



# WIRRINGA BAIYA

## ABORIGINAL WOMEN'S LEGAL CENTRE INC

Wurringabaiya provides free legal advice to Aboriginal and Torres Strait Islander women, children and youth who are or who have been victims of violence.

31 August 2022

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Dear Attorney-General,

### **PUBLIC CONSULTATION DRAFT: CRIMES LEGISLATION AMENDMENT (COERCIVE CONTROL) BILL 2022**

We refer to the above Draft Bill and welcome the opportunity to contribute to the consultation.

#### **The use of the term 'coercive control'**

As has been noted by many, all forms of domestic and family violence (DFV) is coercive control. The perpetrators are overwhelmingly men using it against women, who are, or have been intimate partners, but it is not limited to intimate partner relationships. Coercive control is the execution and maintenance of power in a relationship. The aim of DFV is for a perpetrator to control their victim with a range of coercive behaviours ranging from physical and sexual violence to psychological and economic abuse. However, as has been recognised, many forms of non-physical behaviours including: threats, emotional denigration, humiliation, manipulation, financial control, monitoring and isolation from friends and family, denigration of a person's cultural and spiritual identity, are not recognised in NSW law as part of the spectrum of DFV. The consequence of these repeated patterns of behaviour is a loss of physical and psychological freedom for its victims. Having said that, the term 'coercive control' is often used to refer to those more covert and sometimes subtle forms of non-physical forms of abuse, to differentiate it from other forms of DFV for the purposes of the current legal discussion in NSW, and in this submission we will do the same.

#### **Structural racism in the criminal legal system**

We refer to our submission to the NSW Parliamentary Joint Select Committee, dated 19 February 2021.

Once again, we acknowledge the important symbolic role the law plays in educating the community at large about coercive control, and contributing towards social change. But as we have previously stated, changing the law will not be enough, and could lead to unintended consequences that will cause harm to our clients.

Sadly, the criminal legal system does not serve Aboriginal women well, despite improvements in policing over the years. Aboriginal women in NSW continue to be grossly

over-represented in custody, as recently as June 2022, Aboriginal women comprised 40% of the total female inmate population.<sup>1</sup>

The recent NSW BOCSAR report about trends of the DFV related stalking and intimidation offences in the criminal legal system from 2012 to 2021 also provides good reason for concern. BOCSAR found that in those ten years there was an increase of 163.8% in police laying charges for these offences, which they attributed to changes to police responses.<sup>2</sup> BOCSAR found that the change was especially profound for the Aboriginal community with Aboriginal people accounting for a quarter of those charged with the offences:

This increase has been keenly felt by Aboriginal people. Legal proceedings against Aboriginal people increased 274 percent from 2012 to 2021. In 2021, Aboriginal people accounted for 28% of court finalisations and 52% of prison sentences. Of the 272 adults in prison for domestic stalking/intimidation in December 2021, over a third were Aboriginal.<sup>3</sup>

While we do not in any way diminish the seriousness and harm caused by stalking and intimidation, these statistics make it very difficult for Aboriginal women to believe that the NSW criminal legal system is just and fair for all, or even has improved for Aboriginal people.

Structural racism not only means that Aboriginal women are over-represented in the criminal legal system as offenders, but the response to Aboriginal women reporting DFV is inconsistent or poor. We often advise and frequently have to advocate for Aboriginal women to receive better responses from individual police officers or police stations when reporting DFV.

We therefore remain highly cautious about rushing to criminalise coercive control.

We continue to press that a great deal of cultural and system reform must occur before creating a new complex offence, which will affect Aboriginal women who are also over-represented as victims of DFV.

### **Immediate establishment of an independent implementation taskforce**

From the outset we are concerned about the short period of time that has been provided by the Government for consultation on complex legislation.

<sup>1</sup> NSW Bureau of Crime Statistics and Research, *New South Wales Custody Statistics* (Quarterly Update, June 2022) In June 2022 there were 12,336 adults in prison.

Table 2.1.13 shows increase in Aboriginal female remand population from 102 to 158 in the 2 year period, an increase of 54.9%

Table 2.1.17 shows that while total female inmate population decreased from 822 to 806 (1.94% decrease), the Aboriginal female population increased from 313 to 323 (3.19% increase). And while Aboriginal women comprising 2.7% of the NSW population, Aboriginal women comprise just over 40% of the total female inmate population.

<sup>2</sup> NSW Bureau of Crime Statistics and Research, *Trends in domestic violence-related stalking and intimidation offences in the criminal justice system: 2012 to 2021* (Number 159, June 2022).

<sup>3</sup> NSW Bureau of Crime Statistics and Research, *Significant rise in domestic-violence related stalking and intimidation in NS* (media release, 23 June 2022

<[https://www.bocsar.nsw.gov.au/Pages/bocsar\\_media\\_releases/2022/mr-DV-related-stalking.aspx](https://www.bocsar.nsw.gov.au/Pages/bocsar_media_releases/2022/mr-DV-related-stalking.aspx)>.



In the New South Wales Parliamentary Joint Select Committee on Coercive Control, the Joint Select Committee made multiple recommendations concerning the establishment of a taskforce to manage the introduction and implementation of a criminal offence of coercive control.<sup>4</sup> The Joint Select Committee's first recommendation was that a criminal offence should not be commenced until considerable prior education, training and consultation with stakeholders has taken place and any implementation should be assisted through a multi-agency taskforce.<sup>5</sup>

The Joint Select Committee recommended that the taskforce consult with stakeholders on the following matters prior to the proposal of final legislation:

- A draft of legislation for a coercive control offence,<sup>6</sup>
- Education and training in relation to the elements of the offence,<sup>7</sup>
- Education and training of the judiciary and legal profession on jury directions to address domestic abuse.<sup>8</sup>

The Joint Select Committee made these recommendations on the basis that it believed a "careful and considered approach with a long lead-in time is needed to effectively implement an offence."<sup>9</sup> It also considered Police Scotland's submission that in Scotland, key stakeholders including support and advocacy services for victims of domestic abuse, were engaged in the lengthy consultation process and "instrumental in ensuring that the legislation adequately covered the lived experience of many victims."<sup>10</sup> The Joint Select Committee noted that Scotland and many other jurisdictions that have already criminalised coercive control do not have Aboriginal and Torres Strait Islander peoples, and that it is important that adequate consultation with Aboriginal and Torres Strait Islander communities is undertaken regarding the implementation of the offence.<sup>11</sup>

As a very first step we submit that the NSW Government must:

- Immediately establish an independent, multi-agency taskforce to oversee the consultation on draft legislation, implementation, and ongoing review of the legislation. This taskforce should also have oversight of the cultural and systems reform required. This taskforce should have the appropriate time and capacity to consider the practice implications of any proposed legislative reform whether it be the *Crimes Act 1900* or the *Crimes (Domestic and Personal Violence) Act 2007 (CDPV Act)*. This taskforce must include representation from the recently established and Government funded Aboriginal Women's Advisory Network (AWAN) to ensure Aboriginal women are consulted on every aspect of the drafting, implementation and review process. AWAN should also be consulted on every aspect of the cultural

<sup>4</sup> Joint Select Committee, Parliament of NSW *Coercive Control in Domestic Relationships*, (Report 1/57, June 2021), Recommendations 1, 20-22, 83.

<sup>5</sup> Ibid, Recommendation 1, 1.

<sup>6</sup> Ibid, Recommendations 21, 83.

<sup>7</sup> Ibid, Recommendations 22, 83.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid, 84.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid, 84-87.

and systems reform required.

- Extend the consultation period by at least 6 months. At an absolute minimum there should be a further consultation round on an updated Bill prior to the Bill being introduced into Parliament.

### Cultural and systems change

We strongly stress that any legislative reform should not come before other necessary structural changes to police investigations, criminal court systems and support systems.

We make a number of recommendations below in relation to those changes.

Police cultural and system reforms should include:

- a. Ongoing reviewing and monitoring of police recruitment policies and procedures to ensure racist, sexist, homophobic and transphobic views (both conscious and unconscious bias) are comprehensively tested for on recruitment and throughout a police officer's employment. Such policies and procedures that test racist and sexist views should be developed by independent cultural safety experts and gender safety experts.
- b. All complaints about police be investigated by an independent body whether it be the Law Enforcement Conduct Commission or another body to handle less serious complaints.
- c. Regular and ongoing training for all police on how to identify and respond to DFV, trauma-informed, culturally safe, disability aware and LGBTIQ+ aware practice that is informed by the lived experiences of victim-survivors and also addresses conscious and unconscious bias. Police training about DFV needs to be developed and delivered with significant input from and co-facilitation with sexual, domestic and family abuse experts, cultural safety experts, disability experts, LGBTIQ+ experts and specialist legal services and should primarily be face-to-face training. Current training must be evaluated for its effectiveness and any future training must also be regularly evaluated for its effectiveness. Evaluation reports must be published.
- d. Training and guidelines to assist police in accurately identifying the person most in need of protection and the predominant aggressor, including working with specialist sexual, domestic and family violence services to assist with accurate identification as recommended in the Family Violence Reform Implementation Monitor report.<sup>12</sup> These training programs and guidelines should be publicly available.
- e. Funding for co-responder model with specialist SDFV community-based workers co-located with police
- f. Training and support for police in identifying and responding to vicarious trauma.

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<sup>12</sup> Family Violence Reform Implementation Monitor, *Accurate identification of the predominant aggressor* (Report, December 2021), Recommendation 41, 7.

- g. Information technology systems that enable police easy access to information about history and context of previous violence and abuse.
- h. Publishing of the results of regular audits of policing of sexual, domestic and family abuse and steps police will take for continuous improvement.
- i. The NSW Police Force develop clear and transparent policy and procedures to ensure safe reporting and response to allegations of police employees' perpetration of DFV and address conflict of interest issues which must include independent oversight of such investigations. Consideration should be given to these policies and procedures to also include close family members and close associates of police officers accused of DFV.

Cultural and systems reform within the legal system should include:

- j. Regular and ongoing training for judicial officers, legal practitioners, court staff and interpreters in how to identify and respond to DFV, trauma-informed, culturally safe, disability aware and LGBTIQ+ aware practice that is informed by the lived experiences of victim-survivors and also addresses conscious and unconscious bias. Training about DFV needs to be developed and delivered with significant input from and co-facilitation with sexual, domestic and family abuse experts including lived experience experts, cultural safety experts, disability experts, LGBTIQ+ experts and specialist legal services and should primarily be face-to-face training. Current training must be evaluated for its effectiveness and any future training must also be regularly evaluated for its effectiveness. Evaluation reports must be published.
- k. Training and support for actors in the legal system in identifying and responding to vicarious trauma.
- l. ANROWS research found that police sometimes err on the side of caution in making AVO applications, deferring to the magistrates to determine if an order is warranted. However, magistrates in turn may rely on the initial assessment made by police, as may prosecutors.<sup>13</sup> Implement ANROWS recommendation for greater role clarity and accountability of police and the courts with safeguards to address misidentification.
- m. Pathways to quickly address misidentification through court processes as recommended in the Family Violence Reform Implementation Monitor report.<sup>14</sup>
- n. Creation of specialist courts or court lists that hear DFV matters (as well as sexual assault). While we note that there are a number of specialist court models to consider, we submit that comprehensive and holistic criminal justice support is required throughout the process, from the police investigation through the court process and post final court outcome.

<sup>13</sup> ANROWS, *Accurately identifying the 'person most in need of protection' in domestic and family violence law*, (Research Report, Issue 23, November 2020).

<sup>14</sup> Family Violence Reform Implementation Monitor, *Accurate identification of the predominant aggressor* (Report, December 2021).



## General cultural and systems reform

In addition to the above, we submit there should be broader cultural and systems reform including:

- o. Development of a multi-agency risk assessment and management framework to assist all systems and services in identifying and responding to DFV, including training in the development and implementation of this framework.
- p. All workers across all disciplines should meet minimum practice standards in working with victim-survivors and those who use DFV. Meeting additional practice standards should be required for those specialising in responding to sexual, domestic and family abuse. We note DVNSW Good Practice Guidelines.
- q. Training to support these practice standards must be up-to-date, evidence-based, developed by sexual and domestic abuse experts, culturally safe, disability aware, LGBTIQ+ aware and ongoing and jointly delivered by relevant agency/department and sexual and domestic abuse experts.
- r. Proper resourcing of the sexual, domestic and family violence sector and other sectors to be able to adequately respond to sexual, domestic and family abuse and to ensure an integrated, holistic response.
- s. Specific training to health professionals, especially midwives, GPs and emergency workers in identifying and responding to DFV.
- t. Continued efforts to provide a more trauma informed, culturally responsive legal response, including, but not limited to a criminal legal response
- u. Introduction of a Lived Expertise Advisory Group to the NSW Government representing a diversity of ages, backgrounds and life experiences to embed lived expertise policy advice into the work of government
- v. Accountability frameworks, including to address systematic racism, sexism and other forms of discrimination
- w. Community awareness campaigns, co-designed and co-delivered with SDFV experts including lived experience experts and priority populations.

We note that the Joint Select Committee recommended that:

*The Secretary of the Department of Communities and Justice should work together with a range of public bodies including NSW Police, Health, Education, Justice, Housing and Indigenous agencies to prevent domestic abuse, with the aim of reducing the numbers of victims and perpetrators of abuse. This represents a critical opportunity to implement an early intervention and public health-focused approach, rather than relying solely on traditional criminal justice levers, which only come into play in the aftermath of an offence.<sup>15</sup>*

This was following its finding that “systemic, whole of government reforms are needed to effectively implement changes to domestic abuse laws, and adequately support victims”.<sup>16</sup> In making this finding the Committee considered a submission by ANROWS discussing the approach in Scotland where the legislation is “underpinned by the four pillars of a system’s response ... protection (legal remedies); provision (effective service delivery); prevention

<sup>15</sup> Joint Select Committee, (n4), Recommendation 8, 44.

<sup>16</sup> Ibid, Finding 5, 44.

(strategies for stopping domestic abuse and reducing reoffending); and participation (by those who have experienced domestic abuse).<sup>17</sup>

The approach in Scotland was considered again by the Inquiry in relation to Recommendation 19, that the NSW Government implements tailored training on identifying, recording and responding to coercive control by police, judicial officers and prosecutors, and other workers in relevant fields.<sup>18</sup> Police Scotland told the Committee that the Scottish Government provided Police with significant funding to develop and implement training prior to the enactment of the legislation.<sup>19</sup>

### **Criminalising coercive control is not a panacea**

We bring attention to the recent review of the coercive control legislation in Scotland. This review included a survey with women where coercive control offences had been laid against their intimate partners. We note again that women in Scotland don't experience the same structural racism Aboriginal and Torres Islander women experience in Australia, and the already high levels of mistrust Aboriginal women have with the police.

Of the 29 women who responded to the survey, 11 charges of domestic abuse had been made and five cases had gone to trial. Two perpetrators were found guilty, but not of the new domestic abuse offence.<sup>20</sup> The Survey concluded that it was too early to evaluate the effectiveness of the legislation, however, there was no substantive evidence of the new legislation having had a positive impact on women's experience of the criminal justice system.<sup>21</sup>

#### *Reports on experiences with police*

The reported outcomes of police reports were mixed, with 6 of the 29 women saying their initial contact with police deterred them from contacting the police again.<sup>22</sup> Further to this, 10 of the 29 women reported feeling there was no point calling police again.<sup>23</sup> The findings indicated that the majority of women either felt that police involvement did not affect their feelings of safety (53%) or worse, that they felt less safe because of police involvement (16%).<sup>24</sup> One woman reported that when her case was dropped, she felt "really unsafe and the interactions with the children (and solicitor's letters) showed he was becoming more confident again."<sup>25</sup>

#### *Reports on experiences with Crown Office and Procurator Fiscal Service*

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<sup>17</sup> Ibid, 45.

<sup>18</sup> Ibid, Recommendation 19, 74.

<sup>19</sup> Ibid, 77.

<sup>20</sup> The Scottish Centre for Crime and Justice Research, *Domestic Abuse (Scotland) Act 2018 and the Criminal Justice System: Women's experiences two years; the emerging findings* (Report, January 2022), 8.

<sup>21</sup> Ibid, 9.

<sup>22</sup> Ibid, 19.

<sup>23</sup> Ibid, 20.

<sup>24</sup> Ibid, 24.

<sup>25</sup> Ibid, 25.

Of the 29 women who participated in the survey, only 12 saw their matter referred to court.<sup>26</sup> The research found that the women who responded to the survey also had mixed experiences of the Procurator Fiscal and Crown Office.

While we acknowledge that the cohort was small, and no firm conclusions can be drawn from this review, it cannot be assumed that criminalising coercive control in NSW will see a significant improvement in safety for people experiencing coercive control.

### Improve the AVO legislation

The Joint Select Committee recommended that the *CDPV Act* be amended as a first step, so that in conjunction with the other measures recommended, “when a criminal offence is introduced, the legal system is prepared to implement it.”<sup>27</sup>

It has been identified by many stakeholders that the current *CDPV Act* is offence based, which encourages an incident based approach to policing of DFV. The grounds for an application for an AVO require a person in need of protection to fear the commission of a domestic violence offence or intimidation or stalking. These are incident based offences and have led to police, when applying for AVOs, to focus on proving the incidents rather than on a broad range of controlling behaviour, that when understood in its context is about coercion and power.

We note that the Draft Bill will insert a definition of ‘domestic abuse’ in the *CDPV Act*, which lists types of behaviour that include behaviour understood to be coercive control, such as economic abuse, verbal and emotional abuse. However, this definition does not apply to section 16 of the *CDPV Act*, and thus does not assist a person who is experiencing coercive control to apply for an ADVO. Yet, the Joint Select Committee was of the opinion that inserting a definition of DFV in the *CDPV Act* would mean that coercive and controlling behaviours are clear grounds to obtain an ADVO, and thus by implication assumed an amendment to section 16 of the *CDPV Act*.<sup>28</sup>

We submit that the Government should amend the *CDPV Act* to introduce a contextual definition of DFV into the *CDPV Act* to provide an overall framework of domestic and family violence as one of power, control, coercion, causing fear.

In the 2010 report *Family Violence – a National Legal Response* by the Australian Law Reform Commission (ALRC) and NSW Law Reform Commission (NSWLRC), it was reported that there was overwhelming support from stakeholders that the definition of DFV include behaviour that coerces, controls or dominates a family member.<sup>29</sup>

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<sup>26</sup> Ibid, 30.

<sup>27</sup> Joint Select Committee, (n4), 29.

<sup>28</sup> Ibid.

<sup>29</sup> Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – a National Legal Response* ALRC (Report 114/Report 128, October 2010), vol 1, 207 [5.71].



The ALRC and NSWLRC found the definition of DFV needed to describe the context in which an act of violence takes place, rather than listing specific incidents of abuse.<sup>30</sup> It found that this was necessary to broaden the definition to include non-physical forms of abuse, including emotional and economic.<sup>31</sup>

The ALRC and NSWLRC considered that emphasising the coercive, controlling nature of DFV would serve two functions:<sup>32</sup>

1. it captures seemingly 'minor' events and behaviours which may have a particular meaning to the victim, and
2. it filters out other instances of abuse committed outside the context of controlling or coercive behaviour i.e. acts of physical retaliation by a victim, where that act does not cause fear or form a pattern or controlling or coercive behaviour.

While we agree that a contextual definition of DFV should be included in the *CDPV Act*, and that amending the *CDPV Act* should be the first step, we also submit that the cultural and system changes we refer to above should be in place to ensure the police and the criminal court system respond appropriately to any legislative reform that amends the grounds for an ADVO. While we would like to see the grounds for an ADVO to include a contextual definition of DFV, our serious concerns about the misidentification of Aboriginal women as perpetrators equally apply, and thus we fear that it will result in more ADVOs being taken out against Aboriginal women, and more Aboriginal women being charged with contravening ADVOs.

We note that the Joint Select Committee did not explore in any detail how conditions of an ADVO would be drafted to prohibit coercive control behaviour, and what was the experience of other jurisdictions with ADVO regimes where coercive control behaviour was the grounds for an ADVO.

Hence, our submission that an independent taskforce needs to be established immediately to consider all legislative options and the practical implementation of any proposed legislation. The taskforce needs time to fully understand how similar coercive control provisions, whether it be a criminal offence or in ADVO legislation, operates in other jurisdictions.

#### *Amendments to proposed section 6A(2) CDPV Act*

We submit that the list of domestic abuse should be amended to capture a broader range of abuse including:

- reproduction control
- Immigration abuse
- outings or threats to out a person's sexual identity or misgender a person
- belittling a person's cultural identity

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<sup>30</sup> Ibid, 234 [5.166].

<sup>31</sup> Ibid.

<sup>32</sup> Ibid, 235 [5.168-9].

- threats to self-harm if the second person does not maintain communication or a relationship with the first person

Section 6A(2) (iii) should also include preventing the second person's children from expressing their cultural identity. This is often experienced by Aboriginal women in abusive relationships with non-Aboriginal men.

The terms 'coerces' and 'controls' should be defined using plain language to help all members of the public understand. In addition, the terms 'economically abusive' and 'financial control' should be defined and clarified if they are different.

#### *Inconsistency between the two proposed definitions*

We also note the description of coercive control behaviour in the proposed 'abusive behaviour' offence is different to the description in the proposed 'domestic abuse' definition. We submit that this will be confusing for police and the courts as well as the public in their understanding of coercive control.

#### **Legislating a coercive control offence**

Despite our significant concerns, in the event that the NSW Government proceeds to introduce the Draft Bill this year with the stand-alone coercive control offence, we make the following submissions.

#### **Allow significant implementation time**

Considering the above, the NSW Government should commit to an implementation time of at least four years to prepare the legal system, support system and community for a coercive control offence, before the Bill is proclaimed (if and when the Bill is passed).

#### **The definitions**

##### *Section 54C- Limiting the offence to intimate partner relationships*

The offence should not be limited to intimate partner relationships. Coercive control behaviour occurs in many relationships between family members, including kin relationships under Aboriginal customary law. We are particularly concerned about the economic abuse of elders by younger adult members of their family. We are aware of situations where adult children coercively control their older parent's Centrelink payments for their own needs, or adult children insist on receiving parenting payments while the primary care of the children is being provided by the grandparent. We are aware of older Aboriginal people being cared for by other family members and having their payments being controlled by that carer, for their carer's own needs. We are also aware of abusive partners or ex partners using other family members to control the victim-survivor.

We are concerned that if the Government excludes other domestic relationships, it is sending the wrong message to the community, the police and other service systems. That is, coercive control is only harmful in intimate partner relationships.

It also creates an anomaly in that by limiting it to intimate partner relationships, it will only be a domestic violence offence in those relationships for the purpose of the *CDPV Act*. Therefore, a person can only apply for an AVO, pursuant to section 16(1)(a) of the *CDVP Act* on the grounds that they fear “abusive behaviour” if the alleged offender is or was an intimate partner. We submit that this would be confusing for the public, but inconsistent with *CDVPV Act* as it currently sits (which applies to a broader range of relationships), as well inconsistent with the proposed definition of “domestic abuse” to be inserted in the *CDPV Act*, which includes a broad range of behaviour.

If and when the “abusive behaviour” offence commences it is not clear to us what the wording of an ADVO condition would look like to prohibit or restrict a defendant engaging in “abusive behaviour.” We assume that sections 35 and 36 of the *CDPV Act* will need to be amended.

#### *Section 54C – limiting the offence to offenders 18 years or over*

While we are very hesitant to criminalise young people, we want it noted that significant coercive control occurs in intimate relationships between people under the age of 18. In the Aboriginal community we are aware of controlling behaviours being exerted by teenage boys over teenage girls in their relationships. It is for this reason that education and media campaigns about coercive control must be tailored to young people and culturally appropriate for young Aboriginal and Torres Strait Islander people.

We ask that DFV reports to police involving offenders under the age of 18 be monitored on an ongoing basis, especially to evaluate the effects of the targeted public education and media campaign in changing behaviours.

Specialist support is required to work more closely with young people displaying harmful behaviours in relationships with intimate partners and family members to address these behaviours. These support services and intervention programs must be culturally safe for young Aboriginal and Torres Strait Islander people. We also advocate for culturally appropriate programs in schools similar to Love Bites targeting younger children in primary school and years 7 and 8.

#### *Section 54F (b) -Define coercion and control*

We consider it would be useful to define coercion and control to assist in any educative functions of the offence. The word ‘coercion’ is not well understood in the community and the Government should use plain language to define its meaning.

#### **The elements of the proposed offence – sections 54D and 54F**



It is our view that the critical issue for this offence is the effect of coercive control. We refer the Government to legislation in Scotland and Northern Ireland that describes the effects as:

- making a person dependent or subordinate
- isolating a person from friends, family
- controlling, regulating or monitoring a person's activities
- depriving or restricting a person's freedom of action
- frightening, humiliating or punishing a person<sup>33</sup>

We urge the NSW Government to adopt an effects or impact approach rather than listing examples of behaviour. We submit that focusing on the effect of the behaviour, as they do in other jurisdictions, will assist in reducing the risk of misidentification of the primary victim and aggressor.

#### *Listing abusive behaviour*

If the Government is going to list types of abusive behaviour in the proposed section 54F then it must be given the context the Government is providing in its Draft Bill, and therefore should be inserted into section 54D.

Having said that, we are concerned that the list of behaviours, while not exhaustive, will be heavily relied upon by police and courts to determine if there is abusive behaviour, and if the behaviour is not described on the list, it is not "abusive behaviour".

If the Government's Bill is going to maintain a list we submit the following amendments should be made:

- include reproduction control
- include threats to out a person's sexual identity or threats to misgender a person
- redraft proposed section 54F(2)(a) to exclude protective parents withholding contact with children for safety reasons

We note that sexual violence is not on the lists of behaviours, and we question why. Sexual assault is a serious offence and maximum penalties for sexual assault offences are higher than 7 years. While we don't want to see sexual assault complainants being encouraged to accept a prosecution of a lesser offence, we note that there are a range of other sexual offences that have a penalty less than 7 years, such as a sexual act or sexual touching. We have had clients describe sexual violence, including being made to watch pornography as part of the coercive controlling relationship, or experiencing image- based abuse.

#### *Section 54D(1)(d)*

We welcome that the offence does not require proof of harm to the victim.

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<sup>33</sup> *Domestic Abuse (Scotland) Act 2018*, section 3; *Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021*, section 2(3).

### *Reasonable person test*

While we acknowledge it is important to have an objective test to assist in countering any arguments by the alleged offender that the behaviour was acceptable in their relationship, family or culture, we underscore that the reasonable person test is historically centred on white, male, middle class norms and perspective. Thus, when police and fact finders are deciding whether “a reasonable person consider the course of conduct in all the circumstances” to cause fear of violence, or a serious adverse impact, both conscious and unconscious bias towards Aboriginal people is applied in that decision making. We are especially concerned in circumstances where an Aboriginal woman is in a relationship with a non-Aboriginal man, that racist views about how Aboriginal women behave and/or their capabilities to manage their life and parent children, will come into play.

Therefore, ongoing and comprehensive Aboriginal cultural awareness training must be mandated for police, the legal profession and the judiciary to challenge any racist views. It is for this reason that we have submitted above that there needs to be cultural and system reform before the criminalisation of coercive control.

### *Section 54D(1)(d)(ii) - Serious adverse impact*

It is our view that section 54D(1)(d)(ii) sets a high threshold. We note that many women may still be able to perform a number of tasks in their life despite experiencing significant coercive control. We have clients who work in paid positions, parent their children, care for other family members, but nonetheless experience DFV which causes harm. This supports our recommendation that the Government consider adopting an effects approach.

Even in a better world where there was no racism, and Aboriginal women are not at risk of being misidentified, we are concerned that if the bar is too high, the offence, as it is currently proposed will be too difficult to prove. We suggest that in practice it will be easier to satisfy the mens rea and reasonable person test in the proposed offence when the behaviour that forms part of the course of conduct includes incident based offences, such as assaults, or threats. Will this in practice mean that the police rely on incidents that are easily proved to establish the required course of conduct that is, incidents that are already a crime, and then insert in the facts of the charge all the other abusive behaviour not easily proven? It is our understanding from Scotland’s Crown Office and Procurator Fiscal Service that this is the practice in Scotland with the legislation they work under.

The challenge will be for the police to have sufficient evidence for the offence when a victim has only experienced types of abusive behaviour that are not as easy to prove, such as economic abuse or preventing a person keeping connections to family, friends and culture. Yet it is exactly these behaviours that the Government is trying to capture and bring into focus. For this the police will require a sophisticated level of investigation not seen in this state. Putting aside any poor understanding of coercive control and its impact held by many police officers, police are often time poor and have insufficient time and resources (especially in relation to technology facilitated abuse) to fully investigate the DFV incidents already being reported.

### *Section 54G -Course of conduct*

We note that no minimum number of incidents has been specified. Given that it refers to behaviour that is occurring repeatedly or continuously there needs to be more than one incident. However, we question whether there will be legal arguments in proceedings about what is the threshold of 'repeatedly' or 'continuously'.

### *Section 54H- Procedural requirements*

We note that the offence does not require the particulars of any specific incident included in the abusive behaviour to be proved, if it was charged as a separate offence. However, the prosecution does need to prove that there was a course of conduct that consists of "abusive behaviour".

Noting the common law in relation to double jeopardy we are interested to know how police in practice will decide what abusive behaviour will be included in the course of conduct, and what will be charged separately.

### *Section 54I- Statutory review*

While we agree a statutory review should take place, we submit the review should take place much earlier than 3 years after its commencement. We submit that the review should take place no later than 18 months after commencement, and the review should not be a one-off review, but regular and ongoing and allow significant consultation time. Evaluations of those with lived experience of coercive control must be an integral part of the review.

We also note that the statutory review will only apply to the proposed "abusive behaviour" offence and not the amendment to the *CDPV Act*. We submit that the statutory review should apply to amendments to both Acts.

### *Annual reports*

We submit that the Government should provide annual reports about the operation of the new definition of DFV in the *CDVP Act*, including:

- i. How many AVOs are taken out annually and data about the person most in need of protection and the predominant aggressor including about their gender and age as well as if they are Aboriginal and/or Torres Strait Islander
- ii. How the definition is being applied and working in practice
- iii. Data about any changes to what is characterised as a "domestic violence offence"
- iv. Data about any changes to levels of misidentification of the person most in need of protection and the predominant aggressor
- v. The experience of victim-survivors and input from support services

Further to this, once the stand-alone offence commences, the Government should provide annual reports about the operation of the new offence including:

- vi. Number of charges laid, prosecutions commenced, dismissals, early guilty pleas, convictions, findings of not guilty or other outcomes with data included about the



- gender and age of complainants and accused as well as if they identify as Aboriginal and/or Torres Strait Islander
- vii. The types of behaviour described in the charges
  - viii. The extent to which the abusive behaviour offence is used as a stand-alone offence or charged in combination with other offences
  - ix. The use of the defence found in section 54E
  - x. The length of time between reporting abusive behaviour to police and an outcome
  - xi. Number of matters prosecuted by police and number of matters prosecuted by the NSWODPP
  - xii. Independent research about the extent to which the offence is being used and could be used
  - xiii. Independent consultation with police about the investigative tools and methods they use in relation to the offence
  - xiv. Independent surveys of complainants who have reported "abusive behaviour" to police, including complainants where reports have not proceeded to charges, and input from support services

#### *Coercive Control as a defence*

Finally, in considering criminalising a coercive control offence, the Government should use this opportunity to consider legislating a defence for people who have experienced coercive control and thereby resist that control and find themselves being charged with an incident based offence. We note this would require careful consideration to ensure primary perpetrators do not exploit the defence thereby defeating its purpose.

#### **Conclusion**

We welcome the opportunity to discuss our submission further. If you would like any further information please do not hesitate to contact us by emailing Rachael Martin [r.martin@wurringabaiya.org.au](mailto:r.martin@wurringabaiya.org.au) or Christine Robinson [c.robinson@wurringabaiya.org.au](mailto:c.robinson@wurringabaiya.org.au), or calling 9569 3857.

Yours faithfully,

**Wurringa Baiya Aboriginal Women's Legal Centre**



**Per: Rachael Martin  
Principal Solicitor**