref-18)
18. *Criminal Law Consolidation Act 1935* (SA). [↑](#footnote-ref-19)
19. *PGA v The Queen* (2012) 245 CLR 355, [64] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ). [↑](#footnote-ref-20)
20. See, eg, Elizabeth Sheehy, ‘Evidence Law and ‘Credibility Testing’ of Women: A Comment on *E* Case’ (2002) 2(2) *Queensland University of Technology Law and Justice Journal* 157, 168. [↑](#footnote-ref-21)
21. See, eg, ibid 171. [↑](#footnote-ref-22)
22. See, eg, ibid 169. [↑](#footnote-ref-23)
23. See, eg, ibid 171. [↑](#footnote-ref-24)
24. New South Wales, *Parliamentary Debates,* Legislative Assembly, 8 April 1981, 5452 (The Hon D P Landa). [↑](#footnote-ref-25)
25. *Crimes (Sexual Assault) Amendment Act 1981* (NSW) Schedule 1. [↑](#footnote-ref-26)
26. BOCSAR, *Characteristics of the Complainant, the Defendant and the Offence* (Interim Report No. 1, 1985); BOCSAR, *Sexual Assault-Court Outcome: Acquittals, Conviction and Sentence* (Interim Report No. 2, 1985)*.* [↑](#footnote-ref-27)
27. Ibid. [↑](#footnote-ref-28)
28. *Crimes (Amendment) Act 1989* (NSW) Schedule 1. [↑](#footnote-ref-29)
29. Department for Women, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault* (Report, November 1996). [↑](#footnote-ref-30)
30. Ibid 2. [↑](#footnote-ref-31)
31. Ibid 4. [↑](#footnote-ref-32)
32. Ibid 7. [↑](#footnote-ref-33)
33. Ibid. [↑](#footnote-ref-34)
34. Ibid. [↑](#footnote-ref-35)
35. Ibid 9. [↑](#footnote-ref-36)
36. Criminal Justice Sexual Offences Taskforce, Attorney General’s Department of NSW, *Responding to Sexual Assault: the way forward* (Report, December 2005). <<https://www.justice.nsw.gov.au/justicepolicy/Documents/cjsot_report.pdf>>. [↑](#footnote-ref-37)
37. Ibid. [↑](#footnote-ref-38)
38. *Crimes Amendment (Sexual Assault Offences) Act 2007* (NSW) Schedule 1. [↑](#footnote-ref-39)
39. Ibid. [↑](#footnote-ref-40)
40. New South Wales, *Parliamentary Debates,* Legislative Council, 7 November 2007, 3584 (The Hon Hatzistergos). [↑](#footnote-ref-41)
41. Ibid. [↑](#footnote-ref-42)
42. [2006] NSWCCA 256. [↑](#footnote-ref-43)
43. Ibid at [9]. [↑](#footnote-ref-44)
44. Natassia Chrysanthos, ‘It started on Instagram. Now Chanel’s petition is leading a sex education revolution’ *Sydney Morning Herald* (online, 6 March 2021) <<https://www.smh.com.au/national/it-started-on-instagram-now-chanel-s-petition-is-leading-a-sex-education-revolution-20210305-p5780k.html>>. [↑](#footnote-ref-45)
45. The survey is based on the design of the 1996 Women’s Safety Survey. See Australian Bureau of Statistics, ‘Women’s Safety Survey’ (1996). [↑](#footnote-ref-46)
46. Australian Bureau of Statistics, ‘Personal Safety, Australia’ (online, November 2017) <<https://www.abs.gov.au/statistics/people/crime-and-justice/personal-safety-australia/latest-release>> [↑](#footnote-ref-47)
47. Ibid. [↑](#footnote-ref-48)
48. Ibid. [↑](#footnote-ref-49)
49. BOCSAR, ‘Sexual assault offences: Progress through the CJS’ (n 9). [↑](#footnote-ref-50)
50. See New South Wales Law Reform Commission, *Consent in relation to sexual offences* (n 5). [↑](#footnote-ref-51)
51. Ibid recommendation 4.3. [↑](#footnote-ref-52)
52. Ibid recommendation 5.4. [↑](#footnote-ref-53)
53. Ibid recommendation 5.5. [↑](#footnote-ref-54)
54. Ibid recommendation 5.6. [↑](#footnote-ref-55)
55. Ibid recommendation 6.4. [↑](#footnote-ref-56)
56. Ibid recommendation 6.8. [↑](#footnote-ref-57)
57. Ibid, recommendation 7.3. [↑](#footnote-ref-58)
58. *R v Lazarus* (Unreported, District Court of New South Wales, Judge Tupman, 4 May 2017). [↑](#footnote-ref-59)
59. New South Wales Law Reform Commission, *Consent in relation to sexual offences* (n 5) recommendation 8.1. [↑](#footnote-ref-60)
60. Ibid recommendation 8.4. [↑](#footnote-ref-61)
61. Ibid recommendation 8.6. [↑](#footnote-ref-62)
62. See, eg, Emma Brockes, ‘#MeToo founder Tarana Burke: ‘You have to use your privilege to serve other people’ *The Guardian* (online, 15 January 2018) <<https://www.theguardian.com/world/2018/jan/15/me-too-founder-tarana-burke-women-sexual-assault>>. [↑](#footnote-ref-63)
63. Naomi Neilson and Lauren Croft, ’23 barristers oppose NSW Bar on sexual consent reforms’ *Lawyers Weekly* (online 1 June 2021) < <https://www.lawyersweekly.com.au/biglaw/31513-23-barristers-oppose-nsw-bar-on-sexual-consent-reforms>>. [↑](#footnote-ref-64)
64. Ibid. [↑](#footnote-ref-65)
65. Ibid. [↑](#footnote-ref-66)
66. NSW Bar Association, ‘Message From the President’ *New South Wales Bar Association* (online, 1 June 2021) < <https://nswbar.asn.au/the-bar-association/publications/inbrief/view/08b347d11316f1372f3414b4c4689959>>. [↑](#footnote-ref-67)
67. Ibid. [↑](#footnote-ref-68)
68. Joint Standing Committee on Coercive Control, *Coercive Control in Domestic Relationships* (n 12). [↑](#footnote-ref-69)
69. Australian Bureau of Statistics, ‘Personal Safety, Australia’ (n 46). [↑](#footnote-ref-70)
70. Ibid. [↑](#footnote-ref-71)
71. Ibid. [↑](#footnote-ref-72)
72. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9(1)(a)-(b). [↑](#footnote-ref-73)
73. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9(1)(c)-(d). [↑](#footnote-ref-74)
74. (2013) 249 CLR 600. [↑](#footnote-ref-75)
75. Ibid at [55] (French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ). [↑](#footnote-ref-76)
76. See, eg, *R v Burton* [2008] NSWCCA 128, [97]; *R v Hamid* (2006) 164 A Crim R 179, [86]; *Turnbull v R* [2019] NSWCCA 97, [153}; *R v JD* [2018] NSWCCA 233. [↑](#footnote-ref-77)
77. *R v JD* [2018] NSWCCA 233, [102]. [↑](#footnote-ref-78)
78. State of Victoria, *Royal Commission into Family Violence: Summary and recommendations* (Parliamentary Paper No 132, March 2016) 18. [↑](#footnote-ref-79)
79. Ibid 25. [↑](#footnote-ref-80)
80. Ibid citing L Ferguson, ‘Dispatches Child Homicide Study: Main Findings’ (Channel 4 (UK) 2009), in Domestic Violence Resource Centre Victoria, Submission No 945, 44. [↑](#footnote-ref-81)
81. See, eg, Michael McGowan, ‘Murders of Jack and Jennifer Edwards by estranged father “were preventable”, NSW coroner rules’ *The Guardian* (online, 7 April 2021) <https://www.theguardian.com/australia-news/2021/apr/07/john-edwards-inquest-series-of-critical-errors-allowed-man-to-his-children-nsw-coroner-finds>. [↑](#footnote-ref-82)
82. See, eg, Madonna King, ‘”Intimate terrorism”: why the murders of Hannah, Aaliyah, Laianah and Trey must spark change’ *Sydney Morning Herald* (online, 2 November 2020) < <https://www.smh.com.au/lifestyle/life-and-relationships/intimate-terrorism-why-the-murders-of-hannah-aaliyah-laianah-and-trey-must-spark-change-20200910-p55ubz.html>>. [↑](#footnote-ref-83)
83. UK Home Office, *Statutory Guidance Framework: Controlling or Coercive Behaviour in an Intimate or Family Relationship* (December 2015) 3. [↑](#footnote-ref-84)
84. NSW Government, *Coercive Control* (Discussion Paper, October 2020) foreword. [↑](#footnote-ref-85)
85. Ibid 2. [↑](#footnote-ref-86)
86. State of Victoria, *Royal Commission into Family Violence: Summary and recommendations* (n 78) 18. [↑](#footnote-ref-87)
87. Ibid. [↑](#footnote-ref-88)
88. NSW Government, *Coercive Control* (n 84) cl 1.11 [↑](#footnote-ref-89)
89. Ibid cl 2.7. [↑](#footnote-ref-90)
90. Ibid cl 2.9. [↑](#footnote-ref-91)
91. *Domestic Abuse (Scotland) Act 2018.* [↑](#footnote-ref-92)
92. *Serious Crimes Act 2015 (England and Wales).* [↑](#footnote-ref-93)
93. *Domestic Violence Act 2018 (Ireland).* [↑](#footnote-ref-94)
94. *Family Violence Act 2004* (Tas) ss 8-9A. [↑](#footnote-ref-95)
95. NSW Government, *Coercive Control* (n 82) cl 4.13. [↑](#footnote-ref-96)
96. Ibid cls 4.13, 4.23. [↑](#footnote-ref-97)
97. Ibid cl 4.3. [↑](#footnote-ref-98)
98. Ibid cl 4.12. [↑](#footnote-ref-99)
99. Cecilia Connell, ‘Coercive control inquiry hears harrowing accounts of shame, humiliation and abuse’ *ABC* (online, 22 February 2021) < <https://www.abc.net.au/news/2021-02-22/nsw-coercive-control-inquiry-hears-harrowing-tales/13172686>>. [↑](#footnote-ref-100)
100. ABC, ‘Changing attitudes is key to stamping out domestic violence: Tasmanian Governor’ *ABC* (online, 11 March 2015) <<https://www.abc.net.au/news/2015-03-11/tasmanian-governor-targets-domestic-violence/6300116>>. [↑](#footnote-ref-101)
101. Yvette Vignando, ‘Don’t rush into coercive control law: it may not prevent abuse and could even make it worse’ *Sydney Morning Herald* (online, 1 March 2021) <<https://www.smh.com.au/politics/nsw/don-t-rush-into-coercive-control-law-it-may-not-prevent-abuse-and-could-even-make-it-worse-20210226-p57656.html>>. [↑](#footnote-ref-102)
102. Joint Standing Committee on Coercive Control, *Coercive Control in Domestic Relationships* (n 12). [↑](#footnote-ref-103)
103. Law Society of NSW, Submission No 18 toJoint Standing Committee on Coercive Control*,* *Coercive Control in Domestic Relationships* (27 January 2021). [↑](#footnote-ref-104)
104. Public Defenders (NSW), Submission No 97 toJoint Standing Committee on Coercive Control*,* *Coercive Control in Domestic Relationships* (29 January 2021). [↑](#footnote-ref-105)
105. Aboriginal Legal Service (NSW/ACT Limited), Submission No 148 toJoint Standing Committee on Coercive Control*,* *Coercive Control in Domestic Relationships* (1 March 2021). [↑](#footnote-ref-106)
106. Legal Aid NSW, Submission No 139 toJoint Standing Committee on Coercive Control*,* *Coercive Control in Domestic Relationships* (19 February 2021). [↑](#footnote-ref-107)
107. Ibid. [↑](#footnote-ref-108)