

CONSIDERATION OF INFIDELITY AS A FACTOR IN DOMESTIC ABUSE AND COERCIVE CONTROL IN FAMILY LAW PROCEEDINGS

In 1975, Australia abolished adultery as a ground for divorce, with the Whitlam government introducing the *Family Law Act 1975* (Cth) ('FLA'). This established 'no-fault' divorce and ceased the consideration of adultery in court proceedings. Currently, extramarital affairs and infidelity are commonly dismissed in proceedings and not considered when establishing patterns of domestic abuse and coercive control.

This paper discusses, despite the abolishment of the grounds for divorce, whether infidelity should be considered in the context of domestic abuse and coercive control in the Family Law jurisdiction. Courts exercising jurisdiction under the FLA are encouraged to examine the effect and what is communicated by acts of infidelity in a relationship. Identifying domestic abuse effectively requires courts to look at patterns of behaviour, rather than isolated incidents of violence against victims. Infidelity should be considered in this pattern of behaviour and help inform the understanding of the context of the relationship between the victim and the offender.

Defining infidelity and its effects on victims

Infidelity includes a range of sexual and emotional behaviours that take place outside the context of exclusive relationships. Research has outlined sexual infidelity is more easily defined than emotional infidelity,¹ as involving the engagement in sexual activity with another person outside of the relationship. In comparison, emotional infidelity is more complex. However, it has been defined as a person creating emotional distance by spending an excessive amount of time with or thinking about another person outside of the relationship, to the point the other partner becomes ignored or rejected emotionally.² Technology has further facilitated the behaviour via platforms such as social media and video chat.

Several studies have demonstrated the effects of infidelity on individuals. Infidelity can be used to diminish self-esteem, confidence and increase vulnerability, leaving victims feeling powerless, humiliated and jeopardising the person's feelings of safety and security within the

¹ Amanda Guitar et al, 'Defining and Distinguishing Sexual and Emotional Infidelity' (2017) 36 *Current Psychology*, 434.

² Ibid 440.

relationship.³ Isolation and denigration are also common feelings associated with infidelity, impacting the victim's social behaviours and relationships with friends and family and contributing to them feeling entrapped in the relationship. Entrapment has been recognised as a key function of coercive control,⁴ underpinning the pattern of behaviour.

It has further been suggested by research, that infidelity can produce symptoms of Post-Traumatic Stress Disorder.⁵ Women who experienced a husband's infidelity are six times more likely to experience a major depressive episode and anxiety symptoms in comparison to women who had not experienced a negative marital event.⁶ The effects are compounded when there are multiple acts committed. These effects are similar to those who experience ongoing exposure to other types of domestic abuse, with anxiety found to be an outcome of physical and psychological abuse, symptoms increasing with the intensity and frequency of abusive behaviours.⁷ Domestic abuse is rarely an isolated incident. A study of partners impacted by cybersex infidelity outlined self-reported co-dependency increased in half the participants, further marking distinct emotional and behavioural changes for individuals who had experienced infidelity.⁸ Infidelity can serve as a tactic to send a non-verbal message to a partner, supporting it being considered in the broader context and pattern of domestic abuse.

Infidelity not only subjects' victims to psychological and emotional harm but additionally risks physical health. Sexually transmitted diseases and infections can occur between partners with low rates of condom use, when one of the partners engages sexually with a different partner.⁹ The lack of condom use has been found to extend to adolescents, reporting intimate partner violence, who were more likely than others to report standard sexual

³ Ebony Utley, 'Infidelity's co-existence with intimate partner violence – An interpretive description of women who survived a partner's sexual affair' (2017) 81 (4) *Western Journal of Communication* 426, 429.

⁴ Evan Stark, *Interpersonal violence Coercive control: How men entrap women in personal life* (Oxford University Press, 1st ed, 2007).

⁵ Lydia G Ross et al, 'Post-traumatic stress and psychological health following infidelity in unmarried young adults' (2019) 35 (4) *Stress and Health* 468, 469.

⁶ Ibid.

⁷ Rhian Parker, *How Domestic Violence Affects Women's Mental Health* (19 February 2019) The Conversation <<https://theconversation.com/how-domestic-violence-affects-womens-mental-health-104926>>; Frank Fincham and Ross May, 'Infidelity in Romantic Relationships' (2017) 13 *Current Opinion in Psychology* 70, 71.

⁸ Robert Bornstein, 'The complex relationship between dependency and domestic violence: Converging psychological factors and social forces' (2006) 61 (6) *The American Psychologist* 595; Jennifer Schneider et al. 'Is it really cheating? Understanding the emotional reactions and clinical treatments of spouses and partners affected by cybersex infidelity' (2012) 19 *Sexual Addiction and Compulsivity* 123, 133.

⁹ See above Frank Fincham, 70.

risk behaviours and coercive or deceptive risk factors including partner sexual infidelity.¹⁰ There may also be financial consequences for victims as their partners may spend shared finances on maintaining the affair. Affairs can be ‘weaved’ into other types of abuse present in the relationship.¹¹

Power balance within relationships

Similarly, to other types of domestic abuse, demographic research suggests infidelity is gendered in nature, with men engaging in infidelity more than women.¹² Entitlement and constructs of toxic masculinity have been identified as contributing factors in the difference in gender representation,¹³ domestic abuse and coercive control often reinforcing traditional gender roles present in society. The feelings of powerlessness generated by infidelity marks a shift in the power balance and enables maintenance of dominance within the relationship, contributing to the ability of an individual to assert control over a victim. Extra marital can be used to hurt a person. Infidelity alters sexual and psychological dynamics in the relationship and may result in a victim being more vulnerable to sexual coercion as a way to maintain the relationship with the offender. The power imbalance may extend to the children of the relationship. Children who have grown up seeing a parent, particularly mothers, constantly belittled or in a weaker position can develop an implicitly derogatory view of their parent.¹⁴

Christine Murray, co-founder of the organisation ‘See the Triumph’, has researched the experiences of women who had experienced sexual abuse within relationships. Murray identified it was common for the participants to report their partners had been unfaithful more than once throughout the course of their relationship.¹⁵ Despite their infidelity, the abuser continued to control the victim, monitoring and tracking their whereabouts and isolating them

¹⁰ Jay Silverman, ‘Coercive Forms of Sexual Risk and Associated Violence Perpetrated by Male Partners of Female Adolescents’ (2011) 43 *Perspectives on Sexual and Reproductive Health* 60, 61.

¹¹ Christine Murray, ‘Cheating in Abusive Relationships’ *Triumph* (Blog Post, 2014) <http://www.seethetriumph.org/blog/cheating-in-abusive-relationships>

¹² Wendy Wang, *Who Cheats More: What we know about infidelity in America* (10 January 2018) Institute of Family Studies <https://www.relationships.org.au/what-we-do/research/online-survey/january-2018-infidelity>; <https://ifstudies.org/blog/who-cheats-more-the-demographics-of-cheating-in-america#:~:text=also%20means%20infidelity,-.In%20general%2C%20men%20are%20more%20likely%20than%20women%20to%20cheat,gender%20gap%20varies%20by%20age>; See above Frank Fincham, 70.

¹³ Kirstee Williams and Carmen Knudson-Martin ‘Do therapists address gender and power in infidelity? A feminist analysis of the treatment literature’ (2013) 39 (3) *Journal of Marital and Family Therapy* 271, 272.

¹⁴ Jess Hill, *See What You Made Me Do: Power, Control and Domestic Abuse* (Black Inc, 1st ed, 2011) 181.

¹⁵ See above Murray.

from friends and family. Those participating in affairs often blamed the victim for their behaviour, further diminishing self-worth and contributing to a distorted sense of self and reality. Denial of affairs was also common, regardless of whether victims had evidence or not. The deflection of responsibility may further exacerbate the feelings of self-blame present from other forms of abuse. How blame is perceived can impact a victim's response to the affair.¹⁶ Ongoing infidelity can form part of the abuse cycle, with the offender at times demonstrating some remorse and guilt but then continuing to participate in the behaviour.

In addition, the National Domestic and Family Violence Bench Book, providing examples of social abuse, cites the experience of victims where their partner threatened to have an affair.¹⁷ Lying and deception is often used to conceal acts of infidelity, victims reporting gaslighting by partners engaging in infidelity.¹⁸ Gaslighting has previously been recognised as a form of psychological and emotional abuse. Infidelity contributes to humiliation and belittling of victims, undermining self-worth. In all, the shift in power created by infidelity enables greater coercion and control within the relationship.

Coercive control and Family Violence under Section 4AB *Family Law Act 1975* (Cth)

The criminalisation of coercive control has been increasingly debated in Australia, following the murder of Hannah Clarke and her three children, Laianah, Aaliyah and Trey. A coronial inquiry into the death of Hannah Clarke and her children is scheduled to take place in 2021. Coercive control, the term established by Evan Stark, has been defined as a form of domestic abuse, involving repeated patterns of behaviour. It can be physical, sexual, psychological, emotional and financial abuse affecting the autonomy and independence of the victim. Tactics aim to dominate, manipulate and control victims, exploiting and reinforcing gender inequality present in larger society and entrap a victim in a relationship.¹⁹ Cases involving coercive control are more likely to result in serious harm than discrete acts of physical violence.²⁰

¹⁶ Eric Dolan, 'How psychological distress from being cheated on can harm your physical health' *PsyPost* (Blog Post, 2017) <https://www.psypost.org/2017/05/psychological-distress-cheated-can-harm-physical-health-49058>

¹⁷ National Domestic and Family Violence Bench Book, 3.1.7.

¹⁸ See above Jennifer Schneider, 131.

¹⁹ Evan Stark, 'Re-presenting Battered Women: Coercive Control and the Defense of Liberty' (2012) *Violence Against Women: Complex Realities and New Issues in a Changing World* 1, 5.

²⁰ Andy Myhill, 'The Golden Thread: Coercive Control and Risk Assessment for Domestic Violence' (2016) 34 (21) *Journal of Interpersonal Violence* 4477, 4478.

The definition of Family Violence under the Act refers to violent, threatening or other behaviour by a person that coerces or controls a member of the person's family or causes the family member to be fearful,²¹ however it is unclear whether the definition captures the more subtle tactics of coercive control. To effectively apply the definition of family violence, courts are required to understand the effect of the pattern of behaviour and the risk it poses to victims. Section 4AB focuses on behaviours such as physical and sexual assault, stalking, derogatory taunts, property damage and denial of financial support and autonomy. Whilst the list is not exhaustive, a national approach to the criminalisation of coercive control has been urged since Hannah Clarke's death. The Family Violence definition needs to be updated to provide clear parameters as to what is captured by the definition. This will enable judicial officers to better use their discretion to identify more subtle tactics of domestic abuse such as infidelity and its effect on the victim and children. Identifying coercive control requires the understanding of the accumulative effect of behaviour over a long period of time.

State legislation and the definition of family violence varies. Tasmania has two specific offences that address some coercive and controlling behaviours, including economic abuse²² and emotional abuse and intimidation,²³ however coercive control does not operate as a stand-alone offence in any state jurisdiction.

The use of the offences in Tasmania has been limited, with the law relying on victims reporting the abuse. Only eight people have been convicted of economic or emotional abuse under the offence.²⁴ International jurisdictions have been more successful in criminalising coercive control and convicting offenders of the behaviour. Focusing on coercive control rather than incidents of violence would enable early identification and intervention, prior to the escalation of physical violence.

Impact on children and adolescence and consideration of Section 60CC *Family Law Act 1975 (Cth)*

In recent years, research in child development has stressed the impact domestic abuse can have on children. This has been found to extend to coercive control, with children often

²¹ s 4AB *Family Law Act 1975 (Cth)*.

²² s 8 *Family Violence Act 2004 (Tas)*.

²³ s 9 *Family Violence Act 2004 (Tas)*.

²⁴ Marilyn McMahon and Paul Mcgorrey, 'Criminalising emotional abuse, intimidation and economic abuse in the context of family violence; The Tasmanian Experience' (2016) 35 (2) *University of Tasmania Law Review* 1, 11.

used tactically to perpetrate harm and control over victims.²⁵ Post-separation, children may be used to continue to coercively control partners and has been seen to intensify the pattern of behaviour post separation.²⁶ When conflict between parents is frequent, intense and poorly resolved, it puts children's mental health and long-term outcomes at risk.²⁷ A study by Professor Eamon McCroy found children experiencing domestic abuse have exhibited the same hypervigilance as veterans exposed to combat,²⁸ highlighting the severe impact for children exposed to domestic abuse. This is further supported by Megan Mitchell, the National Children's Commissioner, reporting domestic violence as a significant risk factor for youth suicide.²⁹ This impact could extend to infidelity that forms part of the pattern of domestic abuse and the increase in control and conflict within the family home.

The *Family Law Reform Act 1995* (Reform Act) provided the first clear statutory recognition in Australian Family Law of the importance of family violence as an issue to be considered in parenting decisions. It could be argued that courts exercising jurisdiction under the FLA now play a significant role in child protection, making vital its understanding of domestic abuse and coercive control. The importance of courts in these types of matters is reinforced by the lack of investigation by state child protection authorities into allegations of abuse (in the context of the statutory/resourcing constraints imposed upon all those in "care jurisdiction"³⁰), the sometimes minimal consideration of all elements of domestic abuse in family reports (despite the implementation of the courts own Standards³¹), and the highly powerful and discretionary decision-making roles of judges.³² The discretionary role of

²⁵ Jane Callaghan et al, 'Beyond Witnessing: Children's experience of coercive control in domestic violence and abuse' (2018) 33 (10) *Journal of Interpersonal Violence* 1551, 1553.

²⁶ Emma Katz, 'When Coercive Control Continues to Harm Children: Post-Separation Fathering, Stalking and Domestic Violence' (2020) 29 *Child Abuse Review* 310, 310-311.

²⁷ Dr Lauren Smith, 'Children experiencing interparental coercive control' (2018) *Evidence Search and Summary Service Outline* <https://www.iriss.org.uk/resources/esss-outlines/coercive-control>; Lynn Schafran, 'Domestic Violence, Developing Brains and the Lifespan New Knowledge from Neuroscience' (2014) 53 (3) *The Judges' Journal* 32, 32-33.

²⁸ Eamon McCroy, 'Heightened neural reactivity to threat in child victims of family violence' (2011) 21 (23) *Current Biology* 947, 948.

²⁹ Speech by Megan Mitchell, Australian Children's Commissioner, at the 13th Australasian Injury Prevention Network Conference, 13th November 2017.

³⁰ See for example, the Permanent Placement principles (ss8, 10A *Children and Young Persons (Care and Protection) Act 1998* (NSW) which prioritises the preservation of familial relationships provided it is practicable and in the best interests of the child, which in reality can result in children either remaining or returning to inherently unsafe environments due to a lack of practicable alternative options.

³¹ Family Court of Australia, Federal Circuit Court of Australia, Family Court of Western Australia, '*Australian Standards of Practice for Family Assessments and Reporting*' (February 2015)

³² Amanda Hart, 'Child safety in Australian Family Law: Responsibilities and Challenges for Social Science Experts in Domestic Violence Case' (2011) 46 *Australian Psychologist* 31, 32-35.

decision-makers is assisted by the courts 'Family Violence Best Practice Principles'³³ as well as provide guidance on how the court room is managed for matters involving domestic and family violence. The Principles could be more greatly supported through a better understanding of coercive control and the types of behaviours that can be present.

Whilst parenting capacity is not explicitly recognised in Section 60CC, under section 60CC(3) parent history and the quality of children's relationship with each parent is considered. Parenting capacity can be defined as the ability to "recognise and meet the infant's changing physical, social and emotional needs in developmentally appropriate ways and to accept responsibility for this."³⁴

*Sedgley and Sedgley*³⁵ recognised the importance of parenting capacity and the effect the wellbeing of a parent has on children. The major issues in the case included a consideration of whether continued contact where there was a history of family violence, there was evidence as to the adverse effect such an order may have on the primary carer's capacity and thus the children (including the subject child) and whether these factors outweighed the potential advantages of the subject child maintaining a relationship with the father. It was found the behaviour of the father caused "great stress" for the mother, impacting her well-being and parenting. The impact on the nature of the relationship with subject child's mother and siblings was considered, as well as the need for "peace and tranquillity" in the mother's home. This was considered as a more "compelling need" for the subject child, emphasising the need for stability and security, healthy attachment, minimal conflict and nurturing parenting within the home the subject child lives in. These factors justified an order prohibiting the father from spending time with the subject child. The effects of infidelity on victims can be argued to impact parenting capacity in a similar way, disrupting the power balance in relationships, placing further stress on the parent and contributing to further conflict in the relationship.

Both domestic abuse, coercive control and infidelity can significantly impact the parent-child relationship and parenting capacity. The occurrence of domestic abuse, coercive control and infidelity does not support the best interests of the child and their need to form healthy relationships with their parents for physical and psychological development. Child psychiatrist, Dr Bruce Perry, highlights that when a child's caregivers are unresponsive or

³³ 'Family Violence Best Practice Principles', ed 4 (December 2016).

³⁴ Sarah Mares et al, *Clinical Skills in Infant Mental Health* (Australian Council for Educational Resources, 2nd ed, 2011) 63.

³⁵ [1995] FamCA 154.

threatening, the attachment is disrupted and the child's ability to form any healthy relationships during his or her life may be impaired.³⁶ Infidelity can affect the entire family dynamic and in turn, the quality of the relationship between parents and children. Parenting deficits have been closely associated with domestic abuse and high conflict.³⁷ Conflict between parents has been associated with poor parent-child relationships as well as use of harsher parenting techniques and less emotional availability for children.³⁸ Infidelity has been cited as one of the most frequent causes of conflict in relationships and subsequent relationship breakdown.

Children are particularly vulnerable to the impacts of domestic abuse and coercive control due to their dependency on caregivers for survival and the critical periods of development present throughout childhood. This is supported by research on children's neurobiological functioning and how it is disrupted by domestic violence.³⁹ They are often regarded as 'silent' victims,⁴⁰ with their experiences largely unheard. The deeming of children as 'witnesses' is beginning to be challenged, as they are no longer seen as passive bystanders but deeply engaged in what occurs in the family environment.⁴¹ This extends to the harm experienced as a result of domestic abuse and coercive control. Environment has a powerful influence on how a child develops,⁴² with the risk of severe psychological harm for children experiencing domestic abuse and coercive control. The chronic nature of domestic abuse and coercive control and its creation of ongoing fear and tension jeopardises children's healthy development. The fear response experienced by children can become almost automatic, leaving them in a state of constant hyperarousal, long after incidents of abuse have ceased.⁴³ This can impact a range of outcomes including academic performance. Children learn best when they experience a sense of safety and protection. If the attachment to the primary carer is disrupted the children's brain will become more focused on survival, impacting their future learning and ability to grow and thrive.⁴⁴ Children may never see their parent physically

³⁶ Dr Bruce Perry, 'Violence and childhood: how persisting fear can alter the developing child's brain' (2001) *Childhood Trauma Academy* http://childtrauma.org/CTMATERIALS/Vio_child.asp.

³⁷ Angela Lynch, 'Family violence and high conflict: What's the difference and does it really matter' (2017) *Women's Legal Service* <https://childaware.org.au/wp-content/uploads/sites/3/2017/06/03-Angela-Lynch.pdf>.

³⁸ Alexandra Schmidt et al, 'Effects of parental infidelity and interparental conflict on relational ethics between adult children and parents: a contextual perspective' (2016) 38 (3) *Journal of Family Therapy* 386, 390.

³⁹ See above Amanda Hart, 31.

⁴⁰ See above Lynn Schafran.

⁴¹ See above Jane Callaghan.

⁴² Child Welfare Information Gateway, 'Understanding the Effects of Maltreatment on Early Brain Development' (2001) *A Bulletin for Professionals* 1, 17; See above Lynn Schafran, 36.

⁴³ *Ibid* 7.

⁴⁴ *Ibid* 6.

harmed, yet can be significantly impacted by the atmosphere domestic abuse creates within the home.⁴⁵ The most beneficial action a court can take for children is to cease the exposure to domestic abuse and support the protective parent in establishing safety and promoting recovery from abuse.⁴⁶

The ongoing stress experienced by victims inhibits attachment, with the focus for parents being on surviving rather than connecting with their children.⁴⁷ Time and energy is diverted away from the child to minimise abuse. Abusive partners often insist their needs come first, with the victim focusing attention on the offender, away from their children.⁴⁸ Additionally, the overwhelming stress experienced by victims has been seen to impact the use of appropriate parenting methods.⁴⁹ Parents who are experiencing trauma, such as domestic abuse may be too emotionally unstable or inconsistent to offer their child the comfort and protection required for secure attachment.⁵⁰ Secure attachment is fundamental to children's long-term outcomes, resulting in children with reduced socio-behavioural problems, increased language and school readiness skills compared to children exposed to insensitive parenting and a history of insecure attachment.⁵¹ A supportive relationship with at least one stable and committed adult caregiver assists children in building resilience and recovering from abuse.⁵² It is detrimental to children to risk their secure attachment with their primary caregiver. Children are reliant on their caregivers for physical and emotional care, medical care, safety and behaviour management.⁵³ Domestic abuse effects the sense of safety of children within the home and with their primary caregiver. Children as a survival mechanism may attach more strongly to the offender against the other parent as a way to minimise the abuse against themselves,⁵⁴ further disrupting their relationship with the victim. As a result of these impacts, domestic abuse and coercive control has been regarded as an "assault on the caregiving

⁴⁵ See Lyn Schafran, 33.

⁴⁶ Ibid 34.

⁴⁷ Fiona Buchanan et al, 'The Effects of Domestic Violence on the Formation of Relationships Between Women and their Babies: "I was too busy protecting my baby to attach"' (2014) 29 *Research on the Effects of Intimate Partner Violence on Women* 713, 717-718.

⁴⁸ Lessa Hooker et al, 'Domestic and family violence and parenting: Mixed methods insights into impact and support needs: State of knowledge paper' (2016) 1 Australian's National Research Organisation for Women's Safety 1, 23.

⁴⁹ Ibid 17.

⁵⁰ Bessel Van Der Kolk, *The Body Keeps Score* (Penguin Books, 1st ed, 2014) 119.

⁵¹ See above Lessa Hooker, 15.

⁵² Ibid 32.

⁵³ Ibid 1.

⁵⁴ See above Jess Hill.

system.”⁵⁵ Recent studies on the impact of parental infidelity on the parent and children’s psychological and emotional state and parenting capacity highlights the similarity to other types of domestic abuse. This supports the need to consider infidelity as part of the pattern of abuse and the effect it has on children of the relationship. Without a consideration of infidelity, there is a risk of a lack of understanding of the family dynamics created by the pattern of domestic abuse and infidelity.

Recent research surrounding infidelity has been explored using a family therapy framework.⁵⁶ Children may be involved in age-appropriate counselling and therapy obtained to help the family recover from infidelity, recognising the impact it has on children and their relationship with their parents and their exposure to infidelity within the family home. Infidelity is linked to greater conflict between partners, family disruption, violence and psychological distress.⁵⁷ This conflict has been associated with poorer parenting relationships,⁵⁸ with children also found to demonstrate trauma and grief like symptoms as a result of the conflict and distress created by infidelity.⁵⁹ Feelings of guilt, anxiety, fear, worry, depression, shock and aggression in children, can all harm healthy emotional development.⁶⁰ Adolescents are at risk of taking on a parentified role - the reversal of parent-child roles in order to care for the parent who has been hurt by the infidelity.⁶¹

Similarly, to domestic abuse, infidelity has been found to impact the self-esteem of victims, parenting capacity and children’s attachment styles.⁶² Infidelity has been associated with lower self-esteem for victims and greater symptoms of depression.⁶³ Diminished self-esteem can leave victims feeling unsupported in their parenting roles as well as having a lack of confidence in their ability, draining parenting resources. Research suggests parents and children who

⁵⁵ Alytia Levendosky et al, ‘The influence of domestic violence on the development of the attachment relationship between mother and young child’ (2011) 28 (4) *Psychoanalytical Psychology* 512, 516.

⁵⁶ Alexandra Schmidt et al, ‘Effects of parental infidelity and interparental conflict on relational ethics between adult children and parents: a contextual perspective’ (2016) 38 *Journal of Family Therapy* 386, 389-390; Sesen Negash and Martha Morgan ‘A Family Affair: Examining the Impact of Parental Infidelity on Children Using a Structural Family Therapy Framework’ (2016) 38 *Contemporary Family Therapy* 198.

⁵⁷ See above Sesen Negash, 198-199.

⁵⁸ Ibid; See above Alexandra Schmidt, 390.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Rhi Platt, ‘Parental Conflict and Infidelity as Predictors of Adult Children’s Attachment Style and Infidelity’ (2008) 36 (2) *American Journal of Family Therapy* 149, 151-152.

⁶³ Ebony Utley, ‘Infidelity’s co-existence with intimate partner violence – An interpretive description of women who survived a partner’s sexual affair’ (2017) 81 (4) *Western Journal of Communication* 426, 435.

experienced lower self-esteem reported less satisfaction in relationships.⁶⁴ Depression experienced by victims has also been linked to negative impacts on children's emotional and behavioural functioning.⁶⁵ This can be argued to significantly impact a parent and child maintaining a meaningful relationship, fundamental to a child's development due to the impact of infidelity on the victim and the relationship.

International jurisdictions

Scotland, England, Wales and Ireland all have offences concerning coercive control, with Scotland regarded as having the highest standard of coercive control laws. Under the *Domestic Abuse (Scotland) Act 2018* (Scotland), a person is found to commit an offence if the person engages in a course of behaviours which are abusive of the person's partner or ex-partner. The offence requires a finding that the "reasonable person" would consider the course of behaviour to be likely to cause the person to suffer physical or psychological harm, whether intentionally or recklessly. Psychological harm includes fear, distress or alarm. The provisions further outline what constitutes abusive behaviour and its relevant effects, including frightening, humiliating, degrading or punishing the victim. Considering the effects of infidelity, the behaviour could be argued to humiliate and degrade the person significantly. Additionally, Scotland have recognised the impact coercive control has on children, with an aggravating factor being the involvement of children in the relationship when acts of coercive control are perpetrated.

Comparatively to Scotland, in England and Wales, the offence of coercive control is outlined in the *Serious Crimes Act 2015* (England and Wales). The law is similar to Scotland's offence, however, requires findings that behaviour has been repeated and continuous, has had a serious effect on the victim and the offender knows or ought to know the serious effect of the behaviour. England's laws extend to current and intimate personal relationships, those living together and members of the same family. Ireland has enacted similar laws, with its first conviction handed down in February 2020. The offence requires that the person has knowingly and persistently engaged in behaviour that is controlling or coercive and has had a serious effect on the person. A "reasonable person" must consider that the behaviour was likely to have a

⁶⁴ Tracey DeHart et al, 'The regulation of dependency in parent-child relationships' (2003) 39 *Journal of Experimental Social Psychology* 59, 62.

⁶⁵ Samantha Krauss et al, 'Family Environment and Self-Esteem Development: A Longitudinal Study from Age 10 to 16' (2019) 119 (2) *Journal of Personality and Social Psychology: Personality Processes and Individual Differences* 457, 459.

serious effect. The provision outlines ‘serious effect’ to include fear of violence and serious alarm or distress which substantially impacts day-to-day activities.

The Philippines has recently taken a harsh stance against infidelity and extramarital affairs, with the Supreme Court handing down a decision that referred to infidelity as ‘psychological violence’.⁶⁶ Supporting this decision, the *Anti-Violence Against Women and Children (VAWC) Act* (Phillipines), specifically refers to infidelity. The Supreme Court ruling, decided by Chief Justice Diosdado Peralta, considered the mental and emotional suffering experienced by the wife, evidencing the impact the affair had taken on the wife’s health. The husband was convicted under section 5 of the Act. He was ordered to pay a fine and undertake psychological counselling and treatment.

Typologies and risk assessment

Health services, victim organisations, police and courts commonly use screening tools and risk assessments to assist in safety planning and establishing the risk of imminent and escalating violence. Risk assessment and screening tools assist practitioners in ‘predicting’ or assessing the likelihood of an offender committing similar abuse in the future or the escalation of abuse.⁶⁷

Safety planning has been most recently outlined in the Australian Standards of Practice for Family Assessments and Reporting.⁶⁸ Family assessors must take “reasonable steps” to ensure participating in the assessment does not expose any family members, children or other persons to a risk of harm due to family violence. Safety planning involves the consideration of past behaviour and how this may inform future behaviours and minimising the potential risks for the victims and children. If infidelity was considered a coercive and controlling behaviour, it would be relevant to include on risk assessment tools.

Addressing domestic abuse and coercive control is dependent on the intent of the offender, the effect on the victim and the repetitive nature of the behaviour. Considering infidelity allows a more detailed and thorough examination of these factors as well the pattern of behaviour of offenders. This can assist in assessing current behaviour and decision-making and also in

⁶⁶ Tetch Torres-Tupas, *SC affirms prison term for husband found guilty of extramarital affair* (27 October 2020) The Inquirer <https://newsinfo.inquirer.net/1353022/sc-affirms-prison-term-for-husband-found-guilty-of-extramarital-affair>

⁶⁷ Hayley Boxall et al, ‘Domestic violence typologies: what value to practice?’ (2015) 494 *Trends and Issues in Crime and Criminal Justice* 1, 2.

⁶⁸ Australian Standards of Practice for Family Assessments and Reporting (Feb 2015) Part 6.

predicting future behaviour and its possible escalation. Understanding domestic abuse and coercive control requires a consideration of all types of behaviour that take place in the relationship. Discounting infidelity would limit understanding of the offender, the pattern of their behaviour, their attitude towards their partner and the psychological effect the behaviour has on a victim and how its use allows for greater control and coercion.

Victims and Engagement in Extramarital Affairs

Identifying the pattern of behaviour, rather than looking at infidelity as an isolated incident will ensure victims of abuse will not be unfairly targeted. Victims may engage in infidelity themselves, whilst experiencing domestic abuse, remaining trapped in a relationship due to the effects of abuse. Victims may be unable to leave abusive relationships safely, increasing their vulnerability for engaging in an extramarital affair. Victim's reasons for having an affair will differ from offenders, and it is important this is analysed when observing patterns of behaviour. Victims are often accused of cheating by offenders as a way to portray jealousy and possessiveness. It is important these allegations are carefully considered and are not used throughout court proceedings to misrepresent victims.

A study by the University of Guelph in Ontario, Canada highlighted men typically cheat for reasons regarding sex, whereas women are more likely to cheat if they are unhappy in the relationship.⁶⁹ Women in abusive relationships may seek comfort by engaging in affairs outside the relationship.⁷⁰ The affair may meet the needs that are not being met within the relationship and act as a coping mechanism and way to fulfil their self-esteem and self-worth that has been diminished in the abusive relationship. It may also be a way for victims to reclaim some power over their lives that has been lost due to abuse and for them to find a way to leave an abusive relationship. An additional partner may also offer physical safety for a victim attempting to leave. Victims may use affairs to sabotage their relationship with the offender and instigate a reason for the abuser to cease being in an intimate relationship with them.

Observing infidelity within a vacuum and not considering other behaviours that occur within in the relationship could disadvantage victims. Considering the broader dynamic of the relationship and why the person may be engaging in an affair is vital to preventing

⁶⁹ Colleen Oakley, 'What I cheated on My Husband' – Five real women share what led them to stray' *Elle* (News Article, 2014) <https://www.elle.com/life-love/sex-relationships/advice/a14608/why-i-cheated-on-my-husband/>

⁷⁰ Ibid.

misidentification of the main perpetrator. Similarly, to other types of abuse, identifying who has greater power in the relationship. assists in identifying the main offender of domestic abuse.

Summary

It has been some time since infidelity and extramarital affairs have been considered in the Family Law jurisdiction. With the rising discussion about domestic abuse and coercive control, it is time to rethink infidelity and its place when considering patterns of behaviour between the victim and the offender, without simply dismissing infidelity in the Family Law jurisdiction as a non-consequential behaviour. The review of recent cases and research in Australia and international jurisdictions, highlights that it is not reasonable to ignore infidelity in Family Law proceedings based on the introduction of no-fault divorce. Identifying infidelity as a form of domestic abuse allows a further and more in-depth understanding of domestic abuse and coercive control and its role in Family Law cases. This will help Family Law move towards increased safety for victims and children, a jurisdiction that now has taken on a fundamental role in child protection.