ACON FEEDBACK TO THE COERCIVE CONTROL EXPOSURE DRAFT BILL

ACON is NSW’s leading health promotion organisation specialising in community health, inclusion, and HIV responses for people of diverse sexualities and/or genders. We coordinate several state and national programs, including programs working with victim-survivors and people who use sexual, domestic and family violence.

ACON welcomes the opportunity to provide feedback on the draft NSW Crimes Legislation Amendment (Coercive Control) Bill 2022, speaking to the needs and experiences of sexuality and gender diverse people who have experienced or used coercive control.

ACON holds significant expertise in the area of LGBTQ+ sexual, domestic and family violence, however we are not a legal service. As such, our feedback is primarily focused on the non-legislative changes that would support the legislation. ACON supports non-legislative activities such as training for police and judiciary, capacity building of the community and health sector in LGBTQ+ inclusion as related to sexual, domestic and family violence, strengthening LGBTQ+ community-led specialist responses, investment in community education and awareness raising initiatives, and ongoing investment in non-punitive interventions for perpetrators and victim-survivors of violence. These non-legislative commitments are crucial to ensuring that actions to address coercive control support the safety of victim-survivors.

We have developed this response to directly address the public consultation draft of the Crimes Legislation Amendment (Coercive Control) Bill 2022, however we also wish to highlight, as we did in our 2021 submission to the Joint Select Committee on Coercive Control, that the introduction of coercive control legislation can bring risks that the laws could be utilised by users of violence as part of systems abuse tactics. These risks mean that non-legislative activities are vital, and that adequate time should be taken to ensure that the Bill meets community needs. We are concerned about the tight timeframe of this consultation and that rushing this important reform may harm the people it is designed to protect. We note and support the advocacy of organisations including Women’s Legal Service, for a phased approach, starting first with a contextual definition of domestic and family abuse in the *Crimes (Domestic and Personal Violence) Act* prior to introducing a stand-alone coercive control offence. This contextual definition should be incorporated as a ground for an Apprehended Domestic Violence Order (ADVO) legislation. This phased approach would help to ensure the legal system is prepared to implement any criminal offences introduced. This approach is aligned with the support of the Joint Select Committee on Coercive Control for this action, in their June 2021 report, section 3.44.

**Implementation of Legislation & Non-Legislative Activities Required for Effective Change**

From our engagement with the Department of Communities and Justice, ACON understands that the NSW Government intends to form an implementation taskforce to manage legislation commencement. However, this taskforce will only be formed once legislation passes. We have also been informed that the Act will commence between 12 to 18 months after the Bill has been passed.

ACON advocate for an independent, multiagency implementation taskforce to be established prior to legislation going to parliament. This would be in line with Recommendation 20 from the Joint Select Committee report, that the taskforce should be responsible for consulting prior to the introduction of the criminal offence. Additionally, given the extent of non-legislative activities that must occur for the legislation to be effective, it is likely that a 12-18 month long time period will not be sufficient. The commencement date should be determined in collaboration with the implementation taskforce.

As ACON outlined in our 2021 Submission to the Joint Select Committee on Coercive Control (ACON, 2021), we strongly advocate for non-legislative/implementation activities to occur. These include:

* Training for the NSW police force, lawyers and judiciary that is developed with LGBTQ+ specialist organisations to include training about the unique forms of identity and systems based coercive control, as well as barriers disclosing experiences and accessing supports that LGBTQ+ people experience. This training should also have a focus on avoiding the misidentification of the primary perpetrator, a significant issue for many LGBTQ+ people.
* Amending policy (and as required, legislation) to stipulate that protection orders should be made for the person “most in need of protection”
* Review of all risk assessment tools, policies, jury directions and sentencing guidelines related to domestic and family violence to ensure that they are relevant and suitable for matters pertaining to LGBTQ+ people.
* Community Education initiatives that are developed in collaboration with LGBTQ+ specialist organisations, that provide information specifically for sexuality and gender diverse people. LGBTQ+ people should also be named and included in all mainstream campaigns about coercive control.
* Investment in safe and affirming services for LGBTQ+ people who are experiencing or using coercive control. LGBTQ+ specialist organisations should be funded to provide case management, counselling and behaviour change services to our communities. We also need a much greater number of mainstream DFV services being accessible to LGBTQ+ populations. This includes enhancing the capacity of the sector to provide services to LGBTQ+ people who are men or non-binary.
* Improvements in data collection to enable to experiences of LGBTQ+ people in the criminal and service system to be measured. Without these improvements it will not be possible for review of legislation to adequately determine whether the bill meets its intended outcomes for LGBTQ+ populations.

**Schedule 1 Amendment of Crimes Act 1900 No 40**

Section 54D (1)(b)
ACON has concerns about this legislation only applying to intimate partners and the incongruence created when other domestic violence legislation includes family violence. LGBTQ+ people experience high rates of family violence. in the largest national survey of LGBTIQ+ people in Australia, Private Lives 3, 65.9% (n=4,019) of respondents reported ever experiencing family violence (Hill, Bourne, McNair, Carman, & Lyons, 2020). LGBTQ+ people can also experience violence from their chosen family and carers.

Family violence can take many different forms and occur in many different relationships, for example through a parent threatening their teenage bisexual child with family exile/homelessness if they date or socialise with other LGBTQ+ people, to adult children coercively controlling their elderly trans parent by withholding their access to gender affirming care and clothing.

Identity-based abuse, including actions such as a pressuring a person to conform to gender norms, withholding access to hormones and telling a person they won’t be believed if they disclose violence because of their sexuality or gender, are common forms of violence perpetrated by family against LGBTQ+ people. In fact, in Private Lives 3, 40.8% of participants indicated they had experienced LGBTQ related abuse from family compared to 10% from intimate partners (Hill, Bourne, McNair, Carman, & Lyons, 2020). Identity based abuse, which aims to change, minimise or silence a person’s identity clearly constitutes coercive control. If the aim of the legislation is to protect people from the perpetration of coercive control, it must therefore include coercive control perpetrated by family.

To do otherwise sends a message to community that coercively controlling actions are acceptable when they are taken by family members. Additionally, that other domestic and family violence legislation, including ADVO legislation, includes family violence is likely to be confusing for community. These issues will reduce the effectiveness of community awareness campaigns as people may incorrectly interpret messaging as saying that only intimate partner violence is illegal.

Section 54D (1)(d)
ACON wish to raise whether the ‘reasonable person’ test would allow for adequate consideration to be taken of the impact of certain actions on LGBTQ+ people. The experiences of coercive control for our communities can be unique and are not always understood by cisgender heterosexual people. For example, a person may abuse their trans partner by continually and purposely misgendering them. This can cause a serious adverse impact on trans people of all genders however these impacts may not be well understood, and if the ‘reasonable person’ test is from perspective informed by cisgenderism, these impacts may not be sufficiently recognised to pass this test.

ACON do recognise the importance of objective standards in legislation so that the burden is not on victim-survivors to provide evidence of actual fear or serious adverse impact. We are not advocating for this provision to be removed, rather we would advocate for this issue to be considered in the development of bench books or other guidance to allow judges to better take into account the specific circumstances of the individual when applying the reasonable person test.

Section 54E (2)(a) and (b)

ACON is concerned that perpetrators of coercive control may utilise the defence that their conduct was reasonable in all of the circumstances, on the grounds that victim-survivors with a mental illness ‘needed’ to be controlled for their own good. Nearly three quarters (73.2%) of Private Lives 3 participants report having ever been diagnosed with a mental health condition, compared to 45.5% among the general Australian population, and 51.9% of participants reported being diagnosed or treated for a mental health condition in the past 12 months, more than twice the 20% reported among the general Australian population (Hill, Bourne, McNair, Carman, & Lyons, 2020). The high rates of mental health conditions experienced by our communities result from ongoing discrimination and experiences of minority stress; and we know that the trauma involved in experiencing coercive control also has significant negative impacts on mental health. In practice, the high rates of mental health in our communities means that this defence provision may be more often used against LGBTQ+ people.

We are concerned that a perpetrator’s use of coercive control could cause PTSD for a victim-survivor, resulting in that person having diminished capacity, and that this diminished capacity could then be used by the perpetrator to state that their use of abuse was reasonable.

ACON understand the importance of the defence that the course of conduct was reasonable in all of the circumstances, for circumstances such as those articulated in the exposure draft bill fact sheet, and that there may be times when a person’s mental health concerns means that they are not able to manage family finances, for example. However, Government should consider whether there are protections that can be put in place to minimise the risk that victim-survivors with mental health concerns that do not inhibit their decision-making capacity will be subjected to additional trauma by having to prove beyond all reasonable doubt that the course of conduct was not reasonable.

Similarly, we are concerned about the ability of the law to protect victim-survivors who have been diagnosed with dementia, have an intellectual disability or have been diagnosed with an acquired brain injury (which may have been inflicted by the perpetrator). Many people with these diagnoses have capacity to make decisions in many, if not all areas of their lives, however these diagnoses may be used by the perpetrator as a defence for their abusive behaviour.

Noting that ACON is not a legal organisation, solutions could include raising the standard for evidence in 54E (2)(a) from being ‘capable’ of raising an issue, to evidence that indicates on the ‘balance of probabilities’ that the course of conduct is reasonable; or providing an exclusion that a mental health or other diagnosis, such as dementia or acquired brain injury, of a victim-survivor cannot be introduced as evidence that the conduct was reasonable, unless there is evidence presented that the victim-survivor’s capacity was limited by that diagnosis.

Section 54F (2)(a)
ACON advocate for Government to take steps to ensure that this subsection cannot be applied to a protective parent withholding contact with the child from an abusive parent when they are doing so to protect the child’s safety. We also suggest that this provision be expanded to include the use of a grandchild of a person to threaten them, as we are aware that access to grandchildren can be used to threaten and control older people.

ACON note that provision (2)(f) includes causing injury or death to an animal. We suggest that this provision be expanded to include engaging in, or threatening to engage in removing access to pets (with the exception of circumstances where this is done for the safety of the pet). People who use coercive control may not cause injury or death to an animal, but threatening to rehome the pet or otherwise restrict access may be used to control a person.

Section 54F(g)
ACON suggest that the examples for paragraph (g) be updated to provide examples of identity-based abuse, systems abuse and reproductive coercion. Examples of identity-based abuse could include:

* Pressuring a person to conform to rigid gender norms
* Threatening to ‘out’ a person’s sexuality, gender or HIV status
* Forcing a person into conversion practices
* Exiling a person from family due to their sexuality or gender
* Purposely using incorrect or offensive pronouns to talk to or about a person
* Stopping a person from taking actions to express or affirm their gender
* Cutting someone off from LGBTQ+ community events
* Telling someone they are not ‘really’ a man/woman/gay/bi etc if they do not behave or have sex in certain ways

While some of these actions may be included within the current examples (for example, making unreasonable demands for how a person exercises personal autonomy), it is important to be specific to ensure that legislation is applied to LGBTQ+ people, and that people can see their experiences reflected in the legislation.

Section 53L
Given the high risk that coercive control legislation may be used against victim-survivors as part of systems abuse, ACON advocate that the review period for the legislation be shortened to 18 months after commencement to ensure that changes can be made if the legislation is found not to be working as intended. We also advocate that subsequent reviews of the legislation be legislated to commence every 2-3 years after the commencement of the previous review, so that effectiveness can be monitored over time.

**Schedule 2 Amendment of Crimes (Domestic and Personal Violence) Act 2007 No 80**

Section 6A (1)
In section 6A (1), the definition of domestic abuse is incongruent with the proposed addition of Division 6A Abusive behaviours towards intimate partners, as this definition includes anyone who has a domestic relationship, including relatives, carers, housemates and people who have lived in the same residential facility. We are supportive of this use of domestic relationship, but as outlined above, would advocate for this scope of relationships to also apply to the proposed Division 6A; as we are concerned that the discrepancy may be confusing for community.

Section 6A(2)
ACON is supportive of the introduction of a definition of domestic abuse within this legislation. As we have advocated for above, in relation to the proposed Abusive behaviours towards intimate partners (coercive control) legislation, we believe examples within 6A(2) should be expanded to more clearly include identity-based abuse, systems abuse and reproductive coercion.

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**References**

ACON. (2021). Submission 81: Coercive Control in Domestic Relationships. Retrieved from Parliament of New South Wales: https://www.parliament.nsw.gov.au/ladocs/submissions/70468/Submission%20-%2081.pdf

Hill, A., Bourne, A., McNair, R., Carman, M., & Lyons, A. (2020). Private Lives 3 A national study of the health and wellbeing of LGBTIQ people in Australia . Melbourne: Australian Research Centre in Sex, Health and Society, La Trobe University.