

## **Domestic violence, social security and the couple rule**

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# Domestic violence, social security and the couple rule

LYNDAL SLEEP

ANROWS

AUSTRALIA'S NATIONAL RESEARCH  
ORGANISATION FOR WOMEN'S SAFETY  
*to Reduce Violence against Women & their Children*

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ANROWS and its partners in this research acknowledge the Traditional Owners of the land across Australia on which we live and work. We pay our respects to Aboriginal and Torres Strait Islander Elders past, present and emerging. We value Aboriginal and Torres Strait Islander histories, cultures and knowledge.

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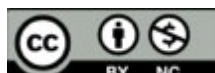
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# Domestic violence, social security and the couple rule

DR LYNDAL SLEEP

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This report addresses work covered in the ANROWS research project 17.02 *Domestic violence, social security law and the couple rule*. Please consult the ANROWS website for more information on this project.

ANROWS research contributes to the six National Outcomes of the *National Plan to Reduce Violence against Women and their Children 2010-2022*. This research addresses National Plan Outcome 4 – Services meet the needs of women and their children experiencing violence.

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ANROWS acknowledges the lives and experiences of the women and children affected by domestic, family and sexual violence and neglect who are represented in this report. We recognise the individual stories of courage, hope and resilience that form the basis of ANROWS research.

Caution: Some people may find parts of this content confronting or distressing.

Recommended support services include: 1800 RESPECT – 1800 737 732 and Lifeline – 13 11 14.

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# Abbreviations

<b>Term</b>	<b>Meaning</b>
AAT	Administrative Appeals Tribunal
NZSSAA	New Zealand Social Security Appeals Authority
CALD	culturally and linguistically diverse
DVO	Domestic Violence Order
DSP	Disability Support Pension

# Executive summary

Access to social security resources is vital to many women who are attempting to be free of an abusive relationship. When it is unclear to the Department of Social Security if the victim/survivor is still in a relationship with the perpetrator, the “couple rule” is used to decide her access to social security payments. The couple rule in social security law (*Social Security Act 1991* (Cth), s. 4(3)) ties women’s<sup>1</sup> access to social security payments to the income and assets of the perpetrator in circumstances where she is determined to be in a relationship with him. Therefore, if an applicant is assessed as being a member of a couple, her own and the perpetrator’s income and assets will be assessed jointly. This may lead to the victim/survivor being denied payment or, if it is later determined that she has not declared her relationship, could result in an overpayment debt and/or criminal prosecution for social security fraud. In the application of this rule, domestic violence is rarely treated as an exception. This can financially entrap victims/survivors in a violent relationship, as they are denied independent social security support at the vulnerable time when they are attempting to permanently separate from the perpetrator. Research has shown that women who experience domestic violence are more likely to go on to experience poverty and disability after the abusive behaviour has ended (Cortis & Bullen, 2015; 2016). The couple rule may increase the risk of victims/survivors experiencing poverty.

Further, the rule is used by perpetrators to intimidate victims/survivors by perpetuating economic dependence, ingraining financial and systems abuse, and also by threatening to separate them from their children through imprisonment for social security fraud.

## Project aims

This project aims to:

- Detail the dynamics between domestic violence, social security payments and the couple rule.
- Highlight similarities among cases at the intersection of domestic violence, social security payments and the couple rule, and also differences among priority groups, including:

- culturally and linguistically diverse (CALD) women;
  - Aboriginal and Torres Strait Islander women;
  - older women;
  - women with disability;
  - women who are or have been incarcerated;
  - lesbian, bisexual, intersex and transgender women; and
  - women living in rural or remote areas.
- Identify what we can learn from the New Zealand experience of applying a similar rule (referred to as the de facto rule in New Zealand), including examining the impact of New Zealand case-law that has found domestic violence to be a special case and an indicator of not being in a relationship.

## Method

This research attempts to explore the dynamics between domestic violence, social security payments and the couple rule by examining pre-existing data sets of Administrative Appeal Tribunal (AAT) decisions of couple rule matters and New Zealand Social Security Appeals Authority (NZSSAA) de facto rule decisions.

The research will have an intersectional focus on those groups of women prioritised by Australia’s National Research Organisation for Women’s Safety’s (ANROWS) National Research Agenda (2014) as having particular vulnerabilities to violence.

## AAT decisions

The AAT provides an independent merits review of Australian Commonwealth administrative decisions. As such, it reconsiders all the previous evidence in detail, including the evidence used by the original decision-maker. The detail available in these publicly available decisions provides a valuable window into the type of decision-making that occurs at both the AAT and other levels of social security decision-making. In the context of domestic violence, social security law and the couple rule, the AAT decisions provide

<sup>1</sup> Please note that although the “couple rule” ties any victim/survivor of domestic violence to the perpetrator, the focus in this study is women.

a rich and non-invasive source of qualitative data about the application of the rule and the lives of those to whom the rule is applied.

AAT decisions that both used the “couple rule” and indicated involvement with domestic violence were identified through the AustLII legal database. These decisions occurred from 1992 to 2016 and are referred to as “couple rule decisions”. The couple rule in social security legislation has remained effectively unchanged since 1992, although understanding of domestic and family violence has changed over this period. All 70 couple rule decisions identified were used in the study, as they demonstrate possible applications of the legislation.

### NZSSAA decisions

The NZSSAA also reports its de facto decisions. The NZSSAA provides a window into the application of the de facto rule in New Zealand. Hence, this research analyses NZSSAA decisions to learn from the New Zealand experience of applying a similar rule (the de facto rule in this jurisdiction). NZSSAA decisions that used the “de facto rule” and involved domestic violence were identified through the NZLII legal database. All 19 decisions identified were used in the study. These decisions are referred to as “de facto rule decisions”.

### Analysis

A directed content analysis was used to analyse both the AAT couple rule and NZSSAA de facto rule decisions that involve domestic violence. The analysis had an intersectional focus on the groups of women that the ANROWS National Research Agenda (2014) prioritised as having particular vulnerabilities to violence; however, other themes that are common throughout priority groups will also be highlighted. These groups include culturally and linguistically diverse (CALD) women; Aboriginal and Torres Strait Islander women; older women; women with disability; women who are or have been incarcerated; lesbian, bisexual, intersex and transgender women; and women living in rural or remote areas.

### Definition of domestic violence

This research project adopts the definition of domestic violence used in *The National Plan to Reduce Violence against Women and their Children 2010-2022* (Council of Australian Governments (COAG), 2011, p. 2), which is that “domestic violence includes physical, sexual, emotional, and physiological abuse”. Domestic violence has been interpreted broadly to include violence experienced in domestic relationships. Almost all violence in this study was perpetrated by a current or past intimate partner; however, other forms of family violence, including child sexual abuse and elder abuse, were also included. The term domestic violence has been used throughout this study to represent the predominance of intimate partner violence in the AAT sample, and its particular challenges in the context of the couple rule. However, the term is to be interpreted broadly to include other forms of family violence, as these were present in a number of decisions and formed part of the power and control context of the decisions.

### Ethics approval

The research received ethics approval through Griffith University’s ethics protocol “Domestic violence the couple rule and social security law” (Project ID: 2018/118). All requirements, including those for confidentiality and anonymity, were met.

## Key findings

### AAT couple rule decisions that involve domestic violence

#### Priority population groups

It was most common for the women who were involved in an AAT couple decision in the context of domestic violence to be a member of one priority population group; the second most common circumstance was for the women to be a member of two priority groups. The study results suggest it is usual for a social security recipient who is subject to a couple rule decision by the AAT in the context of domestic violence

to be in a position where they are at risk of intersectional disadvantage.

Of the priority population groups, women living in remote and regional areas were the most frequently represented (28 out of 70 decisions; 40%). Women with disability were the next most frequently represented group at 26 out of 70 (37%). The third most frequently represented group was CALD women, with 18 women (26%) categorised in this group.

Key findings specific to priority group experience at the intersection of domestic violence and the couple rule:

- Aboriginal and Torres Strait Islander women were under-represented in the sample, perhaps indicating a reluctance to seek a formal appeal of social security decisions.
- Irregular access to interpretation services for CALD women when being interviewed about their relationships was reported.
- The couple rule has been successfully applied to the context of forced marriage and domestic violence.
- More than 70 percent of women with disability identified in the sample (19 out of 26) were categorised as belonging to at least one other priority group. This indicates that women with disability are at the greatest risk of experiencing multiple forms of disadvantage.
- The couple rule was applied in the context where some women with disability were dependent on care from the perpetrator, entrenching their vulnerability.
- For rural and remote women, the combination of geographical isolation, community harassment and reliance on informal community supports was reported to make them particularly vulnerable to adverse couple rule decisions.
- All three women identified in the sample to have been in prison were incarcerated for social security fraud, and all specifically for couple rule violation.

### Common themes

The publication of identifiable and locatable details about individuals, including women who had experienced domestic violence, occurred in almost every AAT social security decision. This is concerning, given the decisions are publicly

available via the AustLII website.<sup>2</sup> Full names, street addresses, places of work and children's schools were disclosed in AAT couple rule decisions that involved domestic violence. This is a serious violation of privacy for all involved and poses a safety risk to women and their children who may be located by past perpetrators through this disclosure.

Some other common themes that are particularly pertinent to the context of domestic violence and the couple rule emerged throughout the sample:

- Fifty-nine out of 70 AAT couple rule decisions involved abuse perpetrated by the alleged partner (84%).<sup>3</sup>
- Financial abuse was identified in 41 percent (24 out of 59) of AAT couple rule decisions that involved domestic violence perpetrated by the alleged partner.
- Control over housing or living arrangements by the perpetrator was identified in 46 percent (27 out of 59), and control over information flow by the perpetrator was identified in 43 percent (25 out of 59) of AAT couple rule decisions that involved domestic violence between the alleged couple. In these decisions, the control over living arrangements and/or information flow provided evidence for a relationship according to the couple rule criteria. The nature of violence and control by the perpetrator was rarely considered in the decision, and social security debt was often the result. This effectively punished the domestic violence victim/survivor for the perpetrator's behaviour.
- The use of domestic violence and hospital records for decision-making, including domestic violence police reports, was identified in 41 out of 59 (69.5%) of AAT couple rule decisions that involved domestic violence perpetrated by the alleged partner.

The latter theme is a concerning factor in the AAT couple rule decisions that involved domestic violence because although this information was collected with women's safety in mind, it was used in the following ways:

<sup>2</sup> This is a key site for legislation and case law. It is managed by the Australian Legal Information Institute, and publicly available at [www.austlii.edu.au](http://www.austlii.edu.au)

<sup>3</sup> In the remaining 11 AAT decisions, violence was perpetrated by those who were not the alleged partner. For example, a person from a past relationship or an adult child.

- To locate the alleged couple's shared residence at the scene of the abuse — this is an issue particularly when perpetrators attempt to continue their control over their ex-partner by harassing them at the victim's/survivor's home post-separation.
- To seek a record of the nature of the relationship as stated by the attending police officer or medical staff.
- To seek a statement about the nature of the commitment from either alleged partner, including the perpetrator.

Figure 1 shows a snapshot of the priority groups cross-referenced with the couple rule decision outcome and frequency of some of the main thematic categories identified in the research. It highlights how financial abuse, control over living arrangements/housing and control over information flow by the perpetrator, as well as the use of domestic violence police reports and hospital records, are clustered around women from CALD backgrounds, women with disability and women living in rural or remote areas. These groups of women are also more frequently found by the AAT to be living in an undisclosed couple relationship.

## Lessons from the NZSSAA de facto rule decisions that involve domestic violence

### Priority population groups

NZSSAA de facto and domestic violence decisions contain de-identified information; therefore, there was much less opportunity to identify whether the woman belonged to a priority population group. No older women, women who are, or have been, incarcerated, or lesbian, bisexual, intersex or transgender women were identified. This does not mean that they were not present in the sample, but rather that they could not be identified from the NZSSAA decision text. One Māori woman, one woman from a CALD background and one woman living in a rural or remote area only, were identified in the NZSSAA decisions. Since the information that would identify and locate victims/survivors were obscured in the reported NZSSAA decisions, it can be assumed that not all members of each priority population group were identifiable. It can thus be assumed that the frequency of each of the priority population groups in the NZSSAA sample is underestimated. The sample did disclose information such as the payment

that the woman had received and any general health issues. Hence it was easier to identify women with disability. Eight women with disability were identified in the NZSSAA sample.

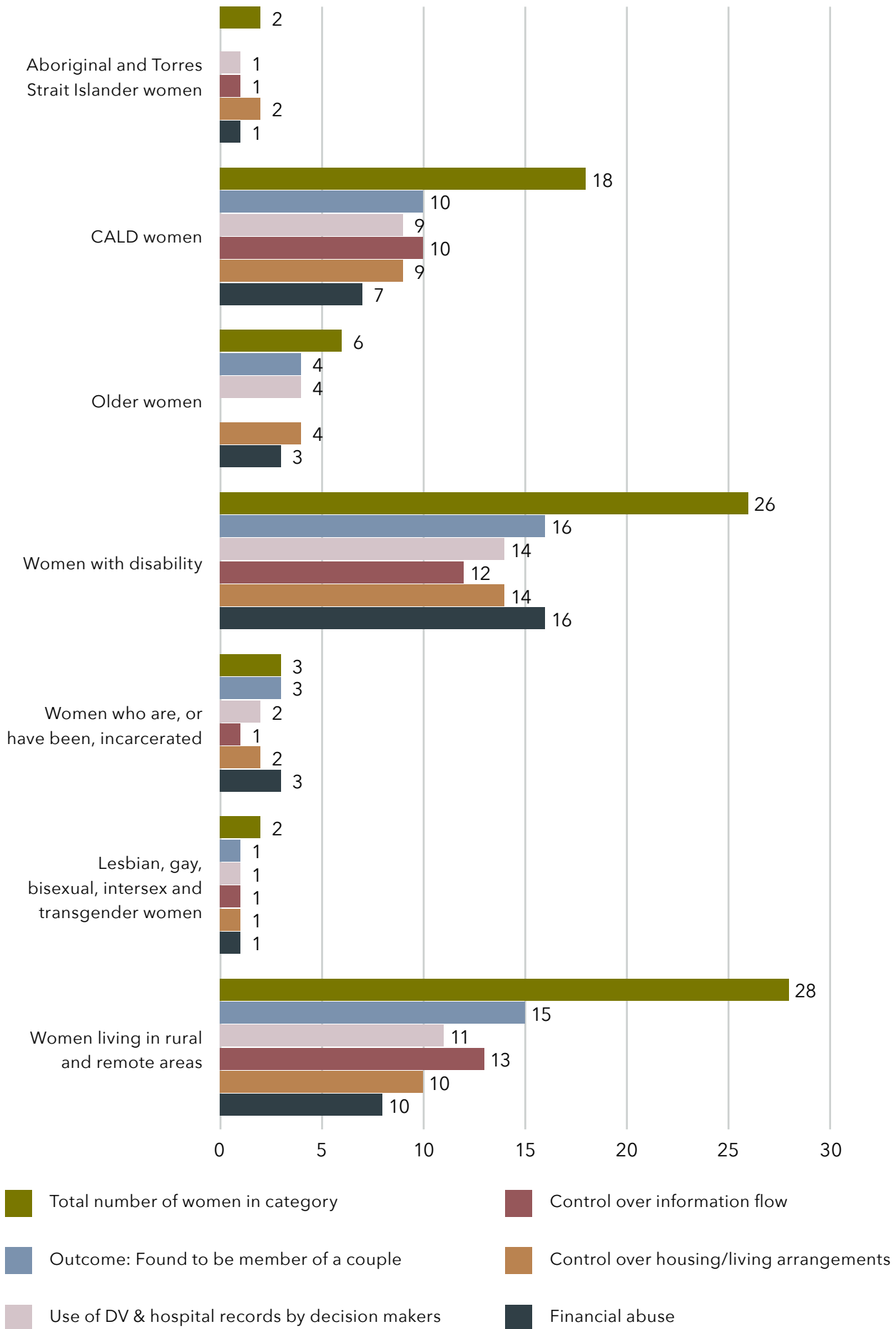
The data do reveal one decision involving an Indigenous woman with disability; however, this is the only decision in this sample involving a woman who can be identified as belonging to more than one category. It can be assumed that this is an underestimate of the intersectional identities of the women involved in the decisions.

### Common themes

As personal and locatable information was de-identified throughout the NZSSAA de facto decisions that involved domestic violence, the privacy of the individuals involved was protected, and domestic violence victims/survivors were not exposed to the risk of being located by past perpetrators.

The case *Ruka v. Department of Social Welfare* [1997] 1 NZLR 154 (CA) ("*Ruka*") was often referred to as a potential precedent for rendering a violent relationship exempt from the de facto rule. *Ruka*, who had claimed social services payments as a single person, was charged under both the *Crimes Act 1961* (NZ) and the *Social Security Act 1964* (NZ) for wilfully omitting to disclose to the Department of Social Services that she was in a relationship between 1977 and 1992. The relationship was not stable and was characterised by long-term physical, emotional, sexual and economic abuse that escalated in severity over time. *Ruka* succeeded in claiming a "battered women's" defence in the New Zealand Court of Appeal and the charges were quashed. This is considered to be a major revision of the de facto rule in New Zealand as it shows that both companionship and economic commitment are needed for a couple to be considered in a "relationship" (Joychild, 2001, p. 23). Disappointingly, however, on examination of the NZSSAA de facto rule decisions that involved domestic violence, a common theme was to make an assessment of the severity of the reported violence in the circumstances and to compare it with that experienced in *Ruka*. In law this is described as distinguishing cases on their facts. Importantly, no NZSSAA de facto rule decisions involving domestic violence in the sample concluded that the violence experienced was severe enough for the alleged couple to not be considered in a relationship. This means

**Figure 1** Priority groups cross-referenced with decision outcome and frequency of thematic category



that, in the NZSSAA decisions sampled, *Ruka* has had the effect of perpetuating the operation of the de facto rule in the context of domestic violence for the purpose of social security entitlement.

Another theme that emerged and cut across intersectional identities in the NZSSAA sample was the reference to whether the woman, the alleged victim/survivor of domestic violence, was passive, or if she provoked or retaliated against the abuse. If the woman was considered to have behaved provocatively or to have retaliated, the abuse was considered less severe in comparison to *Ruka*.

## Key messages for service providers and policy-makers

**AAT information needs to be de-identified for women's safety.** A key finding was that much identifiable and locatable data was publicly available in the AAT decisions. This poses a safety risk for women who have experienced domestic violence, as they can be located by the perpetrator. It also prevents women from keeping a difficult period of their lives private. New reports should omit identifiable information before the decisions are made publicly available, and existing reports should be edited to omit this information. This follows the approach taken in New Zealand where all identifiable and locatable information is obscured or omitted from publicly available NZSSAA decision reports.

**Stronger guidelines should be developed for the AAT's use of domestic violence records from police and hospitals.** Following on from the key finding that domestic violence records were used as evidence of a relationship in AAT couple rule decisions, it is recommended that stronger guidelines be developed for Commonwealth institutions' use of information collected by state institutions. These include police and hospitals in their community integrated responses to domestic violence. This information is collected for the purpose of increasing victim/survivor safety and reducing risk, and should not be used for other purposes without permission from the victim/survivor — particularly where information is being used for an adverse purpose

concerning the victim/survivor, such as in relation to couple rule decisions at the AAT.

**The specific dynamics of domestic violence and how it intersects with the couple rule should be recognised by AAT decision-makers.** Fewer AAT decisions identified within the sample since 2014, may reflect a more complex understanding of domestic violence by Centrelink and the AAT in the context of couple rule decisions. However, cases where it is found that the perpetration of domestic violence involved power and control of the victim/survivor by the perpetrator, and/or had the effect of limiting the independence and/or safety of the victim/survivor of domestic violence, should be considered a special circumstance. The AAT should not regard the victim/survivor as being part of a “couple” for the purpose of the rule and should waive any related Centrelink debt.

In addition, there needs to be recognition in decision-making at the AAT, and also within Centrelink, of how long-term experiences of domestic violence and economic abuse can have an impact upon women in terms of income and assets reporting to Centrelink. **Domestic and family violence training for AAT decision-makers is recommended.**

When applying the couple rule, there needs to be special consideration for women who experience multiple forms of disadvantage. For example, the particularly vulnerable position of immigrant women with various visa statuses who have experienced domestic and family violence and wish to access social security income support, also needs to be taken into account in decision-making, with additional protections provided. **Safe and effective (trauma specialist) interpreter services need to be provided at the AAT and in screening and case management by Centrelink.**

**Further research should be funded to investigate the possibility that individuals should be the basis of eligibility for all social security payments.** The couple rule renders victims'/survivors' access to social security payments dependent on the assets and income of the perpetrator. This creates particularly risky dynamics across intersectional groups for women to access financial support during this difficult time, and for women to assert independence from relationships



that entrap through power, control and economic/financial abuse. The rule means the access of all women to a fair level of income support is mitigated by the possibility of men's violence. Making individuals the basis of eligibility for all social security payments could negate the need for the couple rule, and avoid the particular vulnerability of women who experience domestic violence and have fallen foul of the couple rule.

Definitions of relationships in the legislation are overly rigid. Currently, the "policy of equity" (Carney & Hanks, 1986, p. 145) at the core of the couple rule means that members of a couple are paid a lesser rate than single individuals. This is to accommodate the higher cost of living for single people. However, this does not account for contemporary relationship fluidity and the costs of women's structural vulnerability to domestic violence within the current couple rule. Investigating the possible outcomes of a general payment equivalent to the single rate for all social security recipients, with an awareness of the increased cost incurred by women and families as well as contemporary family fluidity, is recommended. This investigation also needs to consider the possible benefits of aligning social security law with the approach in Australian taxation law where the individual is the basic economic unit for income tax assessment.



# Introduction

Victims/survivors of domestic violence often rely on social security payments for financial support when trying to leave a violent relationship and when trying to establish an independent life for themselves and their dependents (Evans, 2007; Purvin, 2007). Indeed, social security payment is important for increasing the resilience of low-income families. In the context of domestic violence, it provides material means of escape and alleviates poverty for many women ending a violent relationship (Cortis & Bullen, 2015, p. 17). However, Cortis and Bullen (2016, p. 32) report that women who have been affected by domestic violence are twice as likely to experience difficulty accessing welfare services compared to women who had not experienced violence.

In Australia, access to social security payment is determined by a couple's joint income and assets. In the context of domestic violence, a victim/survivor, if married or considered a member of a couple, will have her income and assets assessed jointly with those of the perpetrator's. The couple rule in Australian social security law thus ties women's access to social security payment to the income and assets of the perpetrator (Sleep, 2016; 2017). Further, when applying the couple rule, reports of domestic violence made to police or other services can be interpreted as evidence of a relationship (Sleep, Tranter & Stannard, 2006). This means that information that has been collected to enhance women's safety is being used to assess their entitlement for social security payment. When a couple rule assessment is undertaken in the context of a victim/survivor of domestic violence attempting to redefine their relationship as part of the process of separating from the perpetrator, this can have implications for both the victim/survivor and their dependent's physical safety and financial security.

This research project adopts the definition of domestic violence used in *The National Plan to Reduce Violence against Women and their Children 2010-2022* (Council of Australian Governments, 2011, p. 2), that "domestic violence includes physical, sexual, emotional and physiological abuse". Domestic violence has been interpreted broadly to include violence experienced in domestic relationships. Almost all violence in this study was perpetrated by a current or past intimate partner; however, other forms of family violence, including child sexual abuse and elder abuse were included in this

study. The term domestic violence has been used throughout this study to represent the predominance of intimate partner violence in the AAT sample, and its particular challenges in the context of the couple rule. However, the term is to be interpreted broadly to include other forms of family violence because this was also present in a number of decisions and was part of the power and control context of the decisions. This research explores the dynamic between domestic violence, social security payment and the couple rule. It examines the pre-existing data set of AAT decisions of couple rule matters and will compare this to similar decisions made in New Zealand where domestic violence can be interpreted as evidence against an ongoing relationship. These data sources provide rich, reliable and non-invasive qualitative detail of social security decision-making.

This research is located in the social security law, domestic violence and social policy literature. A review of the relevant literature will be presented in four parts. First, the centrality of the couple rule in Australian social security payment provision will be outlined, as well as the rule's heritage as a development of the historical cohabitation rule. In this section, the need for more research on the current expression of the rule will also be explored. Second, the inextricable interconnections between the couple rule and domestic violence will be identified. Third, the need for more research on the interconnection between the couple rule and domestic violence, particularly from intersectional, international and intra-national perspectives, is demonstrated. Finally, the research questions and methods are detailed.

# State of knowledge review

The state of knowledge review is necessarily interdisciplinary, spanning the literature on the couple rule, social security law, domestic violence and intersectionality of special priority groups identified by ANROWS. The key search terms used included “couple rule”, “married like relationship”, “cohabitation rule”, “domestic violence”, “family violence”, “intersectional”, and “intersectionality”. Abstracts of identified articles were read, and their relevance to the research aim discerned. Relevant articles were read and their sources hand-sorted. These sources included refereed articles, reports, AAT decisions and cases. This was a particularly useful approach for this research project because domestic violence, social security law and the couple rule are interdisciplinary but under-researched topics.

## The couple rule in Australian social security provision

### The couple rule

Australia’s social welfare apparatus is heavily targeted in an attempt to reach those most in need of assistance (see Marston, McDonald, & Bryson, 2014).<sup>4</sup> A mechanism used to target those most in need is means testing for income and assets. Currently, a couple’s income and assets are assessed jointly for social security payment. This means that a married or de facto woman’s access to social security payment is dependent on both her own and her husband’s or de facto partner’s income and assets (Sleep, 2017; Sleep et al., 2006; Tranter, Sleep, & Stannard, 2007; 2008).<sup>5</sup> This

is in contrast to Australian taxation law, which does not consider a couple’s assets or income jointly but assesses each individual as separate taxpayers. For example, an individual is taxed according to their own income only (Stewart, 2009, p. 8; Australia. Commonwealth Taxation Review Committee, Asprey & Parsons, 1975, p. 134) — a husband, wife or de facto partner is not usually asked to pay their partner’s income tax.

If a recipient is not married but is possibly in a de facto relationship, or recently separated, specific guidelines are applied to decide if their income and assets should be assessed in combination with their deemed partner’s. This is provided in s. 4(3) of the *Social Security Act 1991* (Cth) — known as the couple rule. The rule does not just provide the legal basis for excluding a person from social security payment if their alleged partner’s income and assets are too great. Failing to declare a couple relationship to Centrelink — including a new de facto relationship or a recent separation — can also lead to serious financial and criminal consequences for the individual social security recipient.<sup>6</sup> If a social security recipient is found to be part of an undeclared couple, they can be denied payment, have their payment reduced or changed, and/or be asked to repay any overpayment through administrative legal processes (Commonwealth of Australia, 2018). They can be simultaneously criminally prosecuted for fraud if they received payment at a single rate when they should have declared they were a member of a couple.<sup>7</sup>

The couple rule identifies five criteria to be considered when deciding if a person is a member of a couple for social security

4 Please note that the aim to target those most in need is wrought with inherent tensions as the “deserving” are attempted to be distinguished from the “undeserving” (Chenoweth, 2008). This is a politically charged process. However, for the purpose of this study, it is the mechanism of targeting through means testing that is an important engine for the impact of the couple rule on women, and especially those experiencing or having experienced domestic violence.

5 The use of the phrase “social security payment” is deliberately general. The couple rule is positioned as a blanket clause in the *Social Security Act 1991* (Cth). This means that the rule applies to most social security payments including Age Pension, Disability Support Pension, and Newstart Allowance. This is in contrast to the pre-1990 rule, which applied to payments that targeted women and single parents — the Widow’s Pension and Single Parents Pension. The rule’s scope has expanded since the early 1990s to affect almost all social security recipients throughout all age groups, payment types, care needs and, since the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* (Cth), sexual orientation.

6 Or before Centrelink, the Department of Social Security. Centrelink is a main program of the Department of Human Services, which is part of the Social Services portfolio. It “covers a range of government payments and services for retirees, the unemployed, families, carers, parents, students, people with disabilities, Indigenous Australians and people from diverse cultural and linguistic backgrounds, and provides services at times of major change” (Australia. Department of Human Services, 2014, p. 6).

7 These two legal avenues do not correspond and are experienced as double punishment, where a social security recipient can be required to repay their couple rule Centrelink debt through administrative legal processes and also be imprisoned for social security fraud through the criminal justice system. In some cases, a social security recipient successfully appealed their repayment, but still needed to follow through with criminal sentencing for the same couple rule noncompliance (Sleep, 2016). While legal consequences of both a civil and criminal nature are not specific to this context, their effects are. To doubly punish women who have already been effectively punished for being in a violent relationship indicates specific and disproportionate harm.

assessment purposes. These are:

- financial aspects of the relationship;
- nature of the household;
- social aspects of the relationship;
- presence or absence of a sexual relationship; and
- the nature of the commitment (*Social Security Act 1991*(Cth), s. 4(3)).

The criteria have been unchanged since their insertion in the *Social Security Act 1947* (Cth) in 1989 via the *Social Security and Veterans' Affairs Legislation Amendment Act [No. 3] 1989* (Cth). The statutory criteria were reproduced as s. 4(3) when the *Social Security Act 1947* (Cth) was replaced by the *Social Security Act 1991* (Cth). According to the Minister for Social Security, the introduction of these criteria was an attempt to clarify decision-making and reduce intrusive, unstructured investigations and “arbitrary decision-making” (Commonwealth of Australia, 1989, p. 1606). The previous articulation of the rule simply stated that someone “living with a man as his wife on a *bona fide* domestic basis although not legally married to him” be excluded from payment (*Social Security Act 1947* (Cth), s. 83AAA (1) (b); *Social Services Act [No. 3] 1973* (Cth) s. 9).

## A difficult heritage – the cohabitation rule

The previous articulation of the couple rule was known as the cohabitation rule. It aimed to ensure that “an unmarried couple who are living together as man and wife” were treated “no more favourably than a married couple in a similar financial position” (Sackville, 1975, cited in Carney & Hanks, 1986, p. 147).<sup>8</sup> In other words, it was intended to ensure that an unmarried person living with their partner did not receive more allowance from the state than those formally married. This was referred to as “the policy of equity” (Carney & Hanks, 1986, p. 145). In effect, it meant that an unmarried woman who was considered to be living with a man “as his wife” was denied certain social security payments (Jordan, 1981). This was justified on the basis that it was less expensive for each

person to live as a couple rather than alone due to pooling of expenses (Carney & Hanks, 1986, p. 145).

The rule was formally legislated in 1973 when it was introduced with the new Supporting Mother's Benefit through the *Social Services Act [No. 3] 1973* (Cth) amending the *Social Security Act 1947* (Cth). Until then, according to Carney and Hanks (1986, p. 145), it was an unlegislated departmental policy for the administration of Widow's Pension to single mothers. The *Social Services Act 1975* (Cth) amended the *Social Security Act 1947* (Cth) in 1975 to explicitly include the cohabitation rule in the requirements for eligibility for Widow's Pensions (Jordan, 1981, p. 37).

Until November 1977 the rule applied exclusively to women. After this, it was subsumed, along with the Supporting Mother's Benefit, into Supporting Parent's Benefit, which also applied to sole fathers. Along with Widow Pension A, the Supporting Parent's Benefit was subsumed into Sole Parent Pension from 1 March 1989 and then Parenting Payment Single from 20 March 1998 (Bond, Devereux, & Wang, 2001, p. 3). The cohabitation rule endured throughout these changes.

The current articulation of the rule, the couple rule, which is the focus of this research, now applies to all major social security payments (Sleep et al., 2006, p. 135). The single rate for each allowance is generally higher than the partnered rate. This is to accommodate the higher cost of living for single individuals. For example, a single recipient of the Parenting Payment scheme is paid a maximum of \$762.40 per fortnight; a member of a couple receives \$492.80 per fortnight (accurate for 25 May 2018) (Australia. Department of Human Services, 2018).

## The need for more research on the couple rule

The cohabitation rule received much attention in the 1970s and 1980s. It was the subject of an Australian inquiry led by Mossman and Sackville (1977), which concluded that the rule was a “necessary evil”, and cautioned for it to be applied in a way that was respectful and sensitive to women. Second-wave feminists, including McIntosh and Pateman (McIntosh, 1981; McIntosh & Barret, 1992; Pateman, 1986;

<sup>8</sup> Although the couple rule has applied to same-sex couples since the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008* (Cth), until then it applied exclusively to heteronormative couples. Hence the use of the phrase “man and wife” (Sackville, 1975, quoted in Carney & Hanks, 1986, p. 147).

1988; 1989), criticised the cohabitation rule of the 1970s and 1980s. McIntosh focused on the humiliation experienced by women, calling social security officers “sex snoopers” for their concern about women’s sexual activities when applying the rule (McIntosh, 1981, p. 32). Pateman focused on how the cohabitation rule excluded women from the benefits of the welfare state that were afforded to wage-earning men.<sup>9</sup>

Since the cohabitation rule has developed into the couple rule it has been the subject of some research and attracted some community attention.<sup>10</sup> For example, Sleep (2016) found that one in five reported appeals of a Centrelink couple rule decision at the AAT involve domestic violence.<sup>11</sup> However, the link between domestic violence and the couple rule in Australian social security law requires deeper analysis.

## The couple rule and domestic violence

There is an interconnection between the couple rule and domestic violence in Australian social security payments. Sleep (2016) found that the couple rule ties a woman’s access to social security payment to the perpetrator in a number of ways:

- Entitlement to payment is linked to the perpetrator’s income and assets.
- Domestic violence records have been used as evidence of a relationship (both in the Department of Human Services and at merits reviews in the AAT).
- When women are in the process of leaving or attempting to leave a violent relationship, they often make multiple attempts. During this process, some women have fallen foul of the couple rule and have been ordered to repay

substantial social security debts or have been prosecuted for fraud. This creates an additional burden at this vulnerable time for women and effectively entraps them in the violent relationship, and/or punishes them for leaving.

- Perpetrators have used the couple rule to further control the victim/survivor, which demonstrates complicity by institutions with the perpetrator.

## Women’s entitlement to payment linked to perpetrator’s income and assets

As explained above, in Australia’s means-tested social security payment system, couples are assessed jointly for their entitlement to social security payment. This means that the entitlement to social security payment of a woman who is in a violent marriage or de facto relationship is tied to the assets and income of the perpetrator.<sup>12</sup> When it is unclear if the victim/survivor is still in a relationship with the perpetrator, the couple rule is used to decide if the perpetrator’s income and assets should be considered in her access to social security payment. Although domestic violence victims/survivors may claim a one-off emergency payment that is not dependent on the perpetrator’s income and assets, this is a very short-term payment and is not adequate for maintaining economic independence (Australian Law Reform Commission, 2011; Macdonald, 2012). The victim’s/survivor’s access to all continuing payments — including Newstart Allowance, Parenting Payment, Disability Support Pension, and Age Pension — is dependent on the perpetrator’s income and assets unless the victim/survivor can show that they are no longer in a relationship according to the couple rule.

## Domestic violence records used as evidence of a relationship in Australian couple rule decisions

Cortis and Bullen (2015, p. 18) argue that the Department of Human Services undertakes screening for domestic violence so it can ensure victims/survivors access appropriate support. However, they also clarify that this support must be beneficial to the victim/survivor. In many instances this disclosure is beneficial to the victim/survivor; however, this

<sup>9</sup> Margaret Little has written about a similar rule in Canada since the 1990s. See Little (1994; 1998) and Little and Morrison (1999).

<sup>10</sup> See Hopkins (2005), Sleep et al. (2006), Voice (2008). Also see Commonwealth Ombudsman (2007, pp. 11-12), Cameron (2018), National Council of Single Mothers and Their Children Inc. (2006), Fleming (2006) and Senate Standing Committee on Legal and Constitutional Affairs (2006).

<sup>11</sup> The AAT is an external review body that can remake Centrelink decisions on their merits. Social security recipients can appeal to this body if they are unhappy with a Centrelink decision. The AAT was established by the *Administrative Appeals Tribunal Act 1975* (Cth) and commenced operations on 1 July 1976. The *Administrative Appeals Tribunal Act 1975* (Cth) and the *Administrative Appeals Tribunal Regulations 1976* (Cth) set out the Tribunal’s functions, powers and procedures.

<sup>12</sup> Of course, entitlement is additionally tied to a woman’s own income and assets.

is not necessarily the case in the context of the couple rule in Australian social security law. This is because the information collected during this screening can be used as evidence for a relationship according to the couple rule and result in ineligibility and/or an overpayment debt. This amounts to systems abuse or secondary victimisation. Using disclosures of domestic violence as evidence for noncompliance with the couple rule in establishing debt is rarely, if ever, beneficial to the victim/survivor.

Centrelink collects multifarious information according to the couple rule to decide if a social security recipient is entitled to their payment. In 133 AAT couple rule decisions from 1992 to 2015, Sleep (2016) found that collected evidence included:

- transaction records from banks and financial institutions (e.g. see AAT Matter No. 2005/627; AAT Matter No. 2006/906);
- school administrative records (e.g. see AAT Matter No. 2005/668; AAT Matter No. 2006/255);
- hospital records (e.g. see AAT Matter No. 2005/478 [98]);
- parking fines (e.g. see AAT Matter No. 2015/248);
- third-party and neighbours' accounts (e.g. see AAT Matter No. 2005/668; AAT Matter No. 2005/899; AAT Matter No. 2007/1562);
- evidence from Australian Federal Police raids (e.g. see AAT Matter No. 2015/248); and
- police domestic violence reports (e.g. see AAT Matter No. 2011/213).

Of particular concern here is the use of domestic violence police reports as evidence of a relationship.

Sleep (2016; 2017; 2018) found that domestic violence police records, including domestic violence police incidence reports and Domestic Violence Orders (DVOs), were used as evidence of a relationship in a number of decisions (see AAT Matter No. 2006/792 [15], [26]; AAT Matter No. 2008/338 [30], [31]; AAT Matter No. 2008/516 [7]; AAT Matter No. 2011/213 [44]).<sup>13</sup> For example, Sleep (2016; 2017; 2018) discusses AAT

<sup>13</sup> Please note that while it is legal convention in Australia to include applicant and appellant names when citing AAT decisions, even in decisions that involve domestic violence, I have omitted these for this research report for safety and privacy reasons. The format I have

Matter No. 2013/345, in which Ariana was asked to repay \$134,520.85, an overpayment for couple rule noncompliance of Parenting Payment, Pensioner Education Supplement, Child Care Benefit and Child Care Rebate, and Family Tax Benefit.<sup>14</sup> In this decision, police domestic violence incident reports were used as evidence of the alleged couple's address. Cohabitation is considered indicative of a relationship in s. 4(3) under the "nature of the household" criteria (*Social Security Act 1991* (Cth), s. 4(3)). Indeed, the decision-maker listed an array of evidence for the residential address of the perpetrator; the first item in the list was:

Reports obtained from the Police...indicate that when they were called to the...premises in relation to domestic violence issues, they were informed on each occasion that Ariana and [Perpetrator] lived at the premises: (T97/834-920). All the reports record the...premises as the residential address of both Ariana and [Perpetrator]. Further, the report dated...records that [Perpetrator] 'began to consume intoxicating liquor at his home address of...'. They were described in December 2007 as having 'been in a de facto *relationship for the past 15 years*'. (AAT Matter No. 2013/345 [43]; italics in original)

Further, the details were not only used to locate the residential address of Ariana's abusive ex-partner but were revealed on the public record. The names of the victim/survivor, perpetrator, dates of incidents, street addresses and locations were included in the AAT decision and were publicly available.

The reporting of domestic violence incidents in police reports and DVOs aims to increase women's safety (Queensland Police, 2018); however, when the reports are used to limit access to social security payment it can financially entrap women in the relationship. Different records of domestic violence can be used as evidence for different stages of the relationship for couple rule decisions — for example, a DVO may indicate a period of separation. Although this is not the intention of these records, the use of domestic violence police records as evidence that the parties are cohabiting as a couple displays a disregard for the controlling nature of

adopted is drawn from the approach taken in Doyle, Easteal and Emerson-Elliott (2012, pp. 91-95).

<sup>14</sup> Please note that identifiable details in the AAT decisions have been omitted throughout this research report. Pseudonymous have also been used.



domestic violence. It also overlooks the danger of disclosing identities and locations, to the extent that administration of the couple rule can effectively entrap women and collude with perpetrators of domestic violence.

### Entrapment and punishment of victims/survivors through the couple rule

Easteal and Emerson-Elliott (2009) observe that the current application of the couple rule in Australian social security does not consider the current understanding of the complexities of power and control in domestic violence.<sup>15</sup> For example, it has been found that women tend to make multiple attempts to leave an abusive relationship (see Domestic Violence Prevention Centre Gold Coast, 2015). However, the challenges women experience when attempting to leave a controlling relationship are rarely considered in the couple rule cases. Instead, returning to the relationship has been used as evidence of a continuing relationship, even when the evidence also shows that the victim/survivor returned as part of a process of leaving a controlling relationship. For example, Sleep (2016; 2018) considers AAT Matter No. 2011/213 [61], where Ann was considered to be a member of a couple with the perpetrator<sup>16</sup> and was in a continuing relationship with the perpetrator for a period longer than she claimed. This is despite accepting that the relationship had eventually

ended and “that at various times throughout the subject period Ann sought unsuccessfully to bring the relationship to an end” (AAT Matter No. 2011/213 [61]). In applying the couple rule, a key issue was to determine exactly when Ann’s relationship with the perpetrator ended. The debt was quantified according to this date. In this decision, the relationship was not considered terminated until the victim/survivor did not return to the relationship. This means that Ann was asked to repay the social security payment she received while attempting to end the relationship — a time when independent financial support, for herself and her children, would have been crucial. It is unclear whether Ann would have been able to eventually leave the violent relationship without social security financial support.

Further, it is currently accepted by practitioners and researchers in domestic violence that a woman is at heightened risk of harm when attempting to leave the relationship.<sup>17</sup> However, the increased physical risk to women at this time, in addition to their financial risk, is not taken into account in the application of the couple rule. This is demonstrated in AAT Matter No. 2006/792 [15] (Sleep, 2017; 2018), where Ava remained in her abusive husband’s home “only because there was less risk of abuse from [Perpetrator] if she agreed to reside in the same house”. Although the appellant attempted to argue that this was evidence of a special situation outside the normal scope of the couple rule criteria, they were unsuccessful. Instead, the evidence of cohabitation was used by the AAT (among other evidence) as indicative of a commitment to the relationship. The increased risk to the victim/survivor when attempting to leave the household was not considered. The decision to cancel Ava’s Parenting Payment based on the couple rule was affirmed. This may have further entrenched the control the perpetrator had over the victim/survivor and her dependent grandchildren.

<sup>15</sup> Although there have been recent changes to the couple rule section of The Social Security Guide that are more in line with the definition of domestic violence in the The National Plan to Reduce Violence against Women and their Children 2010-2011 (Council of Australian Governments, 2011). This follows the National Social Security Rights Network report (Cameron, 2018) How well does Australia’s social security system support victims of domestic and family violence? For example, economic abuse is explicitly stated as a form of domestic violence (2.2.5.10). The guide now also states that the presence of domestic and family violence “may” indicate that there is not a relationship (2.2.2.10). Similarly, The Social Security Guide (Commonwealth Government, 2019, 2.2.5.30) suggests that:

When deciding to interview a partner for additional information discretion must be exercised to ensure that the contact is appropriate. For instance, there may be circumstances where it is not appropriate to interview a partner at all. Where there are indications that family and domestic violence may be present, the partner/other party should not be contacted.

However, the guide does not suggest that using police domestic violence reports is inappropriate (see Commonwealth Government, 2019, 2.2.5.10). There has also been no corresponding change in the legislation.

<sup>16</sup> Her situation was not considered “unusual or different” (AAT Matter No. 2011/213 [72]) enough to invoke the special consideration available in ss. 24 and 1236 of the *Social Security Act 1991* (Cth).

<sup>17</sup> A 2015 study by ANROWS found that two out of five women experienced violence when temporarily separated from their violent male partner, while six out of ten women reported an increase in violence during separation. See Cox (2016, p. 121). This is supported by a substantial body of Australian and International research. See, for example, Campbell et al. (2003); Kaspiw et al. (2017).

## Perpetrators' use of the couple rule to further control women

Perpetrators may intensify financial abuse after separation, as a way to continue to control women's lives when other forms of control are lost (Cortis & Bullen, 2016, p. 11; Costello, Chung, & Carson, 2005). It has been estimated that 80-90 percent of women who seek support for domestic and family violence also experience financial abuse (Evans, 2007; Macdonald, 2012). Financial abuse, also called economic abuse, is where "perpetrators attempt to prevent or control women's ability to acquire, use and maintain resources" (Cortis & Bullen, 2015, p. 6). Financial abuse can involve limiting access to finances and income, controlling the victim's/survivor's assets and income (Sanders, 2007), and non-consensual debt (Littwin, 2012). There is broad acknowledgement of financial abuse as a form of domestic and family violence in Australian family law (see, for example, *Family Law Act 1975* (Cth), s. 4AB(2) (g)). However, this broad acknowledgement is rarely extended to Australian social security law.

Many women depend on social security payments to support themselves towards independence after a violent relationship has ended. The couple rule places focus back onto the relationship, as their entitlement for independent payment begins the day after the relationship ends. In determining this date, or if the relationship has ended at all, Centrelink can interview the perpetrator. Given his ex-partner's access to social security payment is dependent on his account of the relationship, the perpetrator is thereby afforded scope for further control. Hence financial abuse merges with systems abuse as the perpetrator attempts to regain control after separation through litigious or legally manipulative behaviour, such as using the administrative system through Centrelink (Cameron, 2014).<sup>18</sup> Indeed, Sleep (2016; 2017) found evidence in AAT decisions that perpetrators used the couple rule to further control women. For example, in AAT Matter No. 2006/689 [15] Sally had been granted a housing commission home after residing in a women's shelter since leaving her violent ex-partner. The ex-partner left a public record of her address as his postal address without her permission (AAT Matter No. 2006/689 [26]). These documents disclosing Sally's address as his were accepted by the AAT as evidence that they

were a couple and (along with other evidence) resulted in a social security debt of \$50,861.32. It was not acknowledged that by accepting the perpetrator's use of the address, the decision enabled and supported the perpetrator's further control over the victim/survivor and her children.

Indeed, the power that a perpetrator can wield through the couple rule by establishing the perpetrator's address as the same as the victim's/survivor's (whether residing in the home or not) was also regarded dismissively in AAT Matter No. 2013/345 (Sleep, 2017). Here, the police accounts of a domestic disturbance were used (among other evidence) as an indication of the perpetrator's cohabitation with the victim/survivor, as well as the perpetrator's use of the victim's/survivor's address as his residential address. The victim's/survivor's assertion that the perpetrator "had sought to control her by using the address" was dismissed because "it is unclear as to in what way he was said to have exerted control" (AAT Matter No. 2013/345 [43]). This displays a lack of consideration of the power and control context of domestic violence, where control over the day-to-day life of the victim/survivor is part of the mix. There is room to consider "special circumstances" like the context of domestic violence in couple rule decisions through s. 24 of the *Social Security Act 1991* (Cth). There are also provisions in ss. 1236 and 1237 of the Act to waive any debt due to hardship or special circumstances (see Appendix C for details of these provisions). However, these sections have been used successfully in few reported AAT decisions. Section 24 has been used successfully in three decisions: AAT Matter No. 1998/326, AAT Matter No. 2008/516, and AAT Matter No. 2014/761. Sections 1236 and 1237 have been used in five additional decisions: AAT Matter No. 1992/80, AAT Matter No. 1995/341, AAT Matter No. 1997/228, AAT Matter No. 2000/23, and AAT Matter No. 2012/499. Wangmann (2011) points out that legal practitioners tend to focus on violent events rather than the general control experienced by victims/survivors. This privileges the assessment of the legal practitioner over the experience of the victim/survivor and may minimise the coercing and controlling dynamic at the heart of the relationship (Stark, 2007; 2010). However, by not recognising this dynamic, and by using the address identified by the perpetrator to confer a social security debt upon the victim/survivor for couple rule noncompliance, social security decision-makers institutionally collude (although potentially

<sup>18</sup> See also Australasian Institute of Judicial Administration, 2017, 3.1.3.

unintentionally) with the power and control exerted by the perpetrator over the victim/survivor. Cameron (2014) calls this systems abuse. Indeed, this collusion is insidious as in facilitating the victim/survivor to incur a social security debt, decision-makers create the possibility that the victim/survivor might become more financially dependent on the perpetrator and less trustful of the institutions that ultimately should be helping her. While systems abuse has been well documented by researchers (see, for example, Douglas, 2018, Kaspiw et al., 2017), it has not been detailed in the context of social security law and the couple rule.

## The couple rule, domestic violence and intersectionality

Crenshaw (1991, p. 1242) states that:

...in the context of violence against women, this elision of difference in identity politics is problematic, fundamentally because the violence that many women experience is often shaped by other dimensions of their identities, such as race and class.

While domestic violence is perpetuated and experienced as gender-based inequality, the lives and experiences of women are complex and diverse. Experiences of domestic violence are coloured by the complexities of women's day-to-day lives and other nexuses of identity and/or social inequality. Sokoloff and Dupont (2005) argue that race, class and gender as individual identity characteristics, are not standalone in their inequality but form intertwining social structures that perpetuate inequality at all levels of society — or, in other words, multiple structural discrimination and multiple structural disadvantages. Nixon and Humphreys (2010, p. 152) write of the need to “make room for diverse experiences of, and vulnerabilities to, domestic violence”. The *National Research Agenda to Reduce Violence against Women and their Children* (ANROWS, 2014) and previous ANROWS research have identified a key gap in the current research base on domestic and family violence and sexual assault to be the “tendency to silo lived experience, so that the intersection of multiple sites of disadvantage and stigmatisation” are not readily discernible (Cox, 2015, p. 5).

Mitra-Kahn, Newbiggin and Hardefeldt (2016, p. 31) investigated the experiences of violence for women from diverse groups, and their complexities in terms of intersecting identities. For example, a woman who is both Aboriginal and has a disability can identify and experience the multifaceted structural disadvantages of both identities. Mitra-Kahn et al. (2016) found gaps in current Australian research on intersecting identities. In their mapping of domestic violence intersectionality, Mitra-Kahn et al. (2016) consider Aboriginal and Torres Strait Islander women; CALD women; women with disabilities; lesbian, bisexual, intersex and transgender women; and women in prison. They argue that more research is needed to understand the intersection between all of these groups of women and their experiences of domestic violence.

Frawley, Dyson, Robinson and Dixon (2015, p. 11) found only one key Australian study from a disability and intersectional perspective, including data and analysis on women's cultural background (Cockram, 2003). However, that study did not undertake an intersectional analysis, so the complexities of women's experiences were overlooked. Frawley et al. suggest that:

...research that can work with the available data to disaggregate findings about experiences of disability in Aboriginal communities, rural women with disabilities and women from CALD backgrounds along with data about income, education and other social indicators of inclusion, and experiences of violence and abuse is needed. (Frawley et al., 2015, p. 11)

Focusing analysis on AAT couple rule decisions that involve domestic violence allows a unique opportunity for an intersectional analysis of domestic violence, financial insecurity and other positions and identities experienced by women. This is because the couple rule applies to most Australian social welfare recipients. This is a diverse group of people where overlapping circumstances of disadvantage often intersect. While this project focuses on the intersection of gender and economic status in relation to domestic violence, issues of race, sexuality, culture and geographical isolation, for example, also play a role.



The complexity of overlapping circumstances, identities, experiences and disadvantage is core to this research project. This research details approaches to decision-making at the intersection of the couple rule, economic status and domestic violence in general, but also details differences among priority population groups — such as CALD women; Aboriginal and Torres Strait Islander women; older women; women with disability; women who are or have been incarcerated; lesbian, bisexual, intersex and transgender women; and women living in rural or remote areas — and experiences of intersectional disadvantage among these groups.

## The couple rule in an international context

### The New Zealand de facto rule and domestic violence

The Australian and New Zealand means-tested, flat-rate and nationally financed social security apparatuses are generally considered unique among welfare states — to the extent that Castles (1985; 1994) refers to the “Australian and New Zealand model” (see also Watts, 1997, and Deeming, 2013, on the continued influence of Castles’ thesis).<sup>19</sup> The New Zealand de facto rule is very similar to the couple rule in Australia and is appropriate for comparative analysis.

However, a major difference is that in New Zealand, *Ruka v Department of Social Welfare* [1997] 1 NZLR 154 (CA) provides a legal precedent to consider de facto relationships that involve domestic violence as not meeting the definition of a relationship for social security purposes (Wiseman, 2001). There is no similar case in Australia for testing the couple rule in the context of domestic and family violence.

It is possible that the New Zealand approach to using evidence of domestic violence in de facto rule decision-making could, through *Ruka*, provide a model that aligns more with contemporary understanding of domestic violence than the Australian approach. However, Sleep (2017) analysed

<sup>19</sup> Although New Zealand has a universal superannuation payment, while Australia does not.

NZSSAA de facto rule decisions that mentioned domestic violence police reports and found:

- No decision where domestic violence police reports were used as evidence led to a decision of no relationship for social security purposes. All decisions that used domestic violence police reports found a relationship.<sup>20</sup>
- The decision-makers compared the level of abuse to the extreme physical abuse experienced by the victim/survivor in *Ruka*. In other words, courts distinguished the facts of the *Ruka* case and argued that the abuse in question was not severe enough. For example, NZSSAA Matter No. 2015/84 [69]<sup>21</sup> stated: “the evidence of violence in this case falls well short of the unremitting violence suffered by Ms Ruka”. It is not clear what would be regarded as severe enough abuse to be considered comparable to that in *Ruka*.
- The decision-maker also used the lack of domestic violence police reports as evidence that the violence was not as severe as *Ruka*. For example, NZSSAA Matter No. 2010/65 [54] and NZSSAA Matter No. 2003/62 [10][40].

The way that *Ruka* has been applied to NZSSAA de facto rule decisions that involve domestic violence requires more analysis to establish if this is a way forward for Australia’s couple rule decisions.

## The couple rule in the intra-national context

### Australian taxation law

Outside the social security system, women are treated very differently by Commonwealth law and decision-makers. This is demonstrated by the different assessment units used for taxation, compared with social welfare provision. In the Australian income tax system, the individual is the formal unit of assessment (Australia. Commonwealth Taxation Review

<sup>20</sup> Although it is possible that decisions that did use the *Ruka* precedent to decide there was no relationship did not reach the NZSSAA.

<sup>21</sup> Please note that in New Zealand, it is legal convention to exclude the names and personal details of NZSSAA appellants and respondents in reporting of decisions. This contrasts with the Australian approach where it is convention to include them, even in decisions that involve domestic violence.

Committee, Asprey & Parsons, 1975, p. 134; Stewart, 2009, p. 8). This contrasts with social security provision, which treats couples as a single economic unit through the couple rule. There are benefits and disadvantages to both systems of assessment. For example, individual taxation assessment can be utilised as a mechanism for financial abuse. Therefore, more investigation is required into the impact of using couples as the basic economic unit for entitlement to Australian social security in the context of domestic violence and the role the couple rule has in this.

### Australian family law

It is also pertinent to consider family law disputes pursuant to the *Family Law Act 1975* (Cth), where significant proportions of the client profile are characterised by domestic and family violence, and where questions arise regarding whether parties have separated on a final basis or whether a de facto relationship can be said to exist. In Australian family law, there is an explicit acknowledgement of the significance of family and domestic violence (Parashar & Dominello, 2017). For example, there is a broad acknowledgement of financial abuse as a form of domestic and family violence (see *Family Law Act 1975* (Cth), s. 4AB(2)(g)). The role of financial abuse and other abuses in couple rule decisions has not been so widely acknowledged.

### Australian immigration law

Menjivar and Salcido point out that:

...the experiences of immigrant women in domestic violence situations are often exacerbated by their specific position as immigrants, such as limited host-language skills, isolation from and contact with family and community, lack of access to dignified jobs, uncertain legal statuses, and experiences with authorities in their origin countries. (Menjivar & Salcido, 2002, p. 1)

The understanding of the character and context of access to domestic and family services by women who are immigrants, refugees and asylum seekers is limited. However, in Australian immigration law, there are provisions for temporary partner visa holders (subclass 300, 309 or 820) whose relationship

ends due to partner violence to continue with their permanent partner visa (subclass 100 or 801) application (Department of Social Services, 2017). The aim is to ensure that “partner visa holders do not have to remain in an abusive relationship to stay in Australia” (Australia. Department of Social Services, 2017, p. 1). Evidence of domestic violence is used to allow access to the temporary partner visa, in acknowledgement of the specific position of immigrant women who experience domestic and family violence. However, securing bridging visas is difficult and there is heavy scrutiny of the relationship (Segrave, 2017). Indeed, a genuine relationship must be established according to four categories:

- financial;
- nature of the household;
- the social context of the relationship; and
- the nature of the commitment (Segrave, 2017).

These are reminiscent of the couple rule criteria. Further, the definition of domestic violence is narrow (*Migration Regulations 1994* (Cth), reg 1.21(1)). Also, barriers remain within immigration law for immigrant women with various visa statuses who have experienced domestic and family violence and who wish to access social security income support and Medicare (Vaughan et al., 2016).

### Conclusion

This review of the literature on domestic and family violence, social security law and the couple rule highlights the need for further research in this area. While some research has indicated that the couple rule rarely takes into account the realities of women who experience violence and effectively entraps victims/survivors in violent relationships, there is still much that is not understood. In particular, the experience of this nexus from an intersectional perspective needs more focus, as well as international and intra-national perspectives. It is the purpose of this research to create further understanding of this nexus. The next section outlines the specific research questions and method.

# Method

## Introduction

This research asked the following research questions:

- What is the detail of the dynamic between domestic violence, social security payment and the couple rule?
- What are some similarities among cases at the intersection of domestic violence, social security payment and the couple rule, and also differences among priority groups including: CALD women; Aboriginal and Torres Strait Islander women; older women; women with disability; women who are or have been incarcerated; lesbian, bisexual, intersex and transgender women; and women living in rural or remote areas?
- What can we learn from the New Zealand experience of applying a similar rule (the de facto rule in this jurisdiction), with the case-law precedent of using domestic violence as a special case and indicator of not being in a relationship?

These questions were answered using qualitative content analysis (Hsieh & Shannon, 2005) of merits review decisions of the couple rule in Australia and the de facto rule in New Zealand that involve domestic violence. These decisions are heard by the AAT in Australia and the NZSSAA in New Zealand and provide a window into the activities undertaken by social security decision-makers in the course of their work. These decisions were analysed with a particular focus on identifying similarities among the cases, and also thematic differences among the priority groups.

## AAT and NZSSAA decisions – a window into social security decision-making in Australia and New Zealand

The AAT is an independent merit review body that deals with Australian Commonwealth administrative decisions. This means that a social security recipient, if unsatisfied with a Department of Human Services decision about their payment, can appeal to the AAT. The AAT is able to remake the decision on the merits of the case. Hence it does not just rely on any new evidence or the original decision being in error, but reconsiders all the previous evidence in detail, including the evidence used by the original decision-maker.

As part of the AATs transparency of decision-making, its decisions are generally reported and are available online to the general public through the AustLII database.<sup>22</sup> These reported decisions provided a detailed and reliable record of AAT and social security decision-making, and the lives of the women at the centre of the decisions. Using AAT decisions in this way also allowed the collection of rich qualitative data in a way that did not require additional invasive data collection. The decisions detailed individual interviews and accounts, interviews with neighbours and friends, rental lease details, landlords' accounts of relationships, hospital records, social workers' reports, bank account details and police reports. The NZSSAA provides a similarly rich and non-invasive qualitative window into New Zealand's similar de facto rule decision-making in the context of domestic and family violence.<sup>23</sup> These decisions are available to the general public through the NZLII database (similar to Australia's AustLII).

Decisions by both the AAT and NZSSAA were analysed in this project. The sample includes only AAT decisions that involved the couple rule and domestic violence, and only NZSSAA decisions that involved the de facto rule and domestic violence. It is important to note that the AAT and NZSSAA decisions in the sample do not represent all decisions made by Centrelink or the New Zealand Department of Social Services, nor necessarily all decisions heard at the AAT or NZSSAA. Rather, the sample is taken from AAT and NZSSAA decisions that have been made available on AustLII and NZLII. Findings are, therefore, not an accurate numerical representation of the general decisions made about relationships and entitlement to social security payment in situations involving domestic violence. Each example found, however, is a highly reliable and verifiable occurrence of that type of decision-making. In other words, it is solid evidence that at a specific time, in a specific context, a specific decision was made about a particular person. Further, numerical representations of the findings should be considered underestimates of the number of women who have been administered in this manner. When researching institutional decision-making about women in the context of domestic violence, this is a reasonable approach.

<sup>22</sup> Australian Legal Information Institute, last accessed 25 May 2018, [www.austlii.edu.au](http://www.austlii.edu.au)

<sup>23</sup> This can be accessed at [www.nzlii.org/nz/cases/NZSSAA](http://www.nzlii.org/nz/cases/NZSSAA)

**Table 1** Keys terms used to identify couple rule decisions that involved domestic violence at the AAT

	Terms searched
<i>Couple rule decision</i>	s 4(3), section 4 3, section 4 (3), couple rule, marriage like relationship, married like relationship, de facto, de-facto, defacto, couples, social security
<i>Domestic violence</i>	Violence, abuse, police, attack, control, hurt, conflict, volatile

**Table 2** Keys terms used to identify New Zealand de-facto rule decisions that involved domestic violence at the NZSSAA

	Terms searched
<i>De-facto rule decision</i>	<i>Ruka</i> , de facto, de-facto, defacto
<i>Domestic violence</i>	Violence, abuse, police, attack, control, hurt, conflict, volatile

## Intersectionality

The couple rule applies to most Australian social welfare recipients. This is a diverse group of people where overlapping circumstances and identities often intersect. Focusing on the AAT couple rule decisions that involve domestic violence provided a vantage point for an intersectional analysis of domestic violence, financial insecurity, and other overlapping circumstances and identities experienced by women. The priority groups were identified in ANROWS's National Research Agenda (2014) as having particular vulnerabilities to violence.

## Data collection

The data collection process for this research was similar to the process undertaken by Sleep (2016). In the current project, AAT decisions between 1992 and 2016 were accessed via a search of the AustLII database. This is a previously existing dataset. AAT couple decisions were similarly accessed on AustLII; however, the sample was limited to AAT couple rule decisions that involve domestic violence or abuse, rather than including all available couple rule cases. These decisions were located through searching the AustLII database for decisions that included key terms such as "s. 4(3)", "couple rule", and "marriage like relationship" to locate couple rule decisions (see Table 1). Decisions needed to be identified as involving both the couple rule and domestic violence to be included in the sample. The means that the decision needed to contain at least one of the key search terms from the couple rule decision list, and also at least one from the domestic violence list. This allowed a focus on domestic and family

violence and the couple rule. A sample of 73 AAT decisions was identified. Three of these were excluded from the study as they did not involve a couple rule decision and/or domestic violence. This left 70 AAT decisions that involved domestic violence to be included in the sample. Decisions ranged from two to 113 pages long. All AAT decisions included in the sample are listed in Appendix A.

NZSSAA de facto decisions that involve domestic violence were similarly identified through the NZLII database (similar to Australia's AustLII). The key terms identifying de facto rule decisions that involved domestic violence are shown in Table 2. A sample of 21 NZSSAA decisions was identified. Of these, one did not involve a de facto rule decision, and one did not involve the de facto rule or an abusive relationship. Both were excluded from the study. A sample of 19 NZSSAA de facto decisions that involved domestic violence was used in the study. All NZSSAA decisions included in the sample are listed in Appendix B.

## Analysis

The AAT and NZSSAA decisions were recoded to focus on detailing the dynamic between domestic violence, social security law and the couple rule. There was a particular focus on identifying similarities among the cases, and also thematic differences among priority groups. A similar process was used to analyse NZSSAA de facto rule decisions.

The qualitative content analysis employed was directed content analysis as outlined by Hsieh and Shannon (2005).

Predetermined categories were used to code the text. These categories were derived from the priority groups:

- Aboriginal and Torres Strait Islander women;
- CALD women;
- older women;
- women with disability;
- women who are, or have been, incarcerated;
- lesbian, bisexual, intersex and transgender women; and
- women living in rural and remote areas.

Within these priority groups, and through the entire sample, similarities and contrasts were coded using a more conventional content analysis strategy (also see Hsieh & Shannon, 2005), by letting the data indicate themes that become coding categories.

The directed content analysis allowed for the analysis of cases where a person is part of multiple priority populations in the following ways:

- Cases where a person is part of multiple priority populations were codified as being part of more than one category population.
- The addition of coding categories that combine priority populations also allowed for analysis of similarities and differences in the administration of the couple rule among combined priority groups. For example, older women who are living in rural or remote areas became a further coding category. CALD women with disability became another coding category. This is a similar process to the thematic coding undertaken in Sleep (2016).

## Ethics

The research received ethics approval through Griffith University's ethics protocol "Domestic violence, the couple rule, and social security law" (Project ID: 2018/118).

Since the publicly available AAT decisions contain names and other identifiable information (such as addresses), the researcher de-identified the information when disseminating

the findings of the research. Hence, throughout this research, names are replaced with pseudonyms, and other sensitive information such as addresses are omitted. Additionally, throughout this research, decisions are reported using only the decision reference number — individuals' names are omitted. While it is usual legal practice for reported decisions to include these details, the information is not necessary for the purposes of this study. Any information that might result in the identification of individuals from this report has been omitted.

Unlike the Australian AAT decisions, all NZSSAA decisions are de-identified and have further identifiable and locatable information omitted. Therefore, the extra level of de-identification needed when preparing this research report was not required for the NZSSAA sample.

## Validity and reliability

AAT decisions offer high reproducibility and validity to the research design. The AAT publishes the reasons for its decisions online and free of charge in accordance with its responsibility for transparency in its own administration, and, more broadly, transparency of governmental decision-making (Douglas & Head, 2014). These freely available decisions provide a basis for data with high reliability due to the data being easily reproducible. Further, the decisions provide a valid and accurate source of information on the administrative behaviour of multiple institutions, including the Department of Human Services and police, because they are an official record of some of the decisions and activities of these organisations. The AAT, as a merits review body, remakes the original decision that is under review, meaning it stands in the shoes of the original decision-maker. This means that the same information that was available to the original decision-maker is used as evidence in the AAT decision. As such, the AAT decisions are a publicly available window into the type of information used by, and the decision-making of, social security decision-makers. NZSSAA decisions offer similar validity and reliability.

## Conclusion

This research aimed to detail the dynamic between domestic violence, social security payment and the couple rule. It aimed to do this by examining the pre-existing dataset of AAT decisions on couple rule matters. AAT decisions provided a rich and non-invasive source of qualitative data on the dynamics of social security decision-making, and its effects on those subject to its decisions. This data also has high reproducibility and validity. The material was recoded using a directed content analysis to focus on detailing the dynamic between domestic violence, social security law and the couple rule. There was a particular focus on identifying similarities among the cases, and also thematic differences among the priority groups, including CALD women; Aboriginal and Torres Strait Islander women; older women; women with disability; women who are or have been incarcerated; lesbian, bisexual, intersex and transgender women; and women living in rural or remote areas.



# Key findings

## Introduction

As explained above, the AAT couple rule and NZSSAA de facto rule decisions that involved domestic violence were analysed using directed content analysis. This analysis involved some pre-existing priority population groups identified in the ANROWS National Research Agenda (2014) and the formation of new categories that emerged from the decisions. The key findings are presented as follows. First, the key findings from the AAT couple rule decisions that involve domestic violence will be discussed in two main parts: situations specific to priority population group categories, and the common themes. Second, the NZSSAA de facto rule decisions that involve domestic violence will be discussed in two main parts: situations specific to priority population groups and common themes.

## Domestic violence, social security law and the couple rule in a national context – Australia

### Priority population groups

#### Operationalising the categories

The initial categories were established according to the population groups identified in the ANROWS National Research Agenda (2014) as having particular vulnerabilities to violence. These were:

- Aboriginal and Torres Strait Islander women;
- CALD women;
- older women;
- women with disability;
- women who are, or have been, incarcerated;
- lesbian, bisexual, intersex and transgender women; and
- women living in rural and remote areas.

Operationalising these categories so they could be used to analyse the AAT decisions was difficult. The process used was fluid, since identification in a group was dependent on indicators being available in the AAT decision text. Therefore,

the indicators were derived from the text. Despite this fluid approach, to aid the reproducibility of this study, examples of indicators for each group are presented in Table 3.

### Frequency of priority groups – intersectional disadvantage

Table 4 shows the frequency of each priority population group in the AAT sample. Each AAT decision may represent more than one priority population group. Most women were categorised according to at least one group — 60 out of 70 decisions (86%). Twenty-one decisions involved women who were categorised as belonging to two groups (30%), and 36 involved women belonging to one group (51%). The highest number of priority population groups relevant to a single woman was three out of the possible seven. Three decisions involved women who could be categorised in this way (4%). Thirteen decisions (18%) did not contain information that indicated women from any of the priority population groups. This does not necessarily mean that these women involved in a couple decision in a context of domestic violence did not belong to any of these groups, but rather that there was no information in the AAT decision that allowed them to be identified as belonging to any of the priority population groups that are the focus of this study.

It was most common for women involved in an AAT couple decision in the context of domestic violence to be a member of at least one priority population group; the next most common was for them to be a member of two groups. Therefore it seems it is common for a social security recipient who has a couple rule decision at the AAT in the context of domestic violence to be at the intersection of multiple priority population groups. Since the administrative path to the AAT for a social security recipient is a long and intimidating one (see Sleep, 2003), the additional barrier of administrative appeal might indicate the sample is biased towards those with relatively less structural disadvantage. It could be inferred that the general population of women who are social security recipients and challenged by the couple rule in the context of domestic violence might be subjected to higher levels of intersectionality and structural disadvantage than those in the AAT decision sample. In other words, the AAT sample is most likely an under-representation of the actual level of

**Table 3** Indicators for each priority population group in Australian AAT couple rule decisions that involve domestic violence

Intersectional group	Indicators
<i>Aboriginal and Torres Strait Islander women</i>	Identify as part of an Aboriginal and/or Torres Strait Islander community; use specialist Aboriginal and/or Torres Strait Islander services; identify as Aboriginal and/or Torres Strait Islander; talk of living on “country”.
<i>CALD women</i>	Personal history of immigration; use of interpreters; mention of language other than English spoken; born outside Australia; member of an immigrant community.
<i>Older women</i>	Age Pension recipient; aged over 55.
<i>Women with disability</i>	Disability Support Pension (DSP) recipient; mention of long-term illness, sickness benefit, depression, anxiety, or post-traumatic stress disorder.
<i>Women who are, or have been, incarcerated</i>	Reported prison sentence.
<i>Lesbian, bisexual, intersex and transgender women</i>	Same-sex relationship disclosed; self-identify as lesbian, bisexual, intersex or transgender.
<i>Women living in rural and remote areas</i>	Town or address names located outside metropolitan areas; mention of rural object such as “dams”, “paddocks”, etc. Mention of population size of town or limited housing availability in town due to its small size.

**Table 4** Frequency of each priority population group in Australian AAT couple rule decisions that involve domestic violence

Priority population group	Frequency
Aboriginal and Torres Strait Islander women	2
CALD women	18
Older women	6
Women with disability	26
Women who are, or have been, incarcerated	3
Lesbian, bisexual, intersex and transgender women	2
Women living in rural and remote areas	28

intersectionality and multi-structural disadvantage among all Australian women who have experienced the couple rule in the context of domestic violence.

Of the priority population groups, women living in remote and regional areas were the most frequently represented (28 decisions). Women with disability were the next most frequently represented (26 decisions). The third most frequent category represented was CALD women (18 decisions). Each of the priority population groups will be considered in turn, with a focus on specificities of that group’s experience at the intersection of domestic violence and the couple rule.

#### **Aboriginal and Torres Strait Islander women**

Aboriginal and Torres Strait Islander women were identified in the sample by reference to being a part of an Aboriginal and/or Torres Strait Islander community, use of specialist Aboriginal and/or Torres Strait Islander services, talk of living on ‘country’, or self-identification within the text of the decision as Aboriginal and/or Torres Strait Islander. Using these indicators, two women (3%) who were involved in an AAT couple rule decision that involved domestic violence were identified as Aboriginal and Torres Strait Islander. This was one of the least frequently identified of all the priority



population groups, equal to lesbian, bisexual, intersex and transgender women.

Aboriginal and Torres Strait Islander women are over-represented in domestic violence statistics (ABS, 2018a; Australian Institute of Health and Welfare, 2018, p. 102) and as social security recipients (Nowra, 2007), thus greater numbers were expected. The identification of so few Aboriginal and Torres Strait Islander women in the sample appears to contradict the research on this priority population group. However, research has also found that Aboriginal and Torres Strait Islander women who experience domestic violence are less likely to seek external support (Ingram, 2016) than non-Indigenous women. In addition, Aboriginal and Torres Strait Islander women tend to be distrustful of public institutions such as Centrelink and the AAT and, thus, less likely than non-Aboriginal and Torres Strait Islander women to complain or seek revision of a decision (Family Law Council, 2012, pp. 40-41). Further barriers to Aboriginal and Torres Strait Islander women's access to courts and tribunals include issues with legal literacy, culturally inappropriate information, and inability to attend hearings due to distance (Family Law Council, 2012). Since the AAT is the highest level of administrative appeal, and a number of administrative steps need to occur before reaching this stage, it can be argued that the AAT decisions do not provide a reliable indication of the number of Aboriginal and Torres Strait Islander women who are subject to the couple rule in the context of domestic violence. The number of Aboriginal and Torres Strait Islander women experiencing difficulty at the nexus of the couple rule and domestic violence is most likely much higher than indicated in the AAT sample.

It is important at the outset to acknowledge the diversity of Aboriginal and Torres Strait Islander cultures and experiences, which renders any attempt to extrapolate the experiences described in the AAT decisions to all Aboriginal and Torres Strait Islander women problematic. However, the two AAT identified couple decisions that involve domestic violence do highlight some experiences specific to Aboriginal and Torres Strait Islander women.

#### *Strong community support*

AAT Matter No. 2007/1050 illustrated that strong community support is often provided to women by Aunties in Aboriginal communities. Indeed, Auntie Jann was present as a birth partner for Alice's second birth, and provided ongoing support for Alice after the birth and during her post-natal depression. Auntie Jann also exerted some influence over the perpetrator, telling him "in no uncertain terms, that he needed to provide more help to Alice with the baby" (AAT Matter No. 2007/1050 [41]). Auntie Jann also disclosed to the AAT that she "would not have been pleased if [the alleged couple] had stayed together" (AAT Matter No. 2007/1050 [44]).

#### *Aboriginal identity had no conscious influence on matter*

Alice's identity as an Aboriginal woman, however, did not appear to factor highly in the decision. It was mentioned only once in relation to the accuracy of a hospital form's recording of her marital status. Indeed, Alice's:

...patient admission form describes Alice as 'M', meaning 'married or de facto'. It was argued that little emphasis should be placed on this patient admission form as it was completed by hospital staff, who had made assumptions because of [Perpetrator's] presence, and not Alice herself. In support of this contention it was noted that the form also does not record Alice as being of Aboriginal descent. It was submitted that Alice would never deny her Aboriginality. (AAT Matter No. 2007/1050 [40])

The absence of discussion about Alice's Aboriginal background in the remainder of the decision is important because it shows Alice's identification as Aboriginal had no stated influence on the matter. This contrasts strongly with AAT Matter No. 2011/213, where the couple rule decision involves domestic violence and an Aboriginal and/or Torres Strait Islander woman. In that AAT decision, in-depth consideration is given to the cultural mismatch between the Aboriginal community that Dianna is immersed in and mainstream Australian culture.

### *Cultural mismatch and “shame”*

The concept of “cultural mismatch” relates to Aboriginal women who are immersed in their community and refers to the clash between the women’s community culture and mainstream Australian society. Such cultural mismatch was experienced by Dianna in AAT Matter No. 2011/213. In this decision, the expertise of an academic socio-linguist was admitted. The socio-linguist explained in detail some specificities of this cultural mismatch. First, she explains how this cultural clash accounts for the ostensible inconsistencies in Centrelink records:

...it would explain the apparent inconsistencies in some of the information provided by Dianna to Centrelink, for example completing a ‘Becoming Partnered’ form in April 2008 and days later, its ‘No longer partnered’ equivalent. [Expert] pointed out that given Dianna’s limited education together with the length and complexity of many of the Centrelink forms she was required to complete, the potential for ‘cultural mismatch’ and confusion on Dianna’s part was significant. (AAT Matter No. 2011/213 [35])

Second, in the community culture described in AAT Matter No. 2011/213, there is a strong sense of shame experienced when a relationship is not successful. Indeed:

According to [expert] ‘shame’ is a central concept in Aboriginal societies throughout Australia with no direct equivalent in mainstream Australian culture. This, according to [expert] could explain Dianna’s apparent reluctance to disclose the status of her relationship with [Perpetrator] to Centrelink and within her own community. (AAT Matter No. 2011/213 [35])

### *Problem supplying home address*

The Australian mainstream concept of “home” is infused in the couple rule, as expressed in s. 4(3) of the *Social Security Act 1991* (Cth). However, this Western mainstream concept of having a permanent residential address does not always translate well to Aboriginal culture. This is important in the context of the couple rule, as the addresses of the alleged partner and the length of habitation at each address are vital evidence in each decision, especially when assessing the nature of the commitment and the nature of the household.

This theme was found in AAT Matter No. 2011/213:

[Expert] was of the opinion that there was a ‘fundamental cultural mismatch’ between Aboriginal and mainstream culture around the notion of a person’s home address. She argued that the practice of government agencies and institutions to require a person to supply a ‘home address’ was based on the Western cultural assumption that people spend most of their time at one particular address. She said that it was common for Aboriginal people to move between different family members to access different resources as needed. In her opinion, [Perpetrator’s] claim of sleeping over at...and...a couple of nights a week after the purported separation, and Dianna’s claim of visiting the companion sometimes for a week at a time was entirely unremarkable. (AAT Matter No. 2011/213 [36])

The special circumstances in AAT Matter No. 2011/213 [82] was an important consideration in the AAT decision, and the debt was waived in accordance of these.

### *Intersectionality*

Indigenous women are generally considered to be subjected to serious intersectional disadvantage (Bessarab & Crawford, 2013). Of the two women who were identified as Aboriginal and/or Torres Strait Islander in the sample of AAT decisions that involved domestic violence, one was also identified as living in a rural or remote area. Greater intersectional representation was expected among Aboriginal and Torres Strait Islander women in the sample; however, the few Aboriginal and/or Torres Strait Islander women identified in the AAT decisions may not provide an accurate representation of this priority population group. Indeed, this finding may represent a possible sample bias rather than a reflection of the diversity of Aboriginal and Torres Strait Islander women’s experiences.

### **CALD women**

CALD women were identified in the sample of AAT couple rule decisions by disclosure of a personal history of immigration from a non-English speaking country, use of interpreters, mention of a language other than English spoken, being born outside Australia, or mention of being a member of an immigrant community. Eighteen women (26%) who were

involved in an AAT couple rule decision in the context of domestic violence were identified as being from a CALD background. This was the third most frequently identified priority population group in the sample.

It is important to acknowledge that CALD communities and the experiences and realities of CALD women are diverse. Hence, the cultural contexts and personal lives of women within this group vary greatly. For instance, specific experiences such as arranged marriages are not experienced throughout all CALD communities. While the experience of one member of a CALD community cannot be considered to be representative of all CALD women, however, some situations specific to CALD women at the intersection of domestic violence and the couple rule were revealed in the AAT decisions sampled.

#### *Language, legal knowledge and cultural barriers to seeking help*

In AAT Matter No. 2006/906, Jasmin described an experience of police intervention in her violent domestic situation:

She described the domestic violence incident when [Perpetrator] called the police. She said that she did not speak a word of English in 1998 and no one explained your rights to you. She was scared and crying and her children were scared. She was trying to give them courage. She only learned about AVOs in the last two years. Although she believes she needs one, and described threats she had received, she does not want to provoke [Perpetrator]. She also explained that in 'our culture' if you get divorced, your name is stained. (AAT Matter No. 2006/906 [90])

Jasmin's experience of dealing with the police as a non-English speaker, her lack of awareness of her legal rights in Australia and the cultural pressure against divorce is reflected in other research about CALD communities (see for example Segrave, 2017, and Vaughan et al., 2016). Some further specific experiences of being a non-English-speaking woman in the context of negotiating the couple rule are exemplified by Jasmin in AAT Matter No. 2006/906. Jasmin experienced irregular access to translation services when dealing with Centrelink and changes were made to her details without an interpreter present. The AAT decision reports that:

She described how the....interpreter left in the middle of the interview and she continued speaking to them as best she could. Not all questions were interpreted while he was present. She specified that some questions had been asked after the interpreter had left. Some changes were made to the form. (AAT Matter No. 2006/906 [69])

The form referred to in the above quotation contained details of Jasmin's relationship with the perpetrator. In this decision, Jasmin successfully appealed the Social Security Appeals Tribunal (SSAT) affirmation of an original Centrelink decision that she was a member of a couple and the resulting debt of \$38,706.46 (AAT Matter No. 2006/906 [1]).

#### *Community/extended family complicity*

Complicit behaviour by the community and extended family members was an experience specific to CALD women identified in the sample of AAT decisions in the context of domestic violence. In the case of Jasmin's couple rule decision, the perpetrator would call his mother after a "fight", and she would ascribe responsibility for the incident to Jasmin:

There was shouting and screaming at home. He was frightening her and the children. He hit her. He used to call his parents when they had a fight and they would come within five minutes. Her mother-in-law blamed her for his getting drunk and gambling. (AAT Matter No. 2006/906 [54])

The ascribing of blame for the perpetrator's behaviour to the victim/survivor by her mother-in-law is also demonstrated in the following. In this instance, the husband had been very drunk while driving and had caused an accident:

They [husband and wife] had a huge argument and she said that either he goes or she would. His mother told her he was going to gaol and if he did, that would be her 'guilt', and that she was to stay there with her children until they were 18. It was not her house, and after that she was on her own. (AAT Matter No. 2006/906 [57])

This example additionally demonstrates the lack of control Jasmin had over her domestic situation, specifically control over housing for herself and her children. The implication

was that she could stay in the family home only for as long as she was rearing their children.

#### *Arranged marriage*

Domestic violence in the context of arranged marriage was also represented in the AAT sample. Lin was pressured to marry against her will and was raped by her fiancé to ensure she was not “marriageable to anyone else”, perhaps by ensuring she was no longer a virgin. In AAT Matter No. 2012/499 [14]:

Lin says she strenuously resisted [Perpetrator’s] proposal but pressure was brought to bear on her by him and his family, and then by her parents and extended family. Within three days of their meeting, they went through a form of customary engagement which involved the women of his family inspecting her to establish her virginity. After this, she says, he forced her to have sex with him, in effect to ensure she was no longer marriageable to anyone else. She later learned that his brother had been under the bed while they had sex, apparently to ensure she did not try to escape, a claim denied by [Perpetrator]. (AAT Matter No. 2012/499 [14])

Although it is unclear what specific claim the perpetrator denies — the presence of the brother, that his purpose was to prevent escape, or the rape in general — the level of violent control experienced by Lin is clear. The complicity of Lin’s extended family unit with the perpetrator’s violence resonates with other research about CALD women’s experiences of domestic violence (see for example Dasgupta, 2007; Gill, 2008; Salter, 2014). Lin was found to be a member of a couple, but her debt of \$42,036.92 was reduced by half due to special circumstances under s. 1237AAD in AAT Matter No. 2012/499 [107-116].

#### *Privacy*

The fear experienced by members of some CALD communities of the disclosure of marital problems, separation and divorce has been documented by researchers (see for example Segrave, 2017). While it seems that some privacy might be granted to the victim/survivor and/or perpetrator out of respect for their being members of a CALD community, this need for privacy was also used as evidence to their disadvantage. In AAT Matter No. 2007/1320, the perpetrator made an application

for his and his ex-wife’s names and address to be obscured in the reporting of the AAT decision for privacy reasons. It was explained that:

That application was put upon the basis that there would be numerous matters of a personal nature which would emerge and which he would prefer not be known to other persons. It was submitted that by reason of his membership of a...community and a...church that his circumstances could readily be known by computer access to published reasons for decision and in those circumstances his privacy would be compromised. It was also submitted that there may be circumstances arising out of published reasons for decision which would hold him to ridicule or gossip. (AAT Matter No. 2007/1320 [5])

The application for both members of the alleged couple was granted on this basis (AAT Matter No. 2007/1321, AAT Matter No. 2007/1320). However, it was also noted that neither member of the alleged couple called witnesses. This would seem logical in the context of their membership within a CALD community and therefore their desire for privacy; for both individuals, “privacy would be compromised” and risked “ridicule and gossip” if witnesses were called. However, the AAT decision did not take this into account. Rather, it stated that “a remarkable feature of both applications was the failure on the part of both applicants to call any persons to give evidence either in corroboration or at all” (AAT Matter No. 2007/1320 [43]). Further, “the failure to call any persons to give evidence in support” was used explicitly as evidence for being a member of a couple (AAT Matter No. 2007/1320 [72]).

#### *Intersectionality*

Of the 18 women in the sample of AAT decisions that involved domestic violence who were identified as CALD women, one was identified as belonging to three other priority population groups, and eight as belonging to two other priority groups. Seven AAT decisions involved women who could only be identified as CALD. This means just over half of the CALD women in the AAT decisions sampled also belonged to another intersectional group. Of these, it was most common for CALD women to also be identified as a woman with disability; five women were categorised into both of these groups. The next most frequently categorised group within the CALD sample

was women living in rural or remote locations. One CALD woman was categorised as both a woman with a disability and a woman living in a rural or remote location. One CALD woman was also categorised as an older woman.

### Older women

Older women were identified in the sample by being an Age Pension recipient or aged over 55. Six of the 70 AAT couple rule decisions that involved domestic violence involved older women (8%). This category marked the median frequency of all priority population groups in the sample, with four being more frequently represented, and four less so. The frequency of this category was smaller than anticipated.

Older women were not represented in sufficient numbers for generalisations to be made about the intersection of domestic and family violence, social security law and the couple rule, for this group in Australia. It is surprising that more women in this category were not represented in the sample. According to Harmer (2008), 77 percent of Australians over the age of 65 receive income support. The income support provided to this age group is the Age Pension, which is subject to the couple rule.

This lower-than-expected frequency could relate to older women being less likely than younger women to be subject to a couple rule decision at the AAT. However, Sleep (2016, p. 100) found that 25 out of 126, almost 20 percent, of AAT couple rule decisions involved Age Pensioners. Older women who are identifiable in the AAT couple rule decisions that involve domestic violence are less frequently represented than older women who are identifiable in the AAT couple rule decisions in general. The distinguishing factor here seems to be the reporting of domestic violence, rather than the appealing of a couple rule decision. Alternatively, the lower frequency than expected might represent older women being secretive about their experience of domestic violence, and reluctant to disclose it in public forums such as the AAT. This fits with previous research in this area (for example, Australian Law Reform Commission, 2017).

However, despite the lower frequency of older women in the AAT couple rule decisions that involve domestic violence,

some experiences specific to this priority population group emerged in the sample.

#### *Nowhere else to go*

One experience that emerged was that some older women had continued living with their violent ex-husband post-separation and/or divorce. For example, in AAT Matter No. 1992/11, the AAT member asked Kate (approximately 58 years old at the time) why she had not left the family home. She replied:

...she saw no reason why she should move out and had preferred that her husband should move but that he had refused. She also said that she had nowhere else to go and that she would feel insecure living alone. (AAT Matter No. 1992/11 [15])

#### *Living separately under one roof*

Similarly, in AAT Matter No. 2011/22 Jane, an Age Pension recipient, was dependent on the care provided by her ex-husband and perpetrator, but claimed a single rate of payment to maintain some financial independence from him. While there is accommodation within the couple rule for a person to live “separately under one roof” and not be considered a couple, the criteria contained in the couple rule must still be applied to make this decision. In other words, the woman living separated under one roof will still need to show that according to the criteria — financial commitment, nature of the household, public presentation and sexual relationship — that when all is considered that they should not be considered a couple. Interestingly, a history or presence of violence or abuse was not considered pertinent to this decision. For example, statements such as “while the relationship was at times volatile” or “while the relationship was not a happy one” were used by the AAT decision-maker before they declared that, according to the Act, the victim/survivor was a member of a couple. For example, in AAT Matter No. 1992/11, the decision-maker stated that:

As the couple have become older and as the applicant’s health has deteriorated it has become more difficult to distinguish this unhappy relationship between two long time legally married persons from hundreds of other unhappy marriage relationships. (AAT Matter No. 1992/11 [24])



*Past violent relationship*

Another situation specific to older women that emerged in this research was those with a history of violence in a past relationship choosing to share accommodation with a different individual later in life for financial reasons, or for the additional care or sense of safety the individual provides. For example, in AAT Matter No. 2004/337, Jenny, who was married between 1959 and 1970:

...separated from her husband in 1969 or 1970 after an extremely violent marriage and went into Department of Housing accommodation with her three children after initially staying with her sister. She is now 66 years old. (AAT Matter No. 2004/337 [4])

Jenny shared the cost of remaining in her housing commission home after her children left with her alleged partner to avoid being moved into smaller apartment accommodation. The AAT decision was about whether they were a couple. When Jenny's daughter was interviewed in the AAT decision:

She called the contention that Jenny and [Alleged Partner] are in a marriage-like relationship “ridiculous”. She said her mother does not want a relationship, having been married to a very violent man. She said she has seen her mother with a broken jaw, ribs and nose. She saw her father pull a rifle on her mother and described him as a violent drunk. (AAT Matter No. 2004/337 [37])

The AAT decision acknowledged this “has greatly influenced her view of marriage and relationships with men” (AAT Matter No. 2004/337 [52]) and the decision was that they were not a couple according to the Act.

*Violence from adult children*

A further situation specific to older women involved in AAT decisions in the context of domestic violence emerged where it was not the current alleged partner who was violent, nor an ex-partner, but a grown child or extended family member. For example, in AAT Matter No. 2006/725, Robyn had custody of her grandchildren, but was subjected to violence and threats from the children's father — her son. The son was also accused of sexual abuse of the children. Although Robyn and her husband James had never divorced, they

had considered themselves separated for many years and the marriage over. According to a social worker's report included in the AAT decision, the need to protect Robyn and her grandchildren from her son's violence “has emphasised [Alleged Partner's] need to reside in the home” (AAT Matter No. 2006/725 [23 (b)]). The protection that James provided for Robyn was considered evidence for their possible continued couple relationship according to the couple rule. This type of family violence overlaps into the literature on elder abuse (see for example ALRC, 2017; Kaspiw, Carson, & Helen, 2016). However, more research is needed to account for the specific intergenerational context of grandparents caring for grandchildren with abusive parents.

*Intersectionality*

Of the women in the sample of AAT decisions that involved domestic violence who were identified as older women, three were also identified as CALD women, two were identified as women living in rural or remote areas, and two as women with disability. Two-thirds (four out of six) of the older women identified in the sample were also identified with some other category. Perhaps this reflects how experiences of domestic violence compound other types of disadvantage over the life course (Ramsey-Klawnsnik & Heisler, 2014). The high level of intersectionality among older women in the sample corresponds with Cortis and Bullen's (2015; 2017) finding that women who experience violence are more likely to go on to experience poverty and disability after the abusive behaviour has ended.

**Women with disability**

Women with disability were identified in the AAT couple rule decisions that involved domestic violence by being or having been a Disability Support Pension (DSP) recipient, or through mention of long-term illness, sickness benefit, depression, anxiety or post-traumatic stress disorder. Of the AAT decisions sampled, 26 of the 70 (37%) were identified as women with disability. This is the second most frequently represented priority population group, after rural and remote women. That women with disability are highly represented in the sample is not surprising, as studies have repeatedly found that women with disability are more likely to experience assault than women without disability (Frohman, 2014).

*Dependent on perpetrator for care and support*

A situation specific to women with disability at the intersection of domestic violence and the couple rule emerged in AAT Matter No. 2011/23, where Mary had taken out a Violence Restraining Order against her ex-partner and father of her children. However, Mary also suffered from a number of psychological issues as well as renal issues, which meant that she often found it difficult to care for her children on her own. Mary did not have an extended family network that she could ask for help:

...no siblings or even close friends, so her only recourse was to ask her estranged husband to help with the children, because she knew that they would be put in foster care otherwise. (AAT Matter No. 2011/23 [44 (f)])

Indeed, this need for support was identified by her doctor in the AAT decision:

I believe she can care for her children as a full-time parent in her current state, however she is in need of significant support. Most of this support comes from her husband [Perpetrator]. In the past she has repeatedly told me she has needed her husband [Perpetrator] even though he does not live with her. They have been separated for some years but [Perpetrator] continues helping out at home whilst she was dealing with her anxiety and depression. (AAT Matter No. 2011/23 [43])

Unfortunately, this meant that the perpetrator had “lived at [her] places quite a lot” because she had been “sick quite a lot”, which caused complication with the couple rule (AAT Matter No. 2011/23 [28]). This placed Mary in a position particularly vulnerable to the perpetrator. However, this was not considered a special condition when applying the couple rule and Mary was required to repay the full amount of debt incurred from claiming the single rate of payment.

*Intersectionality*

Of the 26 women in the sample of AAT decisions that involved domestic violence who were identified as having disability, 16 were also identified with one other category, and three were identified with two other categories. More than 70 percent

of women with disability identified in the sample were also identified with at least one other category (19 out of 26; 73%). This reflects research that identifies women with disability as often suffering other forms of disadvantage (see Grant, 2017).

Of the women involved in an AAT couple rule decision in the context of domestic violence who were identified as having disability, nine were also rural or remote women. Six of the women with disability were from a CALD background, and two women had been incarcerated. One woman with disability was also categorised as an older woman.

*CALD women with disability*

A particular theme that emerged in the AAT decisions was the intersectional relationship between CALD women and women with disability. In particular, the challenges experienced by CALD women who required care for themselves and, due to their illness, also required support to care for children but who were isolated from their family. Hence the traditional family support that a woman might rely on was not available. Reliance on a previously violent ex-husband was a way to obtain the needed support. This occurred in AAT Matter No. 2011/78:

My wife Michelle is unwell and suffers from severe migraines that are getting worse during her pregnancy of our fourth child. When she suffers the migraines she is unable to use her arm her leg and her speech is affected as well. She has given me two letters which I have asked to be attached to this statement so that Centrelink will understand that she is too unwell to care for our two girls that she has in her care full-time and our son when he visits her. She has no family in Australia to move in and help her care for herself and the children. She has asked that I move back in to...to care for her and our children until after the baby is born and her migraines are either better or less debilitating. We have been separated since 2005 and when she has had the baby and is well enough we will travel to...her place of birth to stay with her family to help sort out our relationship. (AAT Matter No. 2011/78 [23])

This care and reliance was interpreted as an indication of being a member of a couple. Further, returning to her home country to access family support was blocked by her alleged partner:

I was struggling to handle looking after a small baby, I had no family support and I was still experiencing severe migraines and other symptoms.

At the same time the tension and conflict between myself and the Applicant was increasing.

I therefore decided at the end of 2001 that the Applicant, our son and I should all return to...The Applicant however refused to do so. He is originally from...and was involved in an opposing political party there and he therefore felt it would be unsafe to go back to the region. (AAT Matter No. 2011/78 [14-16])

This resulted in Michelle being further dependent on the care provided by the perpetrator. She felt she had no option but to depend on him:

Asked why they did get back together in October 2008, she said that she was exhausted and tired and needed someone to look after her and that she “pressured” him to return to look after her because he is the only person she has in Australia. (AAT Matter No. 2011/78 [46])

In addition, Michelle experienced post-natal depression but “refused to see a psychologist because of “shame” and “cultural reasons” (AAT Matter No. 2011/78 [31]. This further intensified her level of disability and her dependence on aid from her alleged partner to care for her children:

I went to see a doctor who suggested that I see a psychologist however I was reluctant to do so as in my culture there is a large stigma attached to mental health disorders and the idea of seeing a counsellor or psychologist. (AAT Matter No. 2011/78 [11])

Michelle’s situation demonstrates how intersectional position can build complex layers of disadvantage. As a woman with a disability Michelle needed extra support to care for her children. Michelle’s isolation as a CALD woman with

no family in Australia meant that she needed to rely on the support of her ex-partner despite his violence towards her. Simultaneously, Michelle felt shame for her illness for cultural reasons and refused treatment. At the intersection of the couple rule and domestic violence, these layers of intersectional disadvantage are further compounded. The support the perpetrator provided was interpreted as an indicator of a continual relationship. As such, Michelle and the perpetrator were considered to be a couple and she was asked to repay the Parenting Payment that she received since their separation. Any economic disadvantage that Michelle had in seeking independence has now been further hindered by being made to repay a social security debt.

#### Women who are, or have been, incarcerated

Women who are, or have been, incarcerated were identified in the AAT couple rule decisions that involved domestic violence by a reported prison sentence. Of the AAT decisions sampled, three involved women who are, or have been, incarcerated (4%). All three of the women were incarcerated for social security fraud, and all specifically for couple rule violation. For example, in AAT Matter No. 1995/341:

On 7 April 1993 the applicant was convicted, following a plea of guilty, in the District Court of Western Australia of the offence of defrauding the Commonwealth, contrary to s.29D of the *Crimes Act 1914*, in the amount of \$45,176.40, and was sentenced to 3 years’ imprisonment, to be released after 8 months upon entering into a recognisance in the sum of \$1,000.00 to be of good behaviour for a period of 28 months. (AAT Matter No. 1995/341 [16], italics added)

#### *Doubly punished*

In AAT Matter No. 1995/341, Victoria appealed the debt at the AAT, after serving a sentence for social security fraud. The decision that Victoria was a member of a couple was affirmed but the debt was written off. This in itself is concerning as Victoria had already served a sentence for couple rule fraud, and was then expected to fight to avoid repaying the debt through the AAT. Victoria has effectively been doubly punished — once by the criminal courts, and then again through administrative law.



*Couple rule is complicit in criminalising the victim/survivor of domestic violence*

The AAT decision involving Victoria is further concerning. First, the relationship was particularly violent. Victoria had claimed Widow's Pension in 1971 on the grounds that her husband had deserted her (this was common reason for a claim in 1971).<sup>24</sup> Victoria met her alleged partner and perpetrator after this desertion. However, the new relationship was unsafe from the early days:

The applicant said that, about six months after she began living with [Perpetrator] she realised that she did not want to stay with him because he was very possessive and very jealous. She added that he was physically violent towards her, at least on a monthly basis, and that he once tried to strangle her with an electrical cord. She said that he threatened to commit suicide if she left him. Later, after their two children had been born, he threatened that, if she were ever to leave with the children, he would kill the children, her, and her other two children. She said that, because she was aware that such family tragedies had occurred, she took his threats seriously. (AAT Matter No. 1995/341 [19])

Victoria did leave in 1989, after which time she became aware that he had been sexually abusing her daughter:

The applicant also told the Tribunal that, after she and [Perpetrator] separated in December 1989, she became aware that he had been sexually abusing her daughter... and had threatened to kill her and the other children if she [daughter] told anyone about this. (AAT Matter No. 1995/341 [21])

The pattern of violence and control that permeates the domestic violence literature is manifest in this AAT decision (Stark, 2007). In the 6 years since leaving her partner, Victoria had

<sup>24</sup> Various payments were available to women in various situations with the suite of Widow's Pensions in 1971. According to Bond, Devereux and Wang (2001), p. 1: "Widows' Pensions were paid from 27 July 1942 (under the *Widow's Pensions Act 1942* (Cth)). They comprised classes A (women with dependent children), B (widows 50 years of age or more without dependent children) and C (younger widows without dependent children, for a maximum of 26 weeks) and, from 8 July 1947 until 1 March 1961, class D (for women 50 or more years of age with dependent children where the husband was imprisoned)." In 1968, this was extended to "helping mothers of families without a breadwinner (such as deserted wives or the wives of prisoners) where they were ineligible for a Widow Pension".

become financially independent and the head of her family. She had re-built her life and the lives of her children. Access to social security payments probably played an important role in this transition. However, many years later she had been incarcerated for claiming social security payment to allow independence from her very violent abuser and to facilitate attempts to leave him. It seems that the couple rule was complicit in criminalising the victim/survivor of domestic violence in this decision (see Sleep, 2016).

*Re-traumatisation*

Second, the AAT decision was made in 1995, but referred to a relationship and evidence from the early 1970s. In this process, the victim/survivor and her children disclosed details of their abuse at the AAT. This included disclosure from Victoria's daughter about her step-father's sexual abuse:

...the daughter of the applicant from her marriage to [First Husband] told the Tribunal that they spent 16 years with [Perpetrator] in a "very unhappy and scared environment" in which she and the other children were never allowed to have a relationship with the applicant or to have a proper social life with friends. She said that she had been sexually abused as a child by [Perpetrator] but that, because of his threats to kill her and the other children, she did not tell the applicant about this until after the applicant had finally left him. She added that, in the last 6 years that they have been away from [Perpetrator] they had become a family and had been able to function and communicate in a way that they never could while they were living with him. Ms ....'s evidence was then discontinued owing to her distress. (AAT Matter No. 1995/341 [29])

The re-traumatisation experienced by the daughter is clear. There is no indication of any counselling support available at the AAT for the daughter or other family members. Further, the daughter was required to disclose such distressing details before the AAT in a couple rule decision in order to defend her mother against paying a debt — an infringement that her mother had already paid for through her incarceration.

### Lesbian, bisexual, intersex and transgender women

The indicators for identifying lesbian, bisexual, intersex and transgender women in the AAT couple rule decisions that involved domestic violence were the disclosure of a same-sex relationship, and/or self-identifying as lesbian, bisexual, intersex and/or transgender. Of the 70 AAT decisions sampled, only two were identified as involving lesbian, bisexual, intersex and/or transgender women (3%). This is, along with Aboriginal and/or Torres Strait Islander women, the least frequently identified priority population group in the AAT decisions sampled.

#### *No same-sex relationship under AAT review in sample*

In both of the identified decisions, the relationship was a same-sex relationship between women. However, neither of these same-sex relationships reported domestic violence, nor was the same-sex relationship the alleged couple relationship under review in the AAT decisions. It is interesting to note that all alleged couples in the AAT decisions were heterosexual. This is despite s. 4(3) of the *Social Security Act 1991* (Cth) applying to same-sex couples since the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws — General Law Reform) Act 2008* (Cth). More lesbian, bisexual, intersex and/or transgender women might have been present in the decisions sampled, but were not identifiable from the data source.

#### *Secrecy and past violent relationship*

Of the information available in the AAT decisions that involved lesbian, bisexual, intersex and transgender women, there was very little mention of diverse sexuality and/or sexual identity. In one decision, AAT Matter No. 2004/785, the relationship with the alleged partner according to the couple rule was argued to be an attempt to both obscure the same-sex relationship from the woman's family and community and to provide some deterrence against harassment from a past-partner. However, excepting this case, this priority population group is remarkable for its absence in the AAT couple rule decisions that involve domestic violence. This might reflect that for much of the sample period, from 1992 until 2007, same-sex couples were not considered a couple according to s. 4(3) of the *Social Security Act 1991* (Cth). However, this leaves a period of 10 years during which this group could be represented in AAT couple rule decisions that

involve domestic violence. It is reasonable to assume that this is sufficient time for at least one member of this priority group to be involved in an AAT couple rule decision that involves domestic violence. Further, the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws — General Law Reform) Act 2008* (Cth) does not explain the absence of intersex or transgender women in the sample.

Little is known about lesbian, bisexual, intersex and transgender women and domestic violence; however, the sense of distrust and isolation experienced by women in this category, particularly in the context of domestic violence, has been well documented (see for example Donovan & Hester, 2014). It could be that, like Aboriginal and Torres Strait Islander women, women who identify as lesbian, bisexual, intersex or transgender have experienced past mistreatment by public institutions. As a consequence, they may distrust public institutions such as the AAT, and consequently be less likely to complain or seek to appeal a decision.

#### *Intersectionality*

Of the two women who were categorised as lesbian, bisexual, intersex and/or transgender, one was also categorised as a woman with disability. Joan's identity as a woman with disability is discussed to a greater extent in the AAT decision than her sexuality, as the focus of the AAT decision was an overpayment of DSP, Parenting Payment and Family Tax Benefit. Further, disability was also a focus of Joan's argument for the incurred debt to be waived; she focuses on "her physical disability, namely, ongoing back pain which renders her incapable of working, and her mental disability, namely, ongoing depression" (AAT Matter No. 2008/279 [96]). There was no argument for a waiver based on Joan's identification as a lesbian, bisexual, intersex or transgender woman, despite the fact the Act did not consider same-sex couples during the period the debt was accrued. Indeed, it seems that even when disclosed, this aspect of a woman's identity tends not to be a focus in AAT couple rule decisions that involve domestic violence.

### Women living in rural and remote areas

The indicators for women living in rural and remote areas were town or address names located outside metropolitan

areas; mention of rural objects such as “dams” or “paddocks”; and mention of the population size of towns or of limited housing availability in a town due to its small size. Twenty-eight of the 70 AAT decisions sampled (40%) involved the woman living in rural and remote areas for at least one period mentioned in the decision.

The frequency of women living in rural and remote areas in the sample was greater than expected. This is because the proportion of the general Australian population living in metropolitan areas is greater than those living outside them. Indeed, the 2016 census revealed that more than two-thirds of Australians lived in a capital city (ABS, 2018b). However, there may be some characteristics of rural and remote life that render women who are experiencing domestic violence particularly vulnerable to the couple rule should they seek social security assistance. For example, the sometimes limited housing available in very remote locations means that sharing accommodation may be necessary; however, this could be interpreted as a couple living together. For example, in AAT Matter No. 2002/1206, Jody resided in “a very small community with not much accommodation to choose from. As a result they [the alleged couple] have resided in the same house for most of their stay, but with separate rooms” (AAT Matter No. 2002/1206 [8]). This was used as evidence to demonstrate the two people were a couple.

#### *Geographical isolation and community pressure*

Geographical isolation can make a domestic violence victim/survivor particularly vulnerable, as there are no near neighbours to report incidences to or to ask for help if needed. For example, in AAT Matter No. 2002/1206, Jody:

had just separated from her then de facto husband and felt insecure in her home as it was in an isolated area of the town. Her former partner would return to her home now and then and this concerned her, as he had been violent towards her in the past. (AAT Matter No. 2002/1206 [8])

In this decision, geographical vulnerability had prompted Jody to move into town. Community pressure then further compounded her feelings of vulnerability. In particular, Jody:

...was also being harassed by male persons who would call into her house late at night and demand sexual

favours from her. She mentioned these concerns to [Alleged Partner], who had been a friend of reasonably long standing, and he suggested that she might like to move into his residence. [Alleged Partner] lived with his stepfather and his residence was close to her home. She thought that arrangement would be more secure. She moved into that residence for that reason. (AAT Matter No. 2002/1206 [8])

In this example, the geographical isolation of the victim’s/survivor’s home as well as community harassment led to Jody’s decision to move into a male friend’s home to feel safe. It is this male friend that Centrelink decided Jody was in a couple relationship with. Jody appealed the resulting \$30,000 debt at the AAT, but was found to be a member of a couple.<sup>25</sup> In this decision, the act of a victim/survivor seeking safe housing and the means to support herself when separating from her husband led to a couple rule violation and a Centrelink debt.

While a similar dynamic can occur in metropolitan areas, the geographical isolation and small size of communities in rural and remote areas make rural women particularly vulnerable to this scenario. In particular, Wendt, Chung, Elder, Hendrick and Hartwig (2017) found that rural women tend to rely heavily on informal social networks for help, when they have them available. Further, while studies have found that social isolation in rural and remote areas can build close-knit communities, it can also contribute to minimising violence as a private matter and exerting community pressures to conform to rigid gender norms (Bhandari, Bullock, Anderson, Danis, & Sharps, 2011; Eastman, Bunch, Williams, & Carawan, 2007; Kaur & Garg, 2010; Wendt, 2009; Wilson-Williams, Stephenson, Juvekar, & Andes, 2008). For Jody, the combination of these factors resulted in her being particularly vulnerable to the couple rule when seeking the safety of her informal social network to protect herself from community harassment post-separation.

<sup>25</sup> Please note that Jody had already successfully appealed the original Centrelink decision that she was a member of a couple at the SSAT. The Department lodged an appeal of the SSAT decision to the AAT, and were successful (AAT Matter No. 2002/1206).

**Table 5** Indicators of common themes among AAT couple rule decisions that involve domestic violence between the alleged couple

Thematic category	Indicators
<i>Financial abuse</i>	Denying woman enough money for basic needs; taking woman's money or jewellery without permission; forging woman's signature; causing financial hardship; interfering with woman's employment; forcing woman to apply for payments she is not entitled to; forcing woman to commit fraud.
<i>Control over housing/living arrangements</i>	Woman leaving home after violent threats or attack; woman too afraid to leave; stalking by perpetrator after woman moved away.
<i>Control over information flow</i>	Using woman's home as mailing address even if not residing there: stating woman is perpetrator's wife or de-facto in official documents without her knowledge or permission; presenting a different account to the woman's of relationship at AAT hearing; using passports to abduct children.
<i>Use of domestic violence and hospital records by decision-makers</i>	Domestic Violence Order (or similar); police intervention reports; Family Court reports; hospital records.

### *Intersectionality*

Of the women in the sample of AAT decisions that involved domestic violence who had lived, or were living, in a rural or remote area, one was identified as belonging to three other priority population groups, and 14 as belonging to two other groups. Thirteen AAT decisions involved women who could only be identified as living, or having lived, in a rural or remote area. This means just over half of the rural or remote women in the AAT decisions sampled identify with another priority group. Of these, it was most common for rural or remote women to also be identified as a woman with disability (10 women). The next most frequently categorised group within the rural or remote sample was CALD women (three), while two women were also categorised as an older woman, and one as an Aboriginal and/or Torres Strait Islander woman.

### **Common themes of the AAT sample of decisions**

Some common themes emerged throughout the full sample of AAT decisions that are particularly pertinent to the context of domestic violence and the couple rule. These are:

- financial abuse;
- control over housing or living arrangements by the perpetrator;
- control over information flow by the perpetrator; and;
- the use of domestic violence records for decision-making.

Key terms for indicators of each of these categories are shown in Table 5. Since most of these themes are elaborations on various types of abuse and how they manifest in alleged couples through the couple rule, only those decisions where the abuse was perpetrated by the alleged partner were considered. Fifty-nine out of 70 AAT couple rule decisions involved abuse perpetrated by the alleged partner (84%).

Cameron (2014) has identified that legal practitioners tend to focus on incidences rather than the context of power and control at the core of domestic violence. As the AAT judgements are documents of administrative decision-making, their focus also tended to be on incidences. However, in analysing the decisions, an effort was made to identify the context of power and control. This was particularly important for the information-control indicator. A perpetrator simply using the victim's/survivor's address as his mailing address was insufficient to be included in the sample; rather, the action needed to be part of a violence and control context. The frequency of each of the common themes throughout the AAT couple rule decisions that involved violence perpetrated by the alleged partner are displayed in Table 6.

The use of domestic violence and hospital records by decision-makers is the most frequently identified theme among the AAT couple rule decisions that involved domestic violence. The other categories are relatively evenly represented among the AAT decisions. Details of each of these common themes will be considered in turn.

**Table 6** Frequency of common themes across AAT couple rule decisions that involved violence between the alleged couple

Thematic category	Frequency
Financial abuse	24
Control over housing/living arrangements	27
Control over information flow	25
Use of domestic violence and hospital records by decision-makers	41

### Financial abuse

Financial abuse was identified as:

- denying a woman sufficient money for basic needs;
- taking a woman's money or jewellery without permission;
- forging a woman's signature;
- causing financial hardship;
- interfering with a woman's employment;
- forcing a woman to apply for payments she is not entitled to, and/or forcing her to commit fraud (Cortis & Bullen, 2015, p. 6; Littwin, 2012; Sanders, 2007).

Not providing or sharing economic resources with a partner to the extent that basic needs were not met was a factor in AAT Matter No. 2006/792. In this decision, Ava was required to provide for the two grandchildren whom she has custody of, without financial support from her alleged partner (ex-husband and perpetrator):

‘...the applicant has sole responsibility for two children [whom the] estranged husband refuses to have anything to do with’. He pointed out that the Family Court had ordered that the applicant had sole responsibility for the children’s ‘...day to day welfare, care and development’ and also contended that [Perpetrator] had ‘...refused to adequately provide...’ for them. (AAT Matter No. 2006/792 [51])

A perpetrator's control of his alleged partner's finances emerged in AAT Matter No. 2001/282. In this decision, Karen, who worked at a school, explained that her perpetrator intimidated her to allow him to access her bank account after separation:

During the time when I was trying to enforce a separation from [Perpetrator], I changed my bank account at the St George Bank into joint names so that [Perpetrator] could also use the account. It was at [Perpetrator's] insistence that I did this. He said that he would contact the School about my past and made other threats about what he would do if I did not cooperate...I did not question why he wanted the account. (AAT Matter No. 2001/282 [8])

Karen's alleged partner and perpetrator then proceeded to take her money from her account and became violent and aggressive about doing so. Karen attempted to adapt to his behaviour to try to prevent his taking her wages:

As soon as he had access to this account he would often take all my money from the account before I had a chance to withdraw it. He would get violent and aggressive about money as he needed it for drugs. Most of the time I did not challenge him because I did not want a scene in front of the kids. On at least one occasion I went to the main office of the Department of School Education to get a counter cheque from them so [Perpetrator] could not get it. (AAT Matter No. 2001/282 [8])

Karen was found to be a member of a couple by the AAT, and was asked to repay the resulting debt.

Similarly, in AAT Matters No. 2007/1320 and No. 2007/1321 the perpetrator forged Sandra's signature on financial documents. This is particularly important in the context of the couple rule as these documents were used as evidence of the financial aspects of a relationship:

...in relation to the purchase of a Toyota motor vehicle, the applicant agreed that he caused his wife's name to be recorded as the co-borrower but said that a representative of the finance company forged her signature. He agreed that he knew that her signature had been forged by that person and said that he allowed it to occur because *I want to buy the vehicle, to get the finance*. (AAT Matter No. 2007/1320 [28])

Sandra was found to be a member of a couple by the AAT and asked to repay the resulting debt (AAT Matter No. 2007/1321 [71-77]).

The denial of finances to care for children and the controlling of a partner's finances through forging financial documents are patterns of financial abuse that are reflected in the literature (see for example Cortis & Bullen, 2016; Costello, Chung, &



Carson, 2005). However, the way these patterns of abuse manifest in the context of the couple rule is twofold. First, the denial of financial support can force a woman to seek other means of support such as social security payment, even when she is still in the relationship. Additionally, the information trail left by perpetrators as they control a woman's financial resources, such as forging their signature on documents, can be used as evidence for a financial commitment according to the couple rule. This can result in denial of social security payment and/or debt (or even imprisonment, if criminally prosecuted), further entrenching the vulnerability of women who experience financial abuse.

### Control over housing and living arrangements

The perpetrator's control over housing and living arrangements also emerged as a general theme in the AAT couple rule decisions that involve domestic violence. This was present in 27 out of 59 (46%) of AAT couple rule decisions that involve domestic violence between the alleged couple. This is a particular concern in the context of the couple rule and domestic violence: the woman's place of residence and whether the perpetrator lives in the same house comprise important evidence in determining the nature of the household criteria of the couple rule (*Social Security Act 1991* (Cth), s. 4(3)). This can manifest as a specific form of financial abuse. For example, in AAT Matter No. 2006/906, Jasmin's alleged partner and perpetrator used a joint property as security for a business loan without her knowledge or consent.

The link between financial abuse and control of accommodation is particularly pertinent here. Records of loans for joint properties, and records of habitation in those properties were used as evidence of a relationship and for calculating debt amounts. A tactic used by perpetrators across intersectional groups was to take out a loan in their partner's name without their knowledge or permission (AAT Matter No. 2006/906) in addition to refusing to leave the property or coercing the women into staying: "he threatened to kill himself if she did not return" (AAT Matter No. 2006/906 [27]). This meant that the woman needed to move from her own house to get away from the perpetrator, often to less appropriate accommodation. To escape the perpetrator, Jasmin moved from her three-bedroom home into her sister's house where she shared a bedroom with her son. The property she owned

with the perpetrator was larger and closer to school bus routes, so her daughter opted to stay with her father at that residence. The joint home loan and the period the perpetrator stayed at the property were all used as evidence for a relationship by Centrelink and in the AAT decision. Jasmin obtained help to cancel the loan but was further threatened and abused, exacerbating her depression:

She had a panic attack and went to hospital. She also went to the police. She got the loan cancelled. [Perpetrator] threatened her and insulted her on the telephone. She has seen counsellors and a specialist doctor and is taking depression tablets. (AAT Matter No. 2006/906 [76])

Since the residential address of both members of the alleged couple is important for the "nature of the household" criteria of the couple rule (*Social Security Act 1991* (Cth), s. 4(3)), controlling a woman's living arrangements is effectively a form of systems abuse (Cameron, 2014). Perpetrators can refuse to leave despite being asked to, or come and go as they please against the wishes of the woman, and this can be used as evidence of a relationship for social security purposes. In this way, the perpetrator can cause the woman to fall foul of the couple rule and have her payment cut, be forced to repay a Centrelink debt or, if criminally prosecuted, be imprisoned. This perpetuates the perpetrator's control over the woman and the woman's vulnerability to institutional systems.

### Control over information flow

Another experience in the AAT sample that was common across all intersectional groups was the perpetrator's control of information flow — or the data double<sup>26</sup> of their alleged partner. This occurred in 25 out of 59 (43%) of AAT couple rule decisions that involve domestic violence between the alleged couple. For example, in AAT Matter No. 2001/282, Karen's perpetrator assumed control over many aspects of her life, including her mail:

This happened with [Perpetrator] with many, many things in my life. He controlled everything. He controlled my Grace Bros card. He controlled my bank accounts. He controlled the mail that came in. He controlled the money in the house. He just — he's a bully, all right? (AAT Matter No. 2001/282 [17])

<sup>26</sup> Or electronic information presence (see Haggerty & Ericson, 2000)



A perpetrator could also use a woman's address as his postal address. This could be used as evidence that he was residing with his alleged partner in the "nature of the household" couple rule criteria (*Social Security Act 1991* (Cth), s. 4(3)). For example, in AAT Matter No. 2007/1321:

The husband said that he used the...address for the purposes of having his mail delivered. He was therefore required to attend those premises on a regular basis to collect it. He did have a post office box which he disclosed on some application forms found within the T-documents but said that he preferred to have mail delivered to the... address because he could not always attend the post office during business hours. (AAT Matter No. 2007/1321 [54])

These two strategies of control — one which controls access to information, such as mail, and the other which controls the formation and flow of that information, such as by showing his address to be the same as the woman's — are both particularly concerning in the context of the couple rule. Intimate records of day-to-day living are used by decision-makers to create an image of the alleged couple's finances, household, sex life, commitment and social life, to decide if they are a couple. To control this information flow and its footprint can render a woman vulnerable to a negative social security outcome under the couple rule.

#### AAT use of domestic violence records to indicate a relationship

Domestic violence and hospital records were used by AAT decision-makers in couple rule decisions. Most domestic violence records were police incident reports, although some were DVOs and other court records. The records were either collected by the Department of Social Security, under the power given in Part 5 of the *Social Security Administration Act (1999)* (Cth), to justify their decision, or provided by the alleged member of a couple. Forty-one out of 59 (69.5%) of AAT couple rule decisions that involved domestic violence between the alleged couple considered domestic violence or hospital records. Twenty-eight out of 59 (47%) involved domestic violence records, and 19 (32%) used hospital records. The type of information admitted, and how it was used, varied. For example, police records noting the nature of the relationship during domestic disputes were used as evidence in couple rule decisions. This is stated explicitly in AAT

Matter No. 2007/1321 when referring to police involvement in a domestic dispute:

the admission by the wife to Police after the date of alleged separation of being in partnership with her husband... point[s] to them being members of a couple. (AAT Matter No. 2007/1321 [69])

And also in AAT Matter No. 2011/665:

Hospital records and the police DVO Information Sheet indicate that they held themselves out as a couple. (AAT Matter No. 2011/665 [37])

In a further variation, domestic violence records including police incidence records and hospital records were used as evidence of the perpetrator's address — even after the couple had allegedly separated:

The frequency of the hospital admissions by the wife as a consequence of assault by her husband, the times of her admissions and the frequency of attendances by police all point to him being at those premises on many occasions. (AAT Matter No. 2007/1321 [54])

In this decision, not only is the residential address of the perpetrator linked to the victim's/survivor's through being at location of the assault, but the frequency of the assaults is used as an indicator of the quantity of time the perpetrator spent at the victim's/survivor's home. These details were used as evidence of a relationship according to s. 4(3) of the *Social Security Act 1991* (Cth). In addition, the phone numbers given at the hospital at the time of the assaults were used as further evidence of the perpetrator residing with his alleged partner (AAT Matter No. 2007/1321[15], [59-61]).

This use of domestic violence and hospital records means that, effectively, evidence of domestic violence collected to enhance women's safety is used to substantiate social security debts through the application of the couple rule. In other words, the information trail that the experience of violence has left, including women's attempts to obtain help to ensure their safety, were used to deny social security payment, or to later impose debts and criminal sanctions. Since social security payment is vital for many women to live independently from the perpetrator, the couple rule uses domestic violence records

to entrap and punish domestic violence victims/survivors for reporting the violence they have experienced. This is not the intention of gathering this information.

The gathering and sharing of information about domestic violence is vital to a community integrated response to domestic violence where police, hospitals, schools and other institutions work together. Each of these institutions has guidelines about how to use this information, how to ensure the privacy of the victim/survivor and perpetrator, and using the information with the aim to do no harm. An example is the Queensland Department of Communities, Child Safety and Disability Services' *Domestic and family violence information sharing guidelines* (2017), which were developed by ANROWS. However, agreements and guidelines are specific to each of the state-based institutions. In contrast, Centrelink has powers through the *Social Security (Administration) Act 1999* (Cth)<sup>27</sup> to obtain information from third parties, including other Commonwealth, state and territory agencies.

This material is used by the AAT when it remakes Centrelink decisions, and is made publicly available in its reported decisions. This means that sensitive information collected by state-based institutions such as police and hospitals can be disclosed to the public through AAT reporting. Such disclosure poses a real risk to the safety of domestic violence victims/survivors and their being located by the perpetrator post-separation. This is particularly concerning as social security payment is vital to providing women with the means to become financially independent of their partner post-separation, particularly in the early stages of separation. Since women are at heightened risk of intensified violence and homicide while separating or recently separated, this is a very serious issue. Indeed, McKenzie, Kirkwood, Tyson, and Naylor (2016) found that half of the intimate partner violence homicides in their study were post-separation. Although recent separation is considered a risk factor for homicide by practitioners, not all separations in their study were recent. Hence, even decisions that deal with violent relationship from many years ago pose this risk.

### Priority groups cross-referenced with frequency of key thematic categories and outcomes

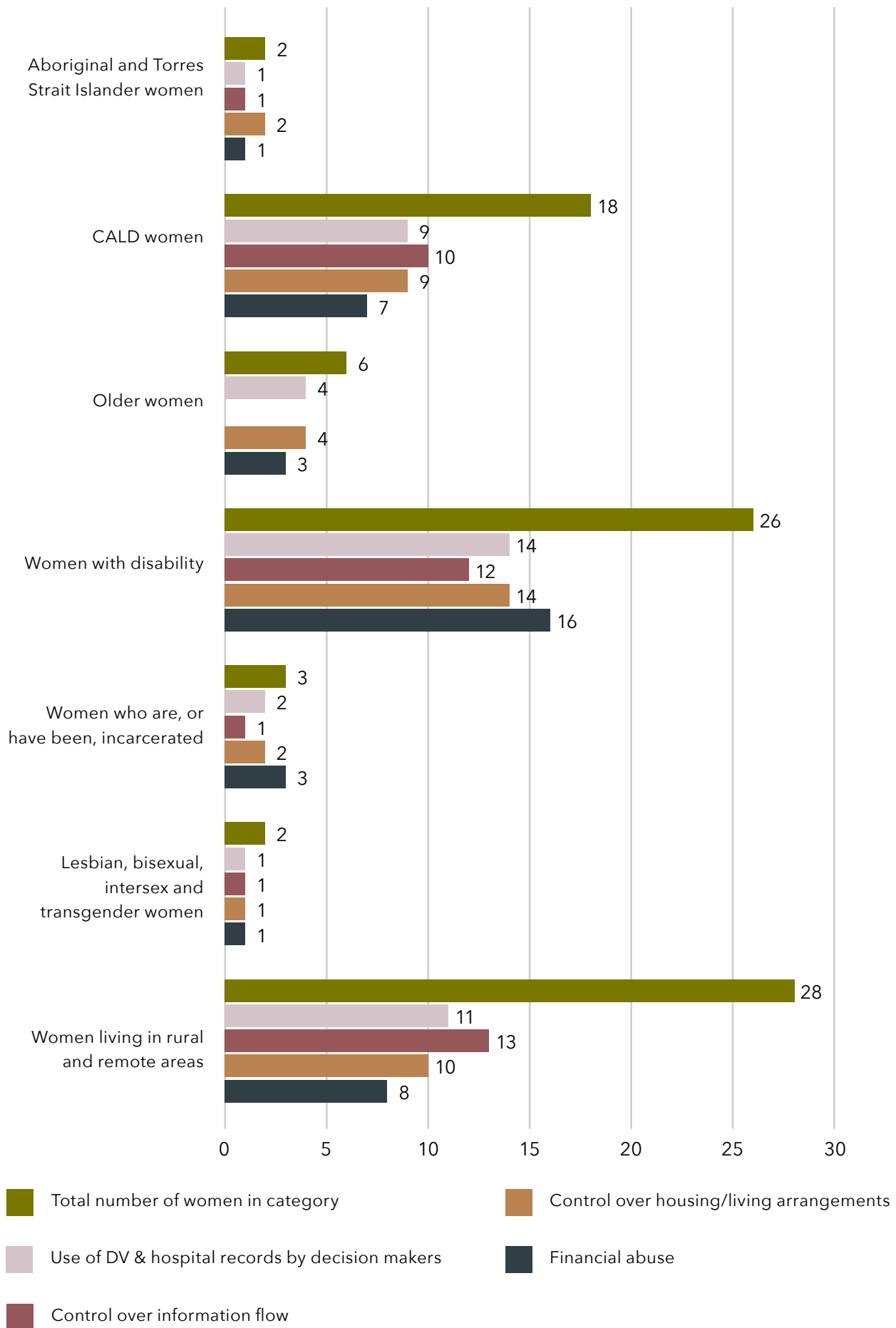
Figure 2 illustrates priority population groups cross-referenced with the frequency of key thematic categories across the AAT sample. It shows that all thematic categories are clustered around women with disability, women living in rural or remote areas, and CALD women. Women with disability are most frequently subjected to financial abuse, control over housing/living arrangements by the perpetrator, and the use of police and hospital domestic violence records in decision-making. Women living in rural and remote areas most frequently experience control of their information flow by the perpetrator.

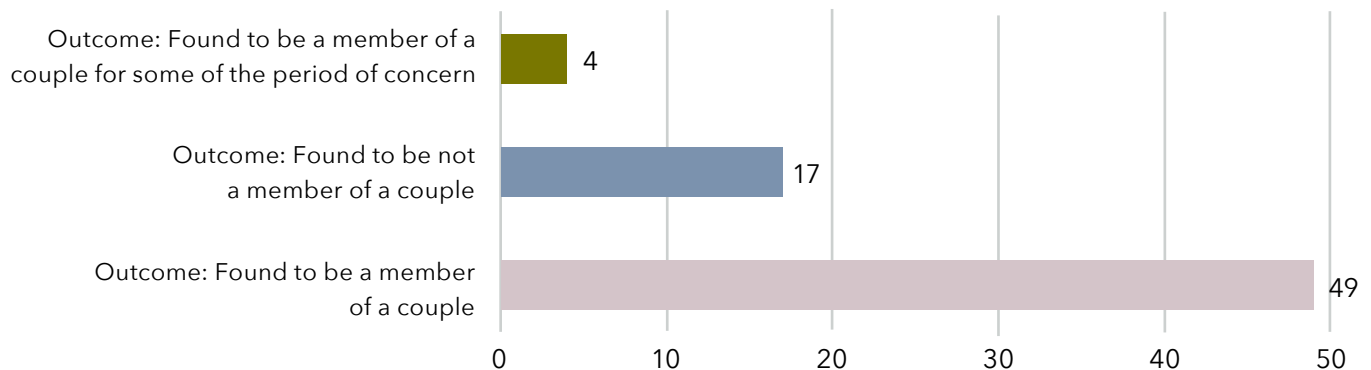
Figure 3 shows the outcome of couple rule decisions across the AAT sample. Decisions where a member of a couple was found, decisions where no member of a couple was found, and decisions that found a member of a couple for part of the designated period, are included. The figure demonstrates that a decision is almost three times more likely to find that the individuals are members of a couple (49), than not (17), in couple rule decisions that involve domestic violence. A small number of decisions found periods of being a couple and not being a couple in the relevant period (4).

Decision outcomes are cross-referenced with priority groups in Figure 4. Women with disability were most frequently found to be a member of a couple (16), women living in rural or remote areas were the next most likely (15), followed by CALD women (10). The decision-maker found special circumstances (s. 24, and ss. 1236/7) in a very small number of decisions across all categories, with a successful waiver of debt due to special circumstances under ss. 1236/7 most frequent for women with disability (5). Please note that these figures are frequencies, and it is possible for the same decision to be found a special circumstance according to both s. 24 and ss. 1236/7. This means that proportions of decisions cannot be distinguished from these figures. The figures do show, however, that the same groups of women who are most frequently subjected to financial abuse, control over housing and information by the perpetrator, and use of

<sup>27</sup> Specifically, *Social Security (Administration) Act 1999* (Cth), ss.191-195.

**Figure 2** Priority groups cross-referenced with frequency of key thematic categories across AAT sample



**Figure 3** Outcome of s. 4(3) couple rule decision across AAT decisions

police and hospital domestic violence records in decision-making, are also most frequently found to be a member of a couple according to the couple rule.

## Conclusion

In analysing the sample of AAT couple rule decisions that involve domestic violence, it was found to be usual for a social security recipient who is subject to a couple rule decision to be at risk of intersectional disadvantage. Further, the priority groups most frequently identified in couple rule decisions that involve domestic violence were women living in remote and regional areas, women with disability and CALD women.

In almost every sampled AAT decision, identifiable and locatable details about individuals were published. This is a serious violation of privacy for all involved and poses a safety risk to women who may be located by past perpetrators through this disclosure.

Common themes across the AAT decisions included:

- Financial abuse, control over housing or living arrangements, and control over information flow were exerted by the perpetrator.
- Police domestic violence and hospital records are used for decision-making, including for evidence of a relationship.
- Women with disability, women living in rural or remote areas and CALD women were found to be most frequently subjected to financial abuse, control over living arrangements and information flow by perpetrator.

Most AAT decisions that involved domestic violence found a couple relationship (43 out of 70), with women with disability most frequently found to be a member of a couple. Women living in remote or rural areas and CALD women were the next most frequent groups found to be a member of a couple.

This means that the same groups of women who are most frequently subjected to financial abuse, control over housing and control over information by the perpetrator, and use of police and hospital domestic violence records in decision-making are also most frequently found to be a member of a couple according to the couple rule.

Key findings from NZSSAA de facto decisions that involve domestic violence will be considered next.

## Domestic violence, social security law and the couple rule – a comparison with New Zealand

Although there are many similarities between the Australian couple rule and the New Zealand de facto rule that allow for meaningful comparison, there are some differences that need to be acknowledged. While the de facto rule is enshrined in legislation, as is the Australian couple rule, it does not have a legislated set of criteria like its Australian counterpart.<sup>28</sup> As such, the NZSSAA decisions are not reported in the same level of detail as the AAT decisions and criteria do not need to be weighed up in the decision-making process. Rather, the decision-maker can focus on the aspect/s of the relationship that they decide are most pertinent to the decision.

<sup>28</sup> Please see earlier in this report for an outline of the Australian "couple rule" s. 4(3) and Appendix C for relevant sections of the *Social Security Act 1991* (Cth). The de facto rule is expressed in s. 63 of the *Social Security Act 1964* (NZ). The relevant parts of the provision are:

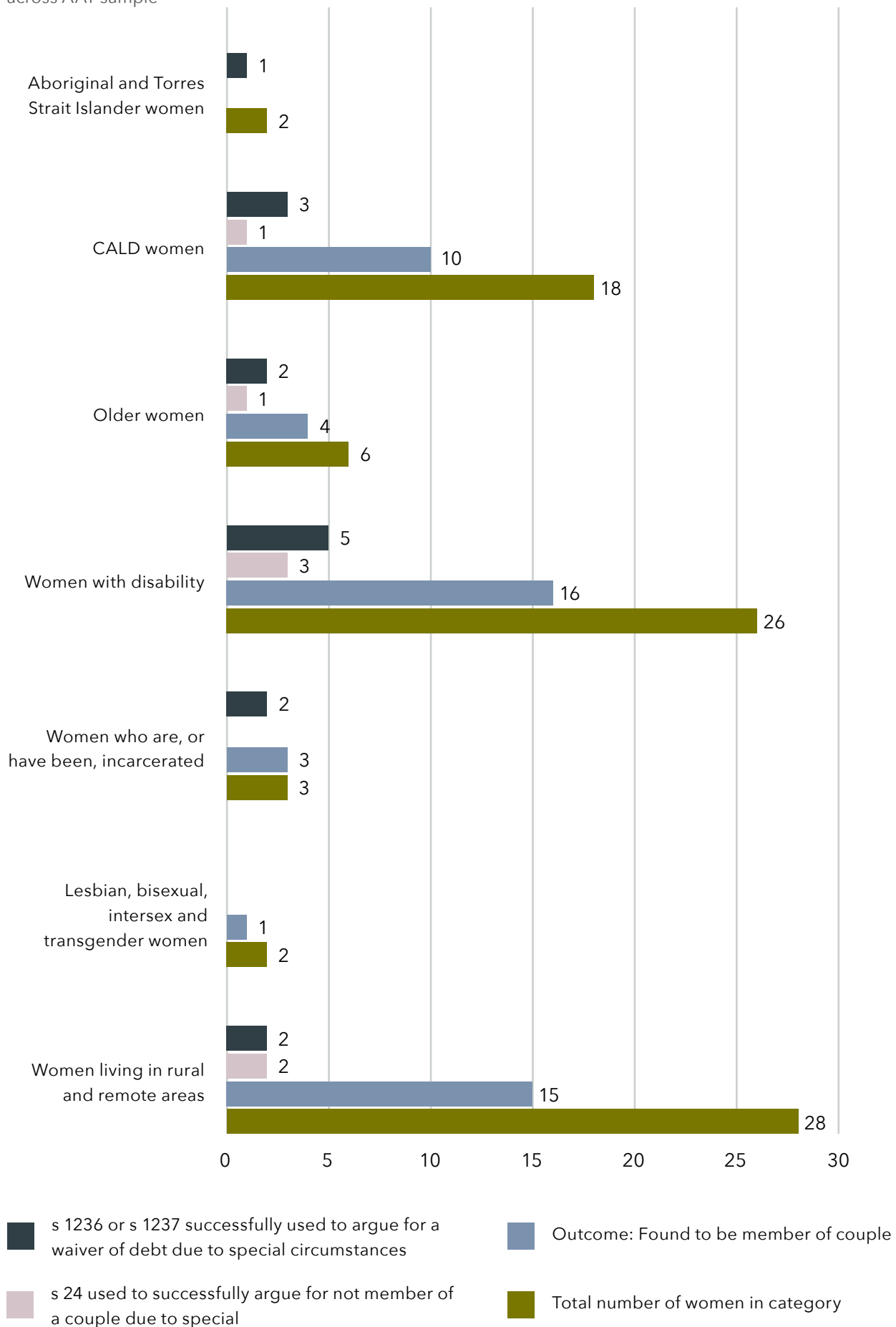
63 Conjugal status for benefit purposes

For the purposes of determining any application for any benefit, or of reviewing any benefit already granted...the chief executive may in the chief executive's discretion -

(a) regard as single any applicant or beneficiary who is married or in a civil union but is living apart from his or her spouse or partner:

(b) regard as married any 2 people who, not being legally married or in a civil union, have entered into a relationship in the nature of marriage...

**Figure 4** Priority groups cross-referenced with frequency of couple rule outcome and successful use of s. 24 and ss. 1236/7 across AAT sample



**Table 7** Indicators for each priority population group in NZSSAA de-facto decisions that involve domestic violence

Intersectional group	Indicators
<i>Indigenous women</i>	Identify as Māori or part of a Māori community; “only person in the whānau” (Māori extended family group).
<i>CALD women</i>	Personal history of immigration; use of interpreters; mention of language other than English spoken; born outside New Zealand; member of an immigrant community; refugee status.
<i>Older women</i>	Superannuation recipient; aged over 55.
<i>Women with disability</i>	Disability Allowance, Sickness Benefit, or Invalid’s Benefit recipient; mention of long-term illness, depression, anxiety, bipolar or post-traumatic stress disorder.
<i>Women who are, or have been, incarcerated</i>	Reported prison sentence.
<i>Lesbian, bisexual, intersex and transgender women</i>	Same-sex relationship disclosed; self-identify as lesbian, bisexual, intersex or transgender.
<i>Women living in rural and remote areas</i>	Mention of living on acreage; mention of keeping farm animals (e.g. horses).

The NZSSAA sample differs from the AAT sample in some further important ways. First, it is a much smaller sample than the AAT sample, at 19 decisions. This was expected due to the smaller population of New Zealand, which results in fewer NZSSAA decisions that involve domestic violence. Second, unlike the Australian sample, the NZSSAA sample does not contain identifiable information in its published decisions. As mentioned earlier, it is convention in the NZSSAA to obscure personally identifiable information. This is explained in NZSSAA Matter No. 2017/20:

The Appellant will be referred to in this decision as “the Appellant”, and the putative “spouse” will be referred to as “OCI”. It is not appropriate to disclose their identities, and for that reason only general information will be set out regarding locations and the like (except as necessary for the reasoning in the decision). For the same reason, the identity of the officers of the Ministry and other persons will not be disclosed in this decision. (NZSSAA Matter No. 2017/20 [6])

The third difference arises from this obscuring of identifiable information, which has implications for identifying priority population groups in the analysis. As explained previously, the categories identified for analysis were derived from the priority population groups identified in the ANROWS National Research Agenda (2014) as having particular vulnerabilities to violence. These were Aboriginal and Torres Strait Islander

women; CALD women; older women; women with disability; women who are, or have been, incarcerated; lesbian, bisexual, intersex and transgender women; and women living in rural and remote areas. Operationalising these categories so they can be used to analyse the NZSSAA decisions was difficult, and required some modification to adapt to the New Zealand context. The Aboriginal and Torres Strait Islander women category was modified to Indigenous women, and indicators that allow the identification of Māori women were used. It must be acknowledged that Aboriginal and Torres Strait Islander and Māori cultures and histories are unique, as are their experiences of colonialism. However, the experiences of Aboriginal and Torres Strait Islander and Māori peoples as First Nations people have some similarities. It is these similarities in relation to NZSSAA de facto decisions that involve domestic violence that are the focus here.

Other categories remain unchanged from the analysis of the Australian AAT sample. The process used was similarly fluid, since identification was dependent on indicators being available in the NZSSAA decision text. Hence, the indicators were derived from the text. Despite this fluid approach, to aid the reproducibility of this study, examples of indicators for each group are presented in Table 7.



**Table 8** Frequency of each priority population category in NZSSAA de-facto decisions that involve domestic violence

Priority population group	Frequency
Indigenous women	1
CALD women	1
Older women	0
Women with disability	8
Women who are, or have been, incarcerated	0
Lesbian, bisexual, intersex and transgender women	0
Women living in rural and remote areas	1

Since the NZSSAA contains de-identified information, there was much less opportunity to identify the population groups of the women involved in the NZSSAA de facto decisions who were impacted by domestic violence. As shown in Table 8, no older women, women who are or have been incarcerated, or lesbian, bisexual, intersex or transgender women were identified. This does not mean that they were not present in the sample, but that they could not be identified from the NZSSAA decision text. Just one Indigenous woman, one CALD woman and one woman living in a rural or remote area were identified. A particular challenge was geographically locating women when their residential address and town were obscured to prevent identification. The sample did disclose the payment that the woman had received and general health issues; eight women with disability were identified in the sample. It can be assumed, however, that the frequency of each of the priority population groups identified in the NZSSAA sample is an underestimate.

Intersectionality among the groups of women in the sample is difficult to discern due to the inherent limitations of the data. It can be assumed that any patterns discerned from this data are underestimates. The data does reveal one decision with an Indigenous woman with a disability; however, this is the only decision that involved a woman who was represented by more than one category. It can be assumed that this is an underestimate of the actual intersectionality in the sample.

## Intersectionality

### Māori women

Just one woman was identified in the Indigenous women category in the NZSSAA sample. She was identified by reference to whānau (Māori extended family group). Note, this is not a definite identification, as the term may also be used in communication by Pākehā (white) New Zealanders. However, a major concern of Janet was to prevent a child who had suffered extreme abuse from being denied their cultural

heritage by removing them from their extended kinship group. Thus, a dynamic potentially specific to Indigenous New Zealanders emerges. The case considers the incentive to present as a couple to the child protection authorities, to keep a child within the kinship group and prevent separation from culture. However, the decision also highlights how this can then complicate entitlement to social security payments that are needed to support the child. Although the records about whānau (kinship) care not intended to be used for social security assessment, they were used to assess the relationship status of Janet and her openly gay alleged male partner:

It is of significance that the records were not made in the context of determining whether the Appellant and OCI were in a relationship in the nature of marriage. The situation related to a small child who is related to the Appellant, and the Appellant was the only person in the whānau available to care for her. The situation was extreme, as there were serious concerns regarding the child's safety given the father's violent behaviour. (NZSSAA Matter No. 2017/20 [80])

However, as mentioned, it can be assumed that this is an underestimate of the actual number of Indigenous women in NZSSAA de facto decisions that involve domestic violence. Further research with another dataset is required.

### CALD women

Similarly, only one woman was identified in the CALD women category in the NZSSAA sample. She was identified by reference to being a refugee. Note, this cannot be considered a definite identification; identification within a particular CALD group, or indication of not speaking English would be stronger identifiers.<sup>29</sup> However, the NZSSAA decision does reveal similar challenges posed by limited social network in

<sup>29</sup> Although the term CALD is not used as widely in New Zealand as it is in Australia, the indicators of this group are applicable in both contexts. For example, terms such as "refugees" and "new immigrants" were used to identify CALD women in both the Australian and New Zealand samples.

the context of domestic violence that were revealed in the Australian AAT sample. Indeed, Sarah became pregnant shortly after arriving in New Zealand, and was dependent on her future perpetrator for accommodation (NZSSAA Matter No. 2012/91 [9]). Sarah was not granted permanent residence until 11 years after her arrival, but was served with a removal order just before obtaining residence and was imprisoned for a short time (NZSSAA Matter No. 2012/91 [11]). In her application for residence, Sarah stated:

*I am living in a genuine and stable partnership with the person named in Section B of this form, that meets the minimum requirements for the recognition of partnerships.* (NZSSAA Matter No. 2012/91 [12]; italics in original).

Sarah's path to residency in New Zealand was dependent on the perpetrator in many ways — for providing a support network and providing emergency accommodation when she first arrived, through to obtaining permanent residency. He also paid for legal representation when she was served a removal order (NZSSAA Matter No. 2012/91 [11]). This dependence and the difficulties that can arrive are well documented in the CALD literature (see for example Segrave, 2017). It is particularly potent in the context of a de facto rule decision because this gives the perpetrator further control by limiting access to social security payment due to the relationship.

However, this is the sole decision in the NZSSAA sample in which a CALD woman could be identified. It can be assumed that this is an underestimate of the actual number of CALD women in NZSSAA de facto decisions that involve domestic violence. Another dataset is needed to account for the actual experiences of CALD women, the de facto rule and domestic violence in New Zealand.

### Older women

Women in this category were identified by receiving superannuation and/or being aged over 55. One woman was categorised as an older woman. It is important to note that while Australia has an Age Pension that is means tested, New Zealand has a universal superannuation program that is not subject to an assets test for eligibility. This means that New Zealand superannuation does not tie a person's eligibility to their partner's assets test through the de facto

rule in the way the Age Pension is tied to the couple rule in Australia. A different dynamic is at work in New Zealand that has implications for the experience of domestic violence for older people engaging with the social security system. This difference has the potential to offer meaningful comparison of the effect of means testing on dynamics of domestic violence; however, due to the low number of women identified in this category in the NZSSAA sample, this comparison cannot be made with this data. Another dataset is required.

### Women with disability

Women with disability was the most frequently identified population group in the NZSSAA sample. Eight women with disability were identified out of 19 de facto decisions that involved domestic violence (42%). Identifiers included receiving Disability Allowance, Sickness Benefit, or Invalid's Benefit, and/or mention of long-term illness, depression, anxiety, bipolar and/or post-traumatic stress disorder. Six of the sampled NZSSAA decisions involved women who were receiving Disability Allowance, Sickness Benefit, or Invalid's Benefit. Two decisions involved women with serious mental health conditions. The alleged partner was the perpetrator of the violence in all except one decision. In that decision, the perpetrator was the woman's ex-husband but the alleged partner was another person. This frequency was comparable to the Australian sample, where 26 out of 70 AAT couple rule decisions (37%) involved domestic violence and a woman with disability.

A couple of themes emerged in the NZSSAA de facto rule decisions that involved domestic violence and women with disability. First, a woman's access to disability payment such as Disability Allowance depended on the perpetrator's income. For example, in NZSSAA Matter No. 2015/84 [86] Bonnie was declared ineligible for Disability Allowance due to the income of the perpetrator, who was also her alleged partner. Second, some women were unable to attend their NZSSAA hearing due to mental health issues. For example, in NZSSAA Matter No. 2004/143[48] Joan declined to attend the hearing of her appeal. She was staying in a women's refuge and, with a history of violent relationships, her post-traumatic stress disorder symptoms had returned. Concern was expressed about Joan attending the hearing without support and she decided to allow the decision to be undertaken "on the

papers”. Despite this, Joan’s alleged partner and perpetrator attended the hearing, and was found to be a “credible witness” (NZSSAA Matter No. 2004/143 [50]). His account of the relationship was generally accepted despite concern from the women’s refuge that:

...the hearing may be part of an abuse scenario known to violence and abuse intervention agencies where the subject assumes a “relationship” that does not exist and increases efforts to control the object of their fantasy when the subject’s feelings and desires are not reciprocated. (NZSSAA Matter No. 2004/143 [48])

Joan was not successful in her appeal.

Interestingly, the theme of being dependent on a perpetrator and alleged partner for care, which was strong in the Australian AAT sample, was not represented in the NZSSAA sample. This may be due to the less detailed evidence collected in the NZSSAA, as the de facto rule does not require all the detail of the couple rule criteria to be collected. Hence, the absence of this narrative in the New Zealand sample may reflect the limitations of this data rather than the absence of this scenario among women with disability who are involved in an NZSSAA de facto decision in the context of domestic violence. More research is needed in this area.

#### **Women who are, or have been, incarcerated**

One woman was identified as being or having been incarcerated in the NZSSAA sample. Unlike the Australian AAT sample, her charge related not to social security relationship fraud but to immigration infringements; Sarah had applied for refugee status but was rejected (NZSSAA Matter No. 2012/91). It is this refugee status that also identified Sarah as belonging to a CALD background and demonstrates an important intersectionality in regards to immigration laws for both of these groups. Additionally, it shows the economic and social vulnerability of those with limited social networks and financial resources who are attempting to prevent or move on from a prison sentence. Nevertheless, a sample of one is very small and it can be assumed that this is an underestimate of the actual number of women who are, or have been, incarcerated in NZSSAA de facto decisions that involve domestic violence. Further research using another dataset is required.

#### **Lesbian, bisexual, intersex and transgender women**

No women were identified in this category in the NZSSAA sample. However, it can be assumed that this is an underestimate of the actual number of lesbian, bisexual, intersex and transgender women in NZSSAA de facto decisions that involve domestic violence. Further research is required.

#### **Women living in rural and remote areas**

This is a problematic priority group for analysing the NZSSAA de facto rule decisions that involved domestic violence. First, different geographies pose a challenge to meaningful comparative analysis. The sheer distances between towns in Australia’s rural and remote areas are far greater than in New Zealand.

Second, the New Zealand approach of de-identifying the NZSSAA decisions made analysis difficult. Addresses, place names, even regional names in the documentation were either replaced with “\*\*\*\*\*” (NZSSAA Matter No. 2006/72), a street name with no other details, or a letter, for example “O” (NZSSAA Matter No. 2003/62 [5]), or omitted (NZSSAA Matter No. 2004/143 [72]). Hence, it was very difficult to locate any of the women in the decisions. The only decision in which a rural or remote woman could be identified was NZSSAA Matter No. 2006/16, where details of the property Meagan resides on were disclosed — “the property at \*\*\*\*\* Road included seven acres of land” — and that she kept horses (NZSSAA Matter No. 2006/16 [26]). However, this is no indicator of the actual frequency of rural and remote women involved in NZSSAA de facto decisions and domestic violence. This is in contrast to the Australian AAT decisions, which often included all locatable details, including house numbers and street addresses. While this means the women in the Australian sample could be identified as rural and/or remote, it also raises important questions about confidentiality and safety. Regardless, it can be assumed that the actual number of rural and remote women in NZSSAA de facto decisions that involve domestic violence is greater than that located in the sample. Further research is required with a more detailed dataset.

## Common themes

The NZSSAA sample shared some common themes with the Australian AAT sample, including accounts of financial abuse by perpetrators who control the woman's finances and/or deny her, and sometimes her children, finances for basic needs. The use of domestic violence records from police (NZSSAA Matter No. 2015/84 [75]), hospitals and other institutions to evidence the nature of the violence, was also a theme shared with the AAT sample. However, two themes unique to the NZSSAA sample emerged: the weighing up of the severity of the violence in light of the legal decision of *Ruka*, and the focus on evaluating the level of passivity versus fault of the victim/survivor. These two themes will be the focus of this section.

### Not violent enough? – The application of *Ruka*

A common theme across the intersectional groups was to compare the severity of the reported violence with that experienced by *Ruka* in *Ruka v. Department of Social Welfare* [1997] 1 NZLR 154 (CA) ("*Ruka*"). This is similar to Sleep's (2017) findings that in NZSSAA decisions involving police domestic violence records, where the decision-maker "weighed up" the level of violence against that experienced by *Ruka*. Statements such as:

We are not satisfied that the extent of violence in the relationship or any claimed psychological or financial abuse negated the proposition that the appellant and Mr XXXX were living in a relationship in the nature of marriage and hence a de facto relationship during the period September 2003 to May 2008. (NZSSAA Matter No. 2015/84 [76])

And, in NZSSAA Matter No. 2011/63:

There may have been problems with the quality of that relationship but the fact that a relationship is unsatisfactory does not necessarily negate the proposition that the relationship is one in the nature of marriage unless for example there is serious violence such as in *Ruka*. (NZSSAA Matter No. 2011/63 [55]).

Similar statements were made in NZSSAA Matter No. 2007/18 [64] and NZSSAA Matter No. 2006/16 [68].

Further, no NZSSAA de facto decision in the sample concluded that the violence was as severe, or more severe, than *Ruka* and decided that the alleged couple were not in a relationship on those grounds. This does not necessarily mean that *Ruka* has failed to negate the de facto rule in the context of domestic violence. It might mean that more violent cases are not going to appeal due to *Ruka*. However, this seems unlikely given the violence in some decisions in the sample were significant and severe. For example, NZSSAA Matter No. 2015/84 [67] involved repeated choking attacks. Choking is considered an indicator of future serious abuse and fatality (Douglas & Fitzgerald, 2014). Nevertheless, there was no evidence of *Ruka* having the effect of negating the de facto rule in the context of domestic violence for the purpose of social security entitlement in the NZSSAAs sampled. This is similar to Sleep's (2017) finding that no NZSSAA de facto decision that used domestic violence police reports as evidence negated the de facto rule on the basis of *Ruka*.

### Not passive enough – women as provocateur

Another theme that transcended intersectional groups in the NZSSAA sample, but was distinct from the AAT sample, was references to whether the woman — the alleged victim/survivor of domestic violence — was passive or if she provoked or retaliated abuse. For example, in NZSSAA Matter No. 2015/84 Bonnie was subjected to violence that was serious enough for the perpetrator to be prosecuted. The violence included strangulation which, as mentioned earlier, involves heightened risk of homicide. She was supposed to have verbally provoked an attack:

The appellant estimated eight to twelve incidents of violence over the period of the relationship. This included the assault in 2008 for which Mr XXXX was prosecuted. She also explained that there were occasions where she said Mr XXXX had put his hands around her neck. The appellant gave no detailed description of any of these events, other than the incident of May 2008. This incident appears to have occurred after some verbal provocation on the part of the appellant. The appellant described receiving three blows to her arms, which she held up to protect her face. She sustained bruising as a result of that incident, sought medical attention and made a complaint to the Police. (NZSSAA Matter No. 2015/84 [67])

It was decided that Bonnie's provocative behaviour on this occasion, and others did "not suggest that she was in fear of Mr XXXX" (NZSSAA Matter No. 2015/84 [68]). Further, that the violence Bonnie experienced from the perpetrator fell:

...well short of the unremitting violence suffered by Ms Ruka when the majority of the Court of Appeal considered the level of violence as a factor which negated the proposition that the parties in that case were living in a relationship in the nature of marriage. (NZSSAA Matter No. 2015/84 [69])

It seems that Bonnie was not passive enough for the violence to be considered serious enough to negate the de facto relationship.



# Conclusion

This research was located in the social security law, domestic violence and social policy literature. The centrality of the couple rule in Australian social security payment provision, the rule's heritage as a development of the historical cohabitation rule, and the need for more research on the current expression of the rule was explored. The inextricable interconnections between the couple rule and domestic violence were also identified. The need for more research on this interconnection, particularly from intersectional, international and intra-national perspectives is demonstrated.

## Key findings

### Key findings from AAT couple rule decisions that involve domestic violence

It is usual for a social security recipient who has a couple rule decision at the AAT in the context of domestic violence to be in a position of intersectional disadvantage.

Most AAT couple rule decisions in the context of domestic violence involved a woman from at least one priority population group — 60 out of 70 decisions. Twenty-one decisions involved women who were categorised as belonging to two groups, and 36 involved women belonging to one group. The highest number of priority population groups relevant to a single woman was three out of the possible seven. Three decisions involved women who could be categorised in this way. Thirteen AAT decisions did not contain information that indicated the decision involved women from any of the priority population groups. This does not necessarily mean that the women involved in a couple decision in a context of domestic violence did not belong to any of these groups, but that there was insufficient information in the AAT decision that allowed identification as belonging to any of the priority population groups. Overall, it was most common for women who were involved in an AAT couple decision in the context of domestic violence to be a member of at least one priority population group, followed by being a member of two priority population groups. It seems it is usual for a social security recipient who has a couple rule decision at the AAT in the context of domestic violence to be in a position of intersectional disadvantage.

**Identifiable and locatable details were published in almost every decision.**

The publication of identifiable and locatable details about individuals, including women who had experienced domestic violence, occurred in almost every decision. This is a concern because the decisions are publicly available over the internet. Full names, street addresses, places of work, and children's schools were disclosed in the AAT couple rule decisions that involved domestic violence. This is a serious violation of privacy for all involved, and a safety risk to women who may be located by past perpetrators through this disclosure.

**Financial abuse, control over housing or living arrangements and control over information flow by the perpetrator are common themes.**

Some specific experiences emerged throughout the sample that are particularly pertinent to the context of domestic violence and the couple rule. Financial abuse, control over housing or living arrangements by the perpetrator, and control over information flow by the perpetrator were particularly concerning because these provided evidence for a relationship according to the couple rule criteria. The effect of violence and control by the perpetrator was rarely considered in the decision, and a social security debt was often the result. This effectively punished the domestic violence victim/survivor for the perpetrator's behaviour.

**Police domestic violence and hospital records were used as evidence for the couple rule.**

The use of domestic violence records for decision-making, including domestic violence police reports and hospital records, was also a concerning factor in the AAT couple rule decisions that involved domestic violence. Although this information was collected with women's safety in mind, it was used in the following ways:

- To locate the alleged couple's shared residence at the scene of the abuse.
- As a record of the nature of the relationship, as stated by the attending police officer or medical staff.
- As a statement about the nature of the commitment from either alleged partner, including the perpetrator.



This is an issue particularly for perpetrators attempting to continue to control their ex-partner by harassing them at their home.

**Women living in remote and regional areas, women with disability and CALD women are the priority groups most frequently identified in couple rule decisions that involve domestic violence.**

Of the priority population groups, women living in remote and regional areas were the most frequently represented (28), followed by women with disability (26). The third most frequently represented category was CALD women, with 18 women categorised in this group. Each of the priority population groups was considered in turn, with a focus on specificities of that group's experience at the intersection of domestic violence and the couple rule.

**Women with disability, women living in rural or remote areas and CALD women are most frequently subjected to domestic violence.**

All thematic categories cluster around women with disability, women living in rural or remote areas and CALD women. This means that these priority groups were most frequently subjected to financial abuse, control over living arrangements and control over information flow by the perpetrator. Of these groups, women with disability are most frequently subjected to financial abuse, control over living arrangements/housing by the perpetrator and the use of police and hospital domestic violence records in decision-making. Women living in rural areas were found to have most frequently experienced control of their information flow by the perpetrator.

**Women most subjected to domestic violence are most frequently found to be in a couple by the AAT.**

An AAT couple rule decision that involves domestic violence is almost three times more likely to find that the individuals are members of a couple (43) than not (17). This means most AAT couple rule decisions that involved domestic violence found a couple relationship. Further, women with disability were most frequently found to be a member of a couple (16), followed by women living in rural or remote areas (15), and CALD women (10). The decision-maker found special

circumstances (according to s. 24 and ss. 1236/7 of the *Social Security Act 1991* (Cth)) in a very small number of decisions across all categories, with a successful waiver of debt due to special circumstances under ss. 1236/7 most frequent for women with disability (5). This means that the same groups of women who are most frequently subjected to financial abuse, control over housing and control over information by the perpetrator, and the use of police and hospital domestic violence records in decision-making — that is, women with a disability, women living in rural or remote areas and CALD women — are also most frequently found to be a member of a couple, according to the couple rule.

### **Lessons from the NZSSAA de facto rule decisions that involve domestic violence**

**Personal and locatable information was de-identified throughout the NZSSAA.**

Unlike in the AAT sample, personal and locatable information was de-identified throughout the NZSSAA de facto decisions that involved domestic violence. This protected the privacy of the individuals involved, and did not expose domestic violence victims/survivors to the risk of being located by past perpetrators.

However, because the NZSSAA decisions contain de-identified information, there were fewer opportunities to identify the population groups of the women involved in de facto decisions involving domestic violence. No older women; no women who are, or have been, incarcerated; and no lesbian, bisexual, intersex or transgender people were identified. This does not mean that they were not present in the sample, but that they could not be identified from the NZSSAA decisions. Just one Indigenous woman, one CALD woman and one woman from a rural or remote area were identified. A particular challenge arose with geographically locating women since their residential address, and even town or region of residence, was obscured in the documentation to prevent identification. The sample did disclose the payment that the woman had received, and her general health issues; eight women with disability were thus identified in the sample. However, it can be assumed that the frequencies of all of the priority population groups in the NZSSAA sample are underestimates.

### Intersectionality is not clear in NZSSAA decisions.

Due to the inherent limitations of the data, intersectionality among the groups of women in the NZSSAA sample is difficult to discern. Further, it can be assumed that any patterns discerned from the data are underestimates. The data revealed one decision involving an Indigenous woman with disability; however, this is the only decision in the sample where a woman who bridges categories can be identified. It can be assumed that this is an underestimate of the actual intersectionality in the sample.

### No decision used the *Ruka* precedent successfully to argue for no relationship.

The case *Ruka v. Department of Social Welfare* [1997] 1 NZLR 154 (CA) provided a precedent for rendering a violent relationship exempt from the de facto rule. Disappointingly, a common theme across the decisions was to compare the severity of the reported violence with that experienced by the woman in *Ruka*. Further, not one NZSSAA de facto decision that involved domestic violence concluded that the violence was comparable to *Ruka*. All decided that the victim/survivor and the perpetrator were in a de facto relationship, notwithstanding the evidence of domestic violence. This means that *Ruka* has not had the effect of negating the de facto rule in the context of domestic violence for the purpose of social security entitlement.

To decide the severity of the abuse in the context of *Ruka*, reference was made as to whether the woman, the alleged victim/survivor of domestic violence, was passive or if she provoked or retaliated abuse. This theme transcended intersectional groups in the NZSSAA sample, but was distinct from the AAT sample.

Hence NZSSAA de facto decisions, like many AAT couple rule decisions, did not take current understandings of domestic violence into account. By focusing on the severity of the violence, and/or the level of passivity of the women, decision-makers did not consider the complexities of power and control in domestic violence contexts, the risk of escalating violence over time, or risk factors such as strangulation. This reinforces the importance of improving understanding of domestic violence among decision-makers.

## Key recommendations

This section will outline key short, medium and long-term recommendations derived from the key findings of this research.

### Short term

A key finding was that much identifiable and locatable data was publicly available in the AAT decisions. This poses a safety risk for women who have experienced domestic violence, as they can be located by the perpetrator. It also prevents women from keeping a difficult period of their lives private. Hence, **a key recommendation is for AAT reporting to de-identify individuals in their publicly available reports, especially in decisions that involve domestic violence.** New reports should omit identifiable and locatable material before the decisions are publicly available, and existing reports should be edited to omit this information. This follows the approach in New Zealand where all identifiable and locatable information is obscured or omitted from publicly available NZSSAA decision reports.

### Medium term

A further key finding was that domestic violence records were used as evidence of a relationship in AAT couple rule decisions. **It is recommended that stronger guidelines be developed for the Commonwealth's use of information collected by state institutions such as police and hospitals.** The intention behind the collection of information was to enhance women's safety; therefore, this needs to be at the foundation of how the information is used — particularly in relation to couple rule decisions at the AAT.

AAT decision-making needs to recognise the long-term experiences of domestic violence, including economic abuse. For example, when women are in the process of leaving or attempting to leave a violent relationship, they often make multiple attempts. During this process, some women have fallen foul of the couple rule and have been ordered to repay substantial social security debts or have been prosecuted for fraud. Such rulings create an additional burden at this vulnerable time for women and can effectively entrap them

in the violent relationship, and/or punishes them for leaving. There needs to be recognition in decision-making both at the AAT and also within Centrelink of how long-term experiences of domestic violence and economic abuse can impact upon women in terms of income and assets reporting to Centrelink at this time. **Domestic and family violence training for AAT decision-makers is recommended.**

Decision-making at the AAT and Centrelink on the couple rule has created scope for systems abuse of women. Perpetrators attempt to regain control after separation through litigious or legally manipulative behaviour, such as using the administrative system through Centrelink. **Once domestic violence is identified, systems abuse needs to be taken into account in decision-making. Protections should also be put in place to protect the victim/survivor.** Centrelink and the AAT need to ensure safe and effective early identification, case management and subsequent (legal) treatment of cases involving domestic violence in accordance with current understandings of domestic violence as coercive and controlling behaviour encompassing economic and financial abuse. The apparent decrease in AAT couple rule decisions that involve domestic violence in recent years might indicate that this is occurring.

When applying the couple rule, there needs to be special consideration for women who experience multiple forms of disadvantage. For example, the particularly vulnerable position of immigrant women with various visa statuses who have experienced domestic and family violence and wish to access social security income support, also needs to be taken into account in decision-making, with additional protection provided. **Centrelink should ensure that safe and effective (trauma specialist) interpreter services are provided in screening and case management.**

## Long term

The couple rule renders women's access to social security payment dependent on the assets and income of the perpetrator. This creates particularly risky dynamics across intersectional groups for women to access financial support during this difficult time. **Further research is needed to explore the individual rather than the couple as the basis of eligibility**

**for all social security payments.** This will negate the need for the couple rule and mitigate the particular vulnerability of women who experience domestic violence to this rule. Currently, the "policy of equity" at the core of the couple rule means that single individuals are paid a greater rate than members of a couple to accommodate their higher cost of living. Making the individual the basic economic unit for social security assessments aligns Australian social security law with Australian taxation law. A costing of this change is needed.

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AAT Matter No. 2005/899.

AAT Matter No. 2005/668.

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AAT Matter No. 2007/1562.

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NZSSAA Matter No. 2010/65.

NZSSAA Matter No. 2003/62.

## Appendix A:

# AAT couple rule decisions that involve domestic violence — sample

AAT Matter No. 1992/11	AAT Matter No. 2004/785	AAT Matter No. 2010/179
AAT Matter No. 1992/80	AAT Matter No. 2005/899	AAT Matter No. 2010/596
AAT Matter No. 1992/92	AAT Matter No. 2005/1153	AAT Matter No. 2010/1045
AAT Matter No. 1994/634	AAT Matter No. 2006/153	AAT Matter No. 2011/22
AAT Matter No. 1995/341	AAT Matter No. 2006/689	AAT Matter No. 2011/23
AAT Matter No. 1996/21	AAT Matter No. 2006/725	AAT Matter No. 2011/78
AAT Matter No. 1996/382	AAT Matter No. 2006/776	AAT Matter No. 2011/108
AAT Matter No. 1996/860	AAT Matter No. 2006/792	AAT Matter No. 2011/162
AAT Matter No. 1997/228	AAT Matter No. 2006/906	AAT Matter No. 2011/213
AAT Matter No. 1998/326	AAT Matter No. 2007/73	AAT Matter No. 2011/665
AAT Matter No. 1998/397	AAT Matter No. 2007/1050	AAT Matter No. 2011/767
AAT Matter No. 1998/826	AAT Matter No. 2007/1320	AAT Matter No. 2012/81
AAT Matter No. 2000/23	AAT Matter No. 2007/1321	AAT Matter No. 2012/139
AAT Matter No. 2000/85	AAT Matter No. 2007/1502	AAT Matter No. 2012/246
AAT Matter No. 2000/1077	AAT Matter No. 2007/1556	AAT Matter No. 2012/372
AAT Matter No. 2001/282	AAT Matter No. 2008/279	AAT Matter No. 2012/499
AAT Matter No. 2002/17	AAT Matter No. 2008/516	AAT Matter No. 2012/910
AAT Matter No. 2002/186	AAT Matter No. 2008/756	AAT Matter No. 2013/345
AAT Matter No. 2002/311	AAT Matter No. 2008/810	AAT Matter No. 2014/761
AAT Matter No. 2002/338	AAT Matter No. 2009/12	AAT Matter No. 2014/764
AAT Matter No. 2002/1206	AAT Matter No. 2009/60	AAT Matter No. 2014/843
AAT Matter No. 2003/583	AAT Matter No. 2009/651	
AAT Matter No. 2004/83	AAT Matter No. 2009/995	
AAT Matter No. 2004/337	AAT Matter No. 2010/28	

# Appendix B:

## NZSSAA de facto decisions that involve domestic violence — sample

NZSSAA Matter No. 2003/62

NZSSAA Matter No. 2003/164

NZSSAA Matter No. 2004/70

NZSSAA Matter No. 2004/143

NZSSAA Matter No. 2005/63

NZSSAA Matter No. 2006/16

NZSSAA Matter No. 2006/72

NZSSAA Matter No. 2007/18

NZSSAA Matter No. 2009/17

NZSSAA Matter No. 2009/55

NZSSAA Matter No. 2010/9

NZSSAA Matter No. 2010/65

NZSSAA Matter No. 2011/63

NZSSAA Matter No. 2012/91

NZSSAA Matter No. 2014/25

NZSSAA Matter No. 2015/7

NZSSAA Matter No. 2015/84

NZSSAA Matter No. 2017/20

NZSSAA Matter No. 2017/25



## Appendix C:

# Relevant sections of the *Social Security Act 1991* (Cth)

Table 9 Relevant sections of the Social Security Act 1991 (Cth)

Section 4 (2)	<p>Subject to <a href="#">subsection</a> (3), a person is a <b>member of a couple</b> for the purposes of this Act if:</p> <ul style="list-style-type: none"><li>(a) the person is legally married to another person and is not, in the Secretary's opinion (formed as mentioned in <a href="#">subsection</a> (3)), living separately and apart from the other person on a permanent or indefinite basis; or<ul style="list-style-type: none"><li>(aa) both of the following conditions are met:<ul style="list-style-type: none"><li>(i) a relationship between the person and another person (whether of the same sex or a different sex) is registered under a law of a State or Territory prescribed for the purposes of section 2E of the <i>Acts Interpretation Act 1901</i> as a kind of relationship prescribed for the purposes of that section;</li><li>(ii) the person is not, in the Secretary's opinion (formed as mentioned in <a href="#">subsection</a> (3)), living separately and apart from the other person on a permanent or indefinite basis; or</li></ul></li><li>(b) all of the following conditions are met:<ul style="list-style-type: none"><li>(i) the person has a relationship with another person, whether of the same sex or a different sex (in this <a href="#">paragraph</a> called the <b>partner</b> );</li><li>(ii) the person is not legally married to the partner;</li><li>(iii) the relationship between the person and the partner is, in the Secretary's opinion (formed as mentioned in <a href="#">subsections</a> (3) and (3A)), a de facto relationship;</li><li>(iv) both the person and the partner are over the age of consent applicable in the State or Territory in which they live;</li><li>(v) the person and the partner are not within a prohibited relationship.</li></ul></li></ul></li></ul>
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**Section 4 (3)**

Member of a couple - criteria for forming opinion about relationship

(3) In forming an opinion about the relationship between 2 people for the purposes of [paragraph \(2\)\(a\)](#), subparagraph (2)(aa)(ii) or subparagraph (2)(b)(iii), the Secretary is to have regard to all the circumstances of the relationship including, in particular, the following matters:

- (a) the financial aspects of the relationship, including:
  - (i) any joint ownership of real estate or other major assets and any joint liabilities; and
  - (ii) any significant pooling of financial resources especially in relation to major financial commitments; and
  - (iii) any legal obligations owed by one person in respect of the other person; and
  - (iv) the basis of any sharing of day-to-day household expenses;
- (b) the nature of the household, including:
  - (i) any joint responsibility for providing care or support of [children](#); and
  - (ii) the living arrangements of the people; and
  - (iii) the basis on which responsibility for housework is distributed;
- (c) the social aspects of the relationship, including:
  - (i) whether the people hold themselves out as married to, or in a de facto relationship with, each other; and
  - (ii) the assessment of friends and regular [associates](#) of the people about the nature of their relationship; and
  - (iii) the basis on which the people make plans for, or engage in, joint social activities;
- (d) any sexual relationship between the people;
- (e) the nature of the people's commitment to each other, including:
  - (i) the length of the relationship; and
  - (ii) the nature of any companionship and emotional support that the people provide to each other; and
  - (iii) whether the people consider that the relationship is likely to continue indefinitely; and
  - (iv) whether the people see their relationship as a marriage-like relationship or a de facto relationship.

## Section 24

**Person may be treated as not being a member of a couple (subsection 4(2))**

(1) Where:

- (a) a person is legally married to another person; and
  - (b) the person is not living separately and apart from the other person on a permanent or indefinite basis; and
  - (c) the Secretary is satisfied that the person should, for a special reason in the particular case, not be treated as a member of a couple;
- the Secretary may determine, in writing, that the person is not to be treated as a member of a couple for the purposes of this Act.

(1A) If:

- (a) a relationship between a person and another person (whether of the same sex or a different sex) is registered under a law of a State or Territory prescribed for the purposes of section 2E of the *Acts Interpretation Act 1901* as a kind of relationship prescribed for the purposes of that section; and
  - (b) the person is not living separately and apart from the other person on a permanent or indefinite basis; and
  - (c) the Secretary is satisfied that the person should, for a special reason in the particular case, not be treated as a member of a couple;
- the Secretary may determine, in writing, that the person is not to be treated as a member of a couple for the purposes of this Act.

(2) Where:

- (a) a person has a relationship with another person, whether of the same sex or a different sex (the **partner**); and
  - (b) the person is not legally married to the partner; and
  - (c) the relationship between the person and the partner is a de facto relationship;
- and
- (d) the Secretary is satisfied that the person should, for a special reason in the particular case, not be treated as a member of a couple;
- the Secretary may determine, in writing, that the person is not to be treated as a member of a couple for the purposes of this Act.

(3) A determination made under [subsection](#) (1), (1A) or (2) is not a legislative instrument.

**Section 1236****Secretary may write off debt**

(1) Subject to [subsection](#) (1A), the Secretary may, on behalf of the Commonwealth, decide to write off a debt, for a stated period or otherwise.

(1A) The Secretary may decide to write off a debt under [subsection](#) (1) if, and only if:

- (a) the debt is irrecoverable at law; or
- (b) the debtor has no capacity to repay the debt; or
- (c) the debtor's whereabouts are unknown after all reasonable efforts have been made to locate the debtor; or
- (d) it is not cost effective for the Commonwealth to take action to recover the debt.

(1B) For the purposes of [paragraph](#) (1A)(a), a debt is taken to be irrecoverable at law if, and only if:

- (b) there is no proof of the debt capable of sustaining legal proceedings for its recovery; or
- (c) the debtor is discharged from bankruptcy and the debt was incurred before the debtor became bankrupt and was not incurred by fraud; or
- (d) the debtor has died leaving no estate or insufficient funds in the debtor's estate to repay the debt.

(1C) For the purposes of [paragraph](#) (1A)(b), if a debt is recoverable by means of:

- (a) deductions from the debtor's social security payment; or
- (b) deductions under section 84 of the *A New Tax System (Family Assistance) (Administration) Act 1999*; or
- (c) setting off under section 84A of that Act;

the debtor is taken to have a capacity to repay the debt unless recovery by those means would result in the debtor being in severe financial hardship.

(2) A decision made under [subsection](#) (1) takes effect:

- (a) if no day is specified in the decision - on the day on which the decision is made; or
- (b) if a day is specified in the decision - on the day so specified (whether that day is before, after or on the day on which the decision is made).

(3) Nothing in this section prevents anything being done at any time to recover a debt that has been written off under this section.

**Section 1237****Power to waive Commonwealth's right to recover debt**

Secretary's limited power to waive

(1) On behalf of the Commonwealth, the Secretary may waive the Commonwealth's [right](#) to recover the whole or a part of a debt from a debtor only in the circumstances described in section 1237A, 1237AA, 1237AAA, 1237AAB, 1237AAC or 1237AAD and, if the debt is an assurance of support debt, subject to section 1237AAE.

When waiver takes effect

(2) A waiver takes effect:

- (a) on the day specified in the waiver (whether that day is before, after or on the day on which the decision to waive is made); or
- (b) if the waiver does not specify when it takes effect - on the day on which the decision to waive is made.

Note: If the Secretary waives the Commonwealth's [right](#) to recover all or part of a debt, this is a permanent bar to recovery of the debt or part of the debt - the debt or part of the debt effectively ceases to exist.

**Section  
1237AAD****Waiver in special circumstances**

The Secretary may waive the right to recover all or part of a debt if the Secretary is satisfied that:

(a) the debt did not result wholly or partly from the debtor or another person knowingly:

(i) making a false statement or a false representation; or

(ii) failing or omitting to comply with a provision of this Act, the Administration Act or the 1947 Act; and

(b) there are special circumstances (other than financial hardship alone) that make it desirable to waive; and

(c) it is more appropriate to waive than to write off the debt or part of the debt.

Note 1: Section 1236 allows the Secretary to write off a debt on behalf of the Commonwealth.

Note 2: This section has effect subject to section 1237AAE in relation to an assurance of support debt.

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