

31 August 2022

Ms Sallie McLean  
Director, Law Enforcement and Crime  
Policy, Reform and Legislation Branch  
Department of Communities and Justice

By email: [policy@justice.nsw.gov.au](mailto:policy@justice.nsw.gov.au)

Dear Ms McLean,

**Response to the Crimes Legislation Amendment (Coercive Control Bill)**

Thank you for the opportunity to make a submission in response to the Crimes Legislation Amendment (Coercive Control Bill).

Please find our submission attached. We give permission for our submission to be published.

If you would like to discuss any aspect of this submission, please contact the signatories to this letter or Liz Snell, Law Reform and Policy Coordinator on 02 8745 6900.

Yours faithfully,

**Women's Legal Service NSW**

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## **Department of Communities and Justice**

# **Response to the public consultation on the Crimes Legislation Amendment (Coercive Control) Bill 2022 (NSW)**

**31 August 2022**

**Contact:**

**Liz Snell**  
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### About Women's Legal Service NSW

Women's Legal Service NSW (**WLS NSW**) is a community legal centre established 40 years ago that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims support, care and protection, human rights and access to justice.

Since 1995 WLS NSW has provided a statewide First Nations Women's Legal Program (**FNWLP**). This program delivers a culturally safe legal service to First Nations women, including regular engagement with communities across NSW. We provide a First Nations legal advice line, casework services including a specialised family law service to assist First Nations women access the family law courts, participate in law reform and policy work, and provide community legal education programs and conferences that are topical and relevant for First Nations women.

An Aboriginal Women's Consultation Network guides the FNWLP. It meets quarterly to ensure that we deliver a culturally safe service. The members include regional community representatives and the FNWLP staff. There is a representative from the Aboriginal Women's Consultation Network on the WLS NSW Board.

### Acknowledgments

We acknowledge the Traditional Owners of the lands on which we work across NSW and on which we live. We pay respect to Elders past, present and emerging. Is, was and always will be Aboriginal land.

We acknowledge the many women who have experienced sexual, domestic and family abuse with whom we work and whose voices and experiences inform our advocacy in the hope for positive change.

### Use of language

#### *Domestic and family abuse*

The Crimes Legislation Amendment (Coercive Control) Bill 2022 attempts to define "domestic abuse" in the *Crimes (Domestic and Personal Violence) Act* which governs apprehended violence orders.

In consulting on this term, we have received strong feedback that the term needs to be more inclusive of the experiences of First Nations communities, culturally and linguistically diverse communities, people with disability and victim-survivors across their lifespan. The preferred term is "domestic and family abuse".

We recommend adopting the language that victim-survivors use and with which they can identify in legislation, policy and practice.

The use of the term "*domestic and family abuse*" in this submission is intended to capture behaviour perpetrated by one person against another or others within a "*domestic relationship*" that coerces or controls or causes fear. The behaviour extends to harm or threats to harm animals.

Section 5 of the *CDPV Act* provides a person has a "*domestic relationship*" with another person if they are/were:

- married, in a de facto or intimate relationship whether or not it is of a sexual nature;
- living together in the same house;

- living together in a residential facility;
- relatives by birth, marriage or adoption;
- in the case of an Aboriginal or Torres Strait Islander, part of the same extended family or kinship group;
- in a relationship involving dependence on the ongoing paid or unpaid care of the other person;
- married to, or in a de facto or intimate relationship with the same person, eg. a woman's ex-partner and current partner are in a domestic relationship with each other even if they have never met.

While all violence is unacceptable, not all violence perpetrated between people in a “*domestic relationship*” should be categorised as domestic and family abuse. To be described as domestic and family abuse the behaviour must come within the framework of coercing or controlling or causing fear.<sup>1</sup>

### *Gendered language*

While acknowledging that anyone can experience domestic and family abuse, the research and our experience over forty years clearly highlights that domestic and family abuse is predominantly perpetrated by men against women and children. Our language in this submission is gendered to reflect this.

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<sup>1</sup> Jane Wangmann, “Incidents v Context: How Does the NSW Protection Order System Understand Intimate Partner Violence?” *Sydney Law Review* Vol 34, 2012, p 718; Jane Wangmann, “Gender and Intimate Partner Violence: A case study from NSW”, *UNSW Law Journal*, Vol 33(3), 2010, p962.

## Executive summary

1. We warmly welcome attention on the issue of better addressing coercive and controlling abuse (**domestic and family abuse**). Domestic and family abuse is harmful and unacceptable and is endemic in so many relationships.
2. We have long understood domestic and family abuse as centred around male privilege and entitlement and male power and control. Domestic and family abuse is predominantly perpetrated by men against women and children. The overarching framework of domestic and family abuse is one in which a male seeks to exert power, control and/or dominance over women and children and/or to cause them fear.
3. As Evan Stark describes:
 

*Coercive control entails a malevolent course of conduct that subordinates women to an alien will by violating their physical integrity (domestic violence), denying them respect and autonomy (intimidation), depriving them of social connectedness (isolation), and appropriating or denying them access to the resources required for personhood and citizenship (control).<sup>2</sup>*
4. This abuse can take many forms, including physical and sexual abuse as well as non-physical abuse, such as psychological abuse, financial and economic abuse, spiritual and cultural abuse, intimidation, stalking and technology-facilitated abuse. It can include the gradual isolation of a woman from her family, friends and supports; degrading put downs, humiliation and threats; gaslighting; constant surveillance of the women; micromanaging every aspect of a woman's life; restrictions on liberty.
5. Context is essential to understanding, identifying and responding to domestic and family abuse.
6. Yet our criminal justice system continues to fail to adequately consider context, instead focusing on incidents in isolation.
7. A clear contextual definition of domestic and family abuse within the *Crimes (Domestic and Personal Violence) Act* can help police to better consider context and the history of domestic and family abuse. The Joint Select Committee on Coercive Control (**Joint Select Committee**) recommended introducing a definition of domestic and family abuse in the *Crimes (Domestic and Personal Violence) Act* (**Crimes (DPV) Act**) as a priority and prior to introducing a stand-alone coercive control offence.
8. We support a phased approach, first legislating a definition of domestic and family abuse in the *Crimes (DPV) Act* which must also be a ground for an apprehended violence order and at a later point considering if there is a further need for a new coercive control offence. It is imperative to see improvements in policing of domestic and family abuse evidenced, including through less instances of misidentification of the person most in need of protection and the implementation of the NSW Auditor-General recommendations.<sup>3</sup> There must also be significant reforms to the criminal justice system, particularly to address the over-representation of First Nations people in custody, including First Nations women, prior to any additional new coercive control offence being introduced. Given the high levels of concerns expressed by many and particularly First Nations women and other experts about the potential for any new offence to be used against the very people it is intended to protect, it is fair and reasonable to have evidence of significant cultural reform, including in the policing of domestic and family abuse, prior to any further criminalisation.

<sup>2</sup> Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life*, Oxford University Press, Oxford, 2007, p 15

<sup>3</sup> NSW Auditor-General (2022) [Police responses to domestic and family violence](#), Audit Office of NSW

9. Prior to introducing a new coercive control offence there also needs to be strong evidence that such an offence will improve women's and children's safety and wellbeing. The available evidence does not support this. It is dangerous to present a coercive control offence as the panacea in the absence of such evidence.
10. We have had the benefit of conversations with many stakeholders interested and concerned about this important issue, including Women's Legal Service NSW Aboriginal Women's Consultation Network, Wirringa Baiya Aboriginal Women's Legal Centre, other community legal centres, DV NSW, the NSW Women's Alliance and academics including Dr Jane Wangmann. The recommendations below are informed by these valuable conversations and are richer for these discussions.
11. The recommendations are grouped into themes:
  - 11.1 Oversight and governance
  - 11.2 A phased approach
  - 11.3 Embedding cultural and systems reform
  - 11.4 Safeguards and accountability
  - 11.5 Additional recommendations if the NSW Government proceeds with a new coercive control offence

### Recommendations

12. In summary we recommend:
  - 12.1 The NSW Government extends the consultation period on the Coercive Control Bill by at least 6 months. This should be further extended if there is a delay in the finalisation of the National Principles on Coercive Control, or if significant legislative or practice concerns are raised with the amendments to the *Crimes (Domestic and Personal Violence) Act*. At an absolute minimum there must be a further public consultation round on an updated Bill prior to the Bill being introduced into Parliament.
  - 12.2 The NSW Government must immediately establish an independent, multi-agency taskforce with a sufficiently resourced secretariat to oversee the consultation on draft legislation, implementation, and ongoing monitoring, evaluation and review of the legislation.
  - 12.3 Use the terminology "*domestic and family abuse*" in legislation and policy to ensure inclusivity.
  - 12.4 The NSW Government introduces a contextual definition of "*domestic and family abuse*" into our *Crimes (Domestic and Personal Violence) Act (CDPV Act)*. Consistent with the NSWLRC and ALRC 2010 recommendation this could be "*violent, threatening or other behaviour perpetrated by one person against another or others within a "domestic relationship" that coerces or controls or causes fear.*"
  - 12.5 Rather than using examples, consider using a "relevant effects" framing with further consultation with priority populations and lived experience experts to ensure language resonates and captures behaviour that may have particular effects for particular priority populations.
  - 12.6 If using examples, the NSW Government:



- 12.6.1 Considers defining terms such as “*coerces*”, “*controls*”, “*economic and financial abuse*” and “*emotional or psychological abuse*”. Further consultation with priority populations and people with lived experience is vital to ensure language that resonates, and people understand.
  - 12.6.2 Makes clear in providing an example of “*damaging or destroying property*” that this includes property owned by the person who damages or destroys it.
  - 12.6.3 Section 6A(1)(e) should refer to “*intimidating*” rather than “*intimidation*”.
  - 12.6.4 Section s6A(1)(f) should remove reference to intention.
  - 12.6.5 Other examples that could be included:
    - 12.6.5.1 reproductive coercion,
    - 12.6.5.2 immigration abuse,
    - 12.6.5.3 specific abuse within the LGBTQIA+ community such as outing or threats to out or misgender or other identity-based abuse, and
    - 12.6.6 systems abuse
- Some of these terms may require a definition.
- 12.6.7 Amend section 6A(2)(h) to “*preventing the second person from or forcing the second person to*”
- 12.7 The NSW Government incorporates domestic and family abuse as a ground for an AVO and amends s16, s29, s49 and of the *Crimes (Domestic and Personal Violence) Act* and incorporates proposed legislative amendments to limit misidentification.
  - 12.8 The NSW Government considers a more detailed review of the *Crimes (DPV) Act*.
  - 12.9 NSW Police must successfully implement cultural and system reforms prior to the introduction of a new coercive control offence including by the following actions:
    - 12.9.1 Publish the results of regular audits of policing of sexual, domestic and family abuse and steps police will take for continuous improvement.
    - 12.9.2 Introduce accountability frameworks to effectively respond to systemic issues, including systemic racism, sexism and other forms of discrimination.
    - 12.9.3 Outline the work police is undertaking with community to try to address barriers to reporting domestic and family abuse to police.
    - 12.9.4 Strengthening mechanisms to ensure greater diversity within the NSW Police Force, including in leadership positions.
    - 12.9.5 Noting similar systemic causes for misidentification in NSW as there is in Victoria, implement the recommendations of the Family Violence Reform Implementation Monitor (2021) in the report: *Accurate identification of the predominant aggressor in NSW*, including the following recommendations relating to police:

- 12.9.5.1 Improving guidance to police to:
  - 12.9.5.1.1 *Support officers to identify the predominant aggressor before beginning the risk assessment.*
  - 12.9.5.1.2 *Clearly differentiate between the risk assessment (and referral) function for civil protection purposes, and any criminal incidents (particularly in cases where a victim has used force).*
- 12.9.5.2 Trial a review process, involving the specialist domestic and family abuse sector, for any domestic and family abuse report where a woman is identified as a respondent (and possibly for other targeted cohorts) before it is committed to NSW Police database.
- 12.9.5.3 Urgently review how domestic and family violence and abuse records are captured in the NSW Police system to ensure that where misidentification is found, the record can be amended so a person does not continue to be incorrectly identified.
- 12.9.5.4 Establish and communicate clear processes to guide police responses where there is new information that suggests misidentification has occurred, including:
  - 12.9.5.5 A contact point at NSW Police that other agencies can use to raise misidentification.
  - 12.9.5.6 An agreed process to make a determination that misidentification has occurred.
  - 12.9.5.7 Specific guidance for police on the actions they need to take once this determination has been made.
  - 12.9.5.8 Develop clear guidance for withdrawing apprehended violence order applications or criminal charges in cases of misidentification and give police prosecutors the authority to quickly facilitate this.
- 12.9.6 There needs to be clear evidence of reduction in police misidentification of the person most in need of protection and the predominant aggressor prior to the introduction of any new coercive control offence.
- 12.9.7 Develop clear and transparent policy and procedures to ensure safe reporting and response to allegations of police employees' perpetration of domestic and family abuse and address conflict of interest issues which must include independent oversight of such investigations.
- 12.9.8 Regular and ongoing training for all police in how to identify and respond to domestic and family abuse, 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 domestic and family abuse 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 made public.

- 12.9.9 Funding for co-responder model with specialist sexual, domestic and family abuse community-based workers co-located with police who are available outside business hours and include more than one specialist domestic and family abuse worker at each of the pilot sites. There must also be funding for evaluation and subject to positive evaluation funding to expand across NSW.
  - 12.9.10 Training and support for police in identifying and responding to vicarious trauma.
  - 12.9.11 Implementation of operation information technology systems that enable police easy access to information about history and context of previous violence and abuse.
- 12.10 The Department of Communities and Justice supports the legal system to undertake the following cultural and systems reform including:
- 12.10.1 Regular and ongoing training for judicial officers, legal practitioners, court staff and interpreters in how to identify and respond to domestic and family abuse, 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 domestic and family abuse 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.
  - 12.10.2 There must also be compulsory training in identifying and responding to domestic and family abuse and identifying and responding to trauma for law students.
  - 12.10.3 Training and support for actors in the legal system in identifying and responding to trauma and vicarious trauma.
  - 12.10.4 Implement the Domestic Violence Review Team recommendation to “enhance and promote domestic violence specialist court practices”.<sup>4</sup>
  - 12.10.5 ANROWS research found that “police sometimes err on the side of caution in making [protection order] 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”. Implement ANROWS recommendation for greater role clarity and accountability of police and the courts with safeguards to address misidentification.
  - 12.10.6 Clear pathways to quickly address misidentification through court processes as recommended in the Family Violence Reform Implementation Monitor report: *Monitoring Victoria's family violence reforms Accurate identification of the predominant aggressor* (2021). These include:
    - 12.10.6.1 *Develop a clear process for an urgent return to court in matters where misidentification has been found.*

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<sup>4</sup> NSW Government (2017) *NSW Domestic Violence Death Review Team Report 2015-17*, Sydney, p xiv (16)

- 12.10.6.2 *Integrate legal services in the family violence response model to ensure timely legal advice in misidentification cases, and provide these services with appropriate training to ensure they are familiar with and work consistently with multi-agency risk assessment and management framework.*
  - 12.10.6.3 *Give urgent attention to exploring legislative options to provide courts with the power to find that misidentification has occurred and to issue a court order for all records to be corrected.*
  - 12.10.6.4 *Roll out the core features of the specialist family violence court model across the state to ensure more magistrates and court workers can engage effectively with respondents and affected family members and recognise misidentification.*
  - 12.10.6.5 *Consider interaction with child protection systems in ensuring the perpetrator is made visible and held accountable and misidentification corrected.*
  - 12.10.6.6 *Ensure that the solutions developed adequately respond to First Nations victim-survivors.*
- 12.11 The NSW Judicial Commission updates benchbooks consistent with Recommendation 67 of the Queensland Women's Safety and Justice Taskforce: *Hear Her Voice – Volume One*, including to:
- 12.11.1 *provide guidance on how to identify the person most in need of protection in the relationship*
  - 12.11.2 *provide guidance on using plain English and trauma informed language*
  - 12.11.3 *content to address myths about domestic and family abuse*
- 12.12 There must be broad cultural and systems reform with the independent implementation taskforce having oversight of this work, including:
- 12.12.1 Development of a multi-agency risk assessment and management framework to assist all systems and services in identifying and responding to domestic and family abuse, including training in the development and implementation of this framework.
  - 12.12.2 Ensuring existing tools, such as the updated Domestic Violence Safety Assessment Tool are consistent and aligned with any multi-agency risk assessment and management framework.
  - 12.12.3 All workers across all disciplines should meet minimum practice standards in working with victim- survivors and those who use domestic and family abuse. Meeting additional practice standards should be required for those specialising in responding to sexual, domestic and family abuse. We note DVNSW Good Practice Guidelines.
  - 12.12.4 Training to support these practice standards must be up-to-date, evidence-based, developed by sexual and domestic abuse experts including lived experience experts, culturally safe, disability aware, LGBTIQ+ aware and ongoing and jointly delivered by relevant agency/department and sexual and domestic abuse experts including lived experience experts.

- 12.12.5 Proper resourcing of the sexual, domestic and family abuse sector and other sectors to properly respond to sexual, domestic and family abuse and to ensure an integrated, holistic response. Funding for specialist women's services including specialist women's legal services.
  - 12.12.6 Continued efforts for all working in the legal system to provide a more trauma informed, culturally responsive legal response, including, but not limited to a criminal justice response.
  - 12.12.7 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.
  - 12.12.8 Accountability frameworks, including to address systematic racism, sexism and other forms of discrimination.
  - 12.12.9 Community awareness campaigns, co-designed and co-delivered with sexual, domestic and family abuse experts including lived experience experts and priority populations.
- 12.13 If despite our very strong objection to proceeding this year in passing a new coercive control offence, the NSW Government nonetheless proceeds, essential safeguards must be introduced, including:
- 12.13.1 A legislative requirement to table a report to Parliament outlining the steps taken towards cultural and systems reform implementation prior to the commencement of a new offence. Include a provision to mandate delay of the commencement date if implementation preparation is insufficient as determined by the independent taskforce. We note the NSW Women's Alliance recently recommended this in [Action to End Gendered Violence](#).
  - 12.13.2 A contextual definition of domestic and family abuse which is a ground for an apprehended violence order commences in the Crimes (Domestic and Personal Violence) Act within 2 years of the passing of legislation.
  - 12.13.3 A new coercive control offence does not commence until at least 4 years from the passing of legislation and subject to successful implementation of cultural and systems reform outlined above as assessed by the independent taskforce.
  - 12.13.4 Annual reports about the operation of the new definition of domestic and family abuse in the Crimes (DPV) Act, where domestic and family abuse is a ground for an ADVO including:
    - 12.13.4.1 Number of reports to police.
    - 12.13.4.2 Number of police ADVOs applications made.
    - 12.13.4.3 Number of police ADVOs made and number of private ADVOs made (in total for each category, as well as a breakdown of how many name children).
    - 12.13.4.4 Length of ADVO.

- 12.13.4.5 Breakdown of gender, age, background and relationship context of the person most in need of protection and the predominant aggressor, including if they identify as Aboriginal and/or Torres Strait Islander.
- 12.13.4.6 Other relevant data.
- 12.13.4.7 The experience of victim-survivors and input from support services.
- 12.13.5 Commissioning research to measure outcomes, use and effectiveness of a contextual definition of domestic and family abuse. This work needs to be commissioned immediately so there are systems in place to collect the necessary data prior to commencement.
- 12.13.6 Once the new offence commences, annual reports about the operation of the new offence including:
  - 12.13.6.1 Number of reports to police, number of charges laid and what charges, prosecutions commenced, dismissals, early guilty pleas, convictions (and for what offence(s)), findings of not guilty or other outcomes with a breakdown of gender, age, background and relationship context of the person most in need of protection and the predominant aggressor, including if they identify as Aboriginal and/or Torres Strait Islander.
  - 12.13.6.2 The length of time between reporting a course of conduct of domestic and family abuse to police and a final outcome.
  - 12.13.6.3 A breakdown of the length of time between:
    - 12.13.6.3.1 Reporting behaviour to police and charges laid.
    - 12.13.6.3.2 Charges laid and prosecution commences.
    - 12.13.6.3.3 Prosecution commences and conviction or another outcome.
  - 12.13.6.4 The number of coercive control offence charges laid:
    - 12.13.6.4.1 on their own.
    - 12.13.6.4.2 in conjunction with other offences and what are these offences.
  - 12.13.6.5 The number of coercive control offence prosecutions undertaken
    - 12.13.6.5.1 on their own.
    - 12.13.6.5.2 in conjunction with other offence(s) and what are these offence(s).
  - 12.13.6.6 The number of matters where charges for other offence(s) and a coercive control offence were originally laid but
    - 12.13.6.6.1 Only the coercive control offence is prosecuted.
    - 12.13.6.6.2 Only the other offence(s) is prosecuted.

- 12.13.6.7 The number of matters where there is a conviction for a coercive control offence in the alternative.
- 12.13.6.8 Number of coercive control offences prosecuted by police and number of coercive control offences prosecuted by the Office of the Director of Public Prosecutions (ODPP).
- 12.13.6.9 Other relevant data.
- 12.13.6.10 Independent research about the extent to which the offence is being used and could be used by police and the ODPP, this must include information about the extent to which the offence is addressing coercive and controlling behaviours not captured by existing offences.
- 12.13.6.11 The experience of victim-survivors and input from support services.
- 12.13.7 In addition to annual reports, include a legislative requirement for regular and ongoing statutory reviews following commencement, with the first review no more than 18 months after commencement. What should be included in the statutory review must be outlined in legislation to ensure a comprehensive review. It must include a review of the effectiveness of the proposed new definition in the *Crimes (DPV) Act* as well as a review of any new provisions relating to the introduction of new offence in the *Crimes Act*. This includes an assessment of the effectiveness of training<sup>5</sup> and examination of transcripts<sup>6</sup> as included for the sexual consent reforms and consideration of provisions in Scotland's legislation.<sup>7</sup> Evaluations of the experience of victim-survivors must be integral to these reviews. We support reviews including additional data as outlined in Dr Wangmann's submission. Ongoing legislative reviews must commence every 2 to 3 years after the commencement of the previous review or earlier if an issue of concern is identified with a report tabled in each House of Parliament within 12 months of the commencement of each review.
- 12.13.8 If despite strong opposition to passing legislation this year, the NSW Government proceeds in doing this anyway, we make the following additional recommendations in relation to the proposed new offence:
- 12.13.8.1 Expand the offence to cover all domestic relationships, as defined under section 5 of the *Crimes (Domestic and Personal Violence) Act*.
- 12.13.8.2 Have a single definition of domestic and family abuse that is used in both the *Crimes (DPV) Act* and the *Crimes Act* which must be a contextual definition and should consider a "relevant effects" framework rather than providing examples.
- 12.13.8.3 Define "coercion" and "control" and "mental harm" (or use the term "psychological harm" and define this).
- 12.13.8.4 If retaining the list of examples approach, consider moving section 54F(2)(g) to section 54F(1) as part of a contextual definition.

<sup>5</sup> *Crimes Act 1900 (NSW)*, section 583(6)

<sup>6</sup> *Crimes Act 1900 (NSW)*, section 583(2), *Criminal Procedure Act 1986 (NSW)*, section 368(2)

<sup>7</sup> *Domestic Abuse (Scotland) Act 2018*, section 14

- 12.13.8.5 Redraft section 54F(2)(a) to clearly exclude protective parents withholding children from contact for safety reasons.
- 12.13.8.6 Specifically name sexual violence as an example of domestic and family abuse.
- 12.13.8.7 Consider a more straight forward framing of the offence and make clear you do not need to prove harm.
- 12.13.8.8 If retaining the framing of the offence in section 54D(1)(d)(i) do not use the terminology “*violence*”.
- 12.13.8.9 Have a provision for alternative available for conviction.
- 12.13.8.10 A new coercive control offence does not commence prior to at least 4 years from the passing of legislation and subject to successful implementation of cultural and systems reform, including what is outlined in this submission.
- 12.13.8.11 Outline the safeguards and protections in place against misidentification of the predominant aggressor.
- 12.13.8.12 Codify the common law principles on context and relationship evidence as recommended by the Joint Select Committee.
- 12.13.8.13 Properly fund early support for children and young people.
- 12.13.8.14 Monitor and evaluate the effectiveness of awareness campaigns and primary prevention work in changing behaviour.

### Consultation period

- 13. We are deeply concerned about the inadequate consultation period for such significant reform. While we commend the Government for providing some alternatives to providing written feedback through Department of Communities and Justice roundtable consultations, this does not replace the need for providing adequate time for proper consultation on complex legislation. It is important these roundtables are not one off but continue as the response to coercive control continues to be developed. Our assessment of the Bill is that it is significantly flawed and there must be further public consultations on further versions of any Bill.
- 14. We remind the NSW Government again that the Scottish legislation criminalising domestic abuse was developed over four years of extensive consultations - with survivors' voices at the centre.
- 15. We continue to call on the NSW Government to extend the consultation period by at least 6 months. It is vital there is further public consultation on further versions of any Bill.
- 16. We also believe it is important there be transparency in the consultation process with the publishing of submissions and the summary notes of roundtable discussions. It would be beneficial to understand different perspectives and the concerns different stakeholders are raising which can inform further discussions. We give permission for our submission to be published.
- 17. We also note the multiple consultations occurring simultaneously on significant pieces of work relating to sexual, domestic and family abuse, including the NSW Government Sexual Violence and Domestic and Family Violence Plans to implement the National Plan to Eliminate Violence against Women and Children. Given the Plans set the vision and work for the next 5 years in NSW, it is disrespectful to



services, advocates and survivors to have such a short consultation period and at the same time as consulting on the very complex Coercive Control Bill. While we acknowledge and appreciate the different methods to provide feedback, including through meetings, a short consultation period does not allow time for proper consultation, particularly with priority populations.

### Recommendation 1

The NSW Government extends the consultation period on the Coercive Control Bill by at least 6 months. This should be further extended if there is a delay in the finalisation of the National Principles on Coercive Control, or if significant legislative or practice concerns are raised with the amendments to the *Crimes (Domestic and Personal Violence) Act*. At an absolute minimum there must be a further public consultation round on an updated Bill prior to the Bill being introduced into Parliament.

### Oversight and governance

18. A key recommendation of the Joint Select Committee on Coercive Control (**Joint Select Committee**) is the establishment of a multi-agency taskforce to have oversight of the drafting of legislation, implementation and monitoring and evaluation.<sup>8</sup>
19. It is important this taskforce is independent.
20. We note the important independent oversight function of the Family Violence Reforms Implementation Monitor in Victoria in ensuring the implementation of Royal Commission into Family Violence recommendations and its continuing important role in monitoring and evaluation. We further note the Queensland Women's Safety and Justice Taskforce recommended the appointment of an independent implementation supervisor to oversee the four phases of implementation of reforms in responding to coercive control and to advise government of when they are satisfied implementation is complete.<sup>9</sup> This is required "so that the public will know the progress of the implementation of its proposed reforms."<sup>10</sup>
21. The report of the Joint Select Committee outlined some of the main challenges the taskforce could seek to address:
  - *The scope and operation of the offence in the current legal framework and how it will be interpreted by investigators, prosecutors and the courts.*
  - *Resourcing for police, prosecution services and courts to use the offence effectively and respond to possible increased demand.*
  - *Victim survivors' ability and willingness to report offences and engage with the criminal justice system.*

<sup>8</sup> Parliament of NSW Joint Select Committee on Coercive Control (2021) *Coercive control in domestic relationships*, Report 1/57 – June 2021 (Joint Select Committee Report), Recommendation 1, 20-22. For a list of issues the taskforce is to consider, see paragraph 5.32

<sup>9</sup> Women's Safety and Justice Taskforce (2021) *Hear her voice - Volume One: Addressing coercive control and domestic and family violence in Queensland*, Recommendation 88

<sup>10</sup> *Ibid*, page x

- *Increasing the barriers that diverse groups of women already experience with accessing the criminal justice system.*
- *The risk of unintended consequences, including misidentification of victims as perpetrators and more opportunities for systems abuse by perpetrators.*
- *The risk of over-criminalisation and regulatory overreach.*
- *Increasing overrepresentation of Aboriginal and Torres Strait Islander people in custody.*
- *Limited evidence about the impact of the introduction of offences in other jurisdictions.*

22. It would also need to have oversight for monitoring and evaluation. Additional work required that was identified in the Joint Select Committee report includes:

- *Overseeing training and education programs, before the rollout of a coercive control offence.*
- *Monitoring the rollout of changes to ADVO and sentencing legislation.*
- *Monitoring the rollout of a coercive control offence, including by collaborating with BOCSAR to collect statistics on charges, prosecutions, guilty pleas and convictions.*
- *Consulting with NSW Police, service providers, court advocates and BOCSAR about how to measure misidentification of victims of domestic abuse.*
- *Funding and coordinating research into best practices for perpetrator intervention programs, in Australia and overseas.*
- *Funding and coordinating research to 'build understanding of LGBTQ people's experiences of the family violence system, barriers and service gaps'.*
- *Identifying gaps in domestic abuse services in regional areas, and for marginalised communities.*
- *Identifying and seeking to address obstacles to justice for Aboriginal and Torres Strait Islander victim survivors of domestic abuse.<sup>11</sup>*

23. The Government supported the establishment of the multi-agency taskforce.<sup>12</sup>

24. It is essential an independent multi-agency taskforce is established immediately.

### **Recommendation 2**

The NSW Government must immediately establish an independent, multi-agency taskforce with a sufficiently resourced secretariat to oversee the consultation on draft legislation, implementation, and ongoing monitoring, evaluation and review of the legislation.

<sup>11</sup> Joint Select Committee Report, paragraph 4.14

<sup>12</sup> NSW Government (2021) *Response to NSW Joint Select Committee on Coercive Control*

### Over-representation of First Nations women in custody

#### *The criminalisation of First Nations women*

25. First Nations women are the fastest growing prison population in NSW and represent about 40% of all women in custody in NSW.<sup>13</sup> First Nations men represent about 28% of all men in custody in NSW.<sup>14</sup>
26. We draw on our submission to the NSW Parliamentary Select Committee into the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody in paragraphs 27-45 below.<sup>15</sup>
27. The majority of women in custody have complex histories of sexual, domestic and family abuse starting in childhood.<sup>16</sup> The rates of previous victimisation are highest for First Nations women, with some studies suggesting that up to 90% of First Nations women in custody are survivors of domestic and family abuse.<sup>17</sup> First Nations women are also 35 times more likely to be hospitalised due to domestic and family abuse related assaults, than non-First Nations women.<sup>18</sup>
28. These statistics are reflected in our work. Our First Nations clients are also more likely to have been raised in poverty and experience domestic and family abuse, systemic racism, addiction, cognitive impairment, homelessness, unemployment, mental illness and poor literacy. They have had early and ongoing contact with police, child protection authorities and other state interventions.
29. Our clients regularly identify and express sadness and anger that their offending, mostly drug and property offences, relates to their desperate attempts to find some relief from the constant psychological and physical pain of years of abuse that they and their families and communities have suffered. This is the heart of criminalisation and injustice for First Nations women. Raped, flogged, addicted, homeless and locked up.

#### *Compounding harm through misidentification as aggressors*

30. We are extremely concerned about the number of women in custody who have been misidentified by police and the courts as offenders. There is growing evidence that at least half of female perpetrated domestic violence occurs in circumstances where the women are the persons most in need of protection but have been misidentified as aggressors.<sup>19</sup>

<sup>13</sup> BOCSAR (2022) *New South Wales Custody Statistics*, NSW Prison Statistics, (Total Female and Aboriginal Female rows)

<sup>14</sup> BOCSAR (2022) *New South Wales Custody Statistics*, NSW Prison Statistics, (Total Male and Aboriginal Male rows)

<sup>15</sup> Women's Legal Service NSW (2020) *Submission in response to the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody*

<sup>16</sup> Australia's National Research Organisation for Women's Safety (2020) *Women's imprisonment and domestic, family, and sexual violence: Research synthesis* (ANROWS Insights, 03/2020); M Stathopoulos and A Quadara (2014) *Women as offenders, Women as victims: The role of corrections in supporting women with histories of sexual abuse*, A report for the Women's Advisory Council of Corrective Services NSW

<sup>17</sup> Australian Law Reform Commission (2018) *Pathways to justice: Inquiry into the incarceration rates of Aboriginal and Torres Strait Islander Peoples*

<sup>18</sup> Productivity Commission Steering Committee for the Review of Government Services (2009) *Overcoming Indigenous Disadvantage: Key Indicators 2009* p26.

<sup>19</sup> H Boxall, C Dowling and A Morgan (2020) *Female perpetrated domestic violence: Prevalence of self-defensive and retaliatory behaviour, Trends and Issues in Crime and Criminal Justice*, Australian Institute of Criminology No 584, J Mansour (2014) *Women Defendants to AVOs: What is their experience of the justice system*, Women's Legal Service NSW; J Wangmann, L Laing & J Stubbs (2020) *Exploring gender*

31. First Nations women are therefore more likely to be both victim-survivors of domestic and family abuse and misidentified as perpetrators of domestic and family abuse. Misidentification is an avoidable tragedy. The NSW Coroner has commented on *“the importance of viewing domestic violence holistically, as episodes in a broader pattern of behaviour rather than as incidents in isolation of one another”*.<sup>20</sup> The Domestic Violence Death Review Team has recommended the NSW Police Force reviews how it captures data on domestic violence so that police can *“view the incident holistically and in the context of the history of the parties and relationship”* and *“make informed decisions as to what action to take in the context of the incident they are dealing with”*.<sup>21</sup>
32. Any such holistic assessment will also require a commitment to trauma informed, sexual, domestic and family violence informed, culturally safe, LGBTIQ+ aware and disability aware practices. Women have told us that they have not disclosed information relevant to the context of their arrest, for example, they have been sexually assaulted prior to their alleged offending, but unable to disclose this to police, lawyers, psychologists or courts due to a range of factors such as shame, fear and culture or not being offered the opportunity to speak with a female officer or practitioner. In effect First Nations women have been silenced, firstly by the perpetrator and then by the systems which are meant to protect them.

### *Compounding harm through lack of gendered response*

33. Because the overwhelming majority of criminalised people are male,<sup>22</sup> legislation, policies and case law are not gendered and fail to acknowledge the specific experiences and needs of women. At the 2020 Australian Women Lawyers National Conference, The Law Council of Australia President Pauline Wright spoke about women's use of violence when defending themselves from domestic and family abuse:

*Often male standards are applied where the women are the alleged perpetrators of the crimes of violence. Women face more serious charges than the men would in the same circumstances because women choose, for instance, to use a weapon.*<sup>23</sup>

34. It has also been identified that the decision in *Bugmy v the Queen* [2013] HCA 38 *“does not address gender”*.<sup>24</sup> In her analysis of *Bugmy*, Jackson refers to the 2001 Aboriginal and Torres Strait Islander Social Justice Commissioner's report in which Commissioner, Dr William Jonas AM, noting the high rates of incarceration of Aboriginal and Torres Strait Islander women, says:

*“Aboriginal women remain largely invisible to policy makers and program designers with very little attention devoted to their specific situation and needs. This is of critical importance, particularly because of the impact that imprisonment has on Indigenous families and communities (especially through separation from children).”*<sup>25</sup>

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differences in domestic violence reported to the NSW Police Force, *Current Issues in Criminal Justice*; note also Heather Nancarrow, Kate Thomas, Valerie Ringland, & Tanya Modini (2020) *Accurately identifying the “person most in need of protection” in domestic and family violence law* (Research report, 23/2020). Sydney: ANROWS.

<sup>20</sup> NSW Government (2017) *NSW Domestic Violence Death Review Team Report 2015-17*, Sydney, p v.

<sup>21</sup> Ibid, Recommendation 2.1.

<sup>22</sup> About 93% of people in custody to June 2022 were male see, BOCSAR (2022) *New South Wales Custody Statistics*, NSW Prison Statistics, (Total 2022 Q2 Male and Female rows)

<sup>23</sup> Cited in Naomi Nielson, ‘Justice system biases target female offenders’, *Lawyers Weekly*, 31 August 2020

<sup>24</sup> Lucy Jackson (2015) ‘Sentencing Indigenous Women After *Bugmy*’ 40(3) *Alternative Law Journal* p73.

<sup>25</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001*, p15

35. We support the Australia Law Reform Commission's recommendation for the development of 'Indigenous Experience Reports'<sup>26</sup>, but such resources must incorporate and reflect the voices and lived experiences of First Nations women. We are aware of the *Bugmy Bar Book*, but note that it contains limited gendered analysis, even in key chapters relevant to First Nations women, such as *Exposure to domestic and family violence* and *Childhood sexual abuse*.<sup>27</sup>
36. Any response to the high level of First Nations people in custody, must include specific provision to seek the expertise and ongoing guidance of First Nations women, particularly in relation to their experiences of both personal violence and state violence.

### *Compounding harm through state violence*

37. State violence and structural racism is a daily experience for First Nations people. Racial profiling and policies that disproportionately impact First Nations people. Sexual and physical violence in closed environments and state care. High rates of child removal. Denial of experiences. Dispossession of land. Severing of connections.
38. Incarceration is not reducing reoffending for First Nations women.
39. There must be genuine opportunities to adopt First Nations laws and customs in responding to criminalised behaviours. The state must provide space for First Nations people to lead the way forward, including equitable opportunities for First Nations women to participate.

### *Compounding harm through lack of culturally safe, trauma informed healing and diversion*

40. Helping women to address their trauma is central to reducing recidivism and diverting them from offending and carceral environments. For First Nations women, this trauma is complex and unique. In addition to high levels of sexual violence and domestic and family violence, First Nations trauma includes trans-generational and community trauma arising from the ongoing trauma experienced as a result of colonisation, dispossession and the Stolen Generations. First Nations trauma is the loss of identity, belonging, love, legacy, community and country and the ongoing forced removal of children from their families and communities.
41. First Nations women deserve specialised, culturally safe spaces to heal. These spaces could divert women from incarceration and provide opportunities for women to safely care for children and to be on country in women only communities, based on an Aboriginal Healing Framework.<sup>28</sup>

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<sup>26</sup> Australian Law Reform Commission (2018) *Pathways to justice: Inquiry into the incarceration rates of Aboriginal and Torres Strait Islander Peoples*, Recommendation 6-2.

<sup>27</sup> The Public Defenders, *Bugmy Bar Book*; we also note the development of the *Bugmy Evidence Project* by the ALS NSW/ACT and are hopeful that this will incorporate a gendered analysis of the experiences and needs of First Nations women.

<sup>28</sup> According to Catherine Caruana, the core characteristics of an Aboriginal Healing Framework include: Indigenous ownership of the program design and evaluation, a holistic and multidisciplinary approach, the centrality of culture and spirituality, the program is informed by history, the use of preventative and therapeutic strategies and the commitment to healing, see C Caruana (2020) 'Healing services for Indigenous people' 17 *Family Relationships Quarterly*.

### *Compounding harm through removal and loss of children*

42. First Nations children in NSW are eight times more likely to be removed from their families and enter care by the age of five years.<sup>29</sup>
43. It is estimated that around 80% of First Nations women in prison are mothers.<sup>30</sup> While many of our criminalised First Nations clients were not the primary caregiver for their children immediately prior to entering custody, they are overwhelmingly concerned about the safety and wellbeing of their children. We observe that in almost every case, domestic and family abuse, misidentification and criminalisation have been key contributors to the removal or loss of their children.
44. As a first step, child protection authorities must immediately enhance their understanding of the gendered impact of sexual, domestic and family abuse and specifically how this is experienced in First Nations communities. They must identify the person most in need of protection, hold perpetrators to account and review the context of harm to facilitate the early identification and support of protective caregivers.
45. Incarceration of women and particularly pregnant women and women with caring responsibilities for children must be as a last resort. During sentencing, courts must consider caregiving responsibilities for children and young people, any history of violence experienced and any history of mental health and substance abuse. This is consistent with the United Nations Bangkok Rules.<sup>31</sup>

### **Trends in domestic violence-related stalking and intimidation offences**

46. The over-representation of women and particularly First Nations women in custody, the significant majority of whom have experienced child sexual abuse and domestic and family abuse and have experience of misidentification provides the context for why we are calling for a phased approach to responding to coercive control.
47. We cannot support the introduction of a new coercive control criminal offence in the face of a broken criminal justice system which often fails women, and particularly First Nations women.
48. We note with concern the recent NSW Bureau of Crimes Statistics and Research (**BoCSaR**) report on *Trends in domestic violence-related stalking and intimidation offences* which highlights the  
*pronounced effect on Aboriginal people who accounted for 28% of court finalisations and 52% of custodial penalties in 2021.*<sup>32</sup>
49. It would be helpful for this data to be further disaggregated by gender to see the impact on First Nations women.

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<sup>29</sup> Family is Culture (2019) *Independent Review of Aboriginal Children and Young People in OOHC*, p40.

<sup>30</sup> Human Rights Law Centre and Change the Record Coalition (2017) *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment*, p 13, citing Juanita Sherwood and Sacha Kendall, 'Reframing Space by Building Relationships: Community Collaborative Participatory Action Research with Aboriginal Mothers in Prison' (2013) 46 *Contemporary Nurse: A Journal for the Australian Nursing Profession* p83, 85.

<sup>31</sup> *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders*, E/2010/30 adopted by the UN General Assembly on 21 December 2010, Rule 41(b)

<sup>32</sup> Stephanie Ramsey, Min-Taec Kim & Jackie Fitzgerald (2022). *Trends in domestic violence-related stalking and intimidation offences in the criminal justice system: 2012 to 2021* (Bureau Brief No. 159). Sydney: NSW Bureau of Crime Statistics and Research.

50. The BoCSaR report comments that “*recent statistics suggest that domestic violence-related assault has remained stable [from 2007 to 2021]*” and “*pooled victim survey results show no change in self-reported DV victimisation over a similar period*”. This leads BoCSaR to conclude the increase in stalking/intimidation reports and charges “*are more likely to reflect changes in law enforcement policy or practice rather than criminal behaviour*”.<sup>33</sup>
51. The NSW Government must commit to reforming the criminal justice system and enabling a First Nations led response to over-representation of First Nations people in custody prior to the introduction of a new coercive control offence.

**A phased approach: Starting with a definition of domestic and family abuse in the *Crimes (Domestic and Personal Violence) Act* which governs apprehended violence orders (AVOs)**

***A contextual definition***

52. We refer to our earlier comments above under the heading “use of language” which outlines the reasons to use more inclusive language, namely “domestic and family abuse”. We recommend the use of the term “domestic and family abuse”.

53. The Joint Select Committee recommended

*Recommendation 2*

*That the NSW Government should propose amendments to the Crimes (Domestic and Personal Violence) Act 2007 to create a clear and accessible definition of domestic abuse, which includes coercive and controlling behaviour. This should be done as a priority, before criminalising coercive control.*

54. This recommendation was made in recognition that NSW is the only jurisdiction in Australia not to have a definition of domestic and family abuse in its domestic violence legislation and a “*clear and accessible*” definition is an important educative tool and helps to build a common understanding.
55. The Government supported this recommendation in principle.
56. It is important that a contextual definition of domestic and family violence is introduced in the *Crimes (DPV) Act*, consistent with the recommendations of the NSW and Australian Law Reform Commissions.<sup>34</sup> Coercive control should be the framework through which domestic and family abuse is understood. It is not an example of domestic and family abuse.
57. What is proposed in s6A of the Crimes Legislation Amendment (Coercive Control) Bill 2022 (**the Bill**) is not a contextual definition. It is a list of examples that without context will capture behaviour that is not domestic and family abuse, such as violent resistance. Such a definition will encourage a continued focus on incidents when what we want to see is a cultural shift to focus on context.
58. We propose the following wording consistent with the NSW and Australian Law Reform Commissions and the *Family Law Act 1975 (Cth)* definition of “*family violence*”:

Domestic and family abuse is violent, threatening or other behaviour perpetrated by one person against another or others within a “domestic relationship” that coerces, controls or causes fear.

<sup>33</sup> Ibid, p17

<sup>34</sup> ALRC and NSWLRC (2010) *Family Violence – A National Legal Response*, Recommendation 5-1, 5-2

59. We note the proposed definition in section 6A does not currently include threats. It is important threats (threatening behaviour) are included in the contextual part of the definition.
60. As was acknowledged in the Joint Select Committee report, the benefit of a contextual definition of domestic and family abuse is that it helps to shift culture away from an incidents-based approach.

#### *Use of examples*

61. We understand the intention in providing examples is educative but believe the way the examples are included may be confusing and repetitive. The examples appear to be taken from Victorian, Queensland and ACT legislation as well as from the *Family Law Act (Cth)*.
62. We prefer a focus on “relevant effects” similar to Scotland, rather than examples, as this encourages a focus on context rather than on incidents (examples). This approach recognises that the unique way a perpetrator targets a victim-survivor cannot be captured by an exhaustive list of examples.
63. Section 2(3) of the *Domestic Abuse (Scotland) Act 2018*:

*The relevant effects are of—*

- (a) making B dependent on, or subordinate to, A,*
- (b) isolating B from friends, relatives or other sources of support,*
- (c) controlling, regulating or monitoring B's day-to-day activities,*
- (d) depriving B of, or restricting B's, freedom of action,*
- (e) frightening, humiliating, degrading or punishing B.*

64. It would be beneficial to consult further on “relevant effects”, including with priority populations and people with lived experience to ensure we are using language that resonates and captures behaviour that may have particular effects for particular priority populations.<sup>35</sup>
65. If the Government does use examples, we make the following comments.
66. We believe it would be useful to define key terms, for example, “*coerces*”, “*controls*” “*financial and economic abuse*” and “*emotional abuse*”, perhaps describing this as “*emotional or psychological abuse*”. These terms are still not well understood, the current examples of financial and economic abuse in the Bill are very limiting and it is important to build a common understanding and also be aiming for national consistency. We note the Joint Select Committee recommendation 6 that the NSW Government continue to advocate for a nationally consistent definition of domestic and family abuse.
67. It should be made clear in providing an example of “*damaging or destroying property*” that this includes property owned by the person who damages or destroys it.
68. Section 6A(1)(e) should refer to “*intimidating*” rather than “*intimidation*”.
69. It is unclear why intention is included in s6A(1)(f). It currently states:

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<sup>35</sup> ALRC and NSWLRC (2010) *Family Violence – A National Legal Response*, Recommendation 5-2



*is intended to cause the second person to fear for the person's safety or wellbeing, or the safety or wellbeing of others; or*

It appears to draw on the provision in section 5(1)(vi) of the *Family Violence Protection Act 2008 (Vic)* which states:

*in any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person; or*

70. We believe intention should be removed.

71. Other examples that could be included are outlined below:

- *reproductive coercion*,<sup>36</sup>
- *immigration-facilitated abuse*,<sup>37</sup>
- *specific abuse within the LGBTQIA+ community such as outing or threats to out or misgender or other identity-based abuse, and*
- *systems abuse*

72. We note it would be useful to define these terms.

73. Section 6A(2)(h) should also acknowledge where someone is forced into connections in addition to acknowledging the prevention of connections. We propose the following amendments:

Amend s6A(2)(h) to “preventing the second person from or forcing the second person to”

74. It is important that if a list of examples is provided it clearly state the list is not exhaustive. There is a danger that in including examples, even where it states it is not an exhaustive list, that in practice it operates as an exhaustive list. There must be guidance materials to guard against this with an opportunity to regularly update guidance materials, in consultation with specialist sexual, domestic and family violence experts, including lived experience experts and priority populations.

### ***Domestic and family abuse as a ground for an AVO***

75. The Joint Select Committee Report noted many stakeholders recognised:

*Inserting a definition of domestic violence in the CDPV Act would mean that coercive and controlling behaviours are clear grounds to obtain an ADVO.*<sup>38</sup>

76. Notably,

<sup>36</sup> The NSW Domestic Violence Death Review Team has acknowledged “*reproductive coercion as a tool of control employed by domestic violence abusers*”. See NSW Government (2017) *NSW Domestic Violence Death Review Team Report 2015-17*, Sydney, p xiii(15)

<sup>37</sup> See, for example, Settlement Services International (2021) *Submission in response to the Joint Select Committee on Coercive Control Inquiry into Coercive Control in domestic relationships*

<sup>38</sup> Joint Select Committee Report, paragraph 3.48

the [Joint Select] Committee considers that expanding and clarifying the grounds for obtaining an ADVO will:

- allow for more consistency across all courts dealing with domestic violence matters in NSW, as well as interstate courts,
- make the civil regime less incident-based, and
- allow victims to get protection from coercive and controlling behaviours, even before an offence is introduced.<sup>39</sup>

77. It is therefore concerning that the definition of domestic and family abuse does not provide grounds for an apprehended violence order.
78. It is vital the definition has the function of grounding an apprehended violence order otherwise it is of little educative value and will be confusing for police and the broader community. We fear this will result in frustration of police and the broader community as people seek protection from domestic and family abuse through an apprehended violence order but are informed this is only possible in limited circumstances.
79. “Domestic and family abuse” grounding an AVO could occur through an amendment to s16 of the *Crimes (DFV) Act*. We note this was recommended by the NSW Law Reform Commission in 2003.<sup>40</sup>
80. Further amendments are required to s27: Obligation to apply for a provisional order in certain circumstances and s49: Circumstances in which police must make application for order.
81. While we support the definition of domestic and family abuse grounding an AVO, we do not support changes to the conditions of an AVO which would give rise to a breach of an AVO under s35 of the *Crimes (DPV) Act*. There are several reasons for this including concern about misidentification leading to further criminalisation of the person most in need of protection, impacting particularly on First Nations women and culturally and linguistically diverse women. It is also not clear how existing and new offences would operate together – for example breach of AVO, stalking and intimidation and the proposed new coercive control offence.
82. What is clear is the need for a contextual definition of domestic and family abuse which if properly implemented can shift police culture away from an incident-based approach. The independent taskforce has an important role in monitoring this. It is also vital the definition of domestic and family abuse in the *Crimes (DPV) Act* is included in the statutory review provisions. It is concerning that this is not part of the proposed review provision in the Bill. This must be addressed.

#### **Further legislative amendments required in Crimes (Domestic and Personal Violence) Act**

83. We acknowledge the significant concerns raised by many, including ourselves, about the practice of police misidentifying the person most in need of protection and the predominant aggressor.
84. Research by the Australian National Research Organisation for Women's Safety (**ANROWS**) highlights that more can be done in legislation and in policy and practice to limit the misidentification of the person most in need of protection. This includes a definition of domestic and family abuse and

<sup>39</sup> Joint Select Committee, paragraph 3.61

<sup>40</sup> NSW Law Reform Commission (2003) *Apprehended Violence Orders*, Report 103, Recommendation 9

amendment to protection order legislation and policy to stipulate a protection order be made for the person “*most in need of protection*”.

85. The Queensland Women's Safety and Justice Taskforce made further recommendations including legislative amendments to provide that:
  - i. *applications and cross applications for a Domestic Violence Order must be considered together*
  - ii. *require the court to determine the person most in need of protection and make it clear that this is 'in the relationship' as a whole rather than in relation to each application or alleged incident*
  - iii. *make clear that, ordinarily, an order should only be made against the primary aggressor in the relationship as a whole to protect the person most in need of protection*<sup>41</sup>
86. All these legislative amendments must be made as part of this process to ensure there is a useful function for the definition of domestic and family abuse and to provide police and the courts with additional guidance to limit misidentification of the predominant aggressor.
87. In addition, the NSW Government should consider a review of the *Crimes (DPV) Act* for the purposes of modernising this legislation as Dr Wangmann outlines in her submission.

### **Safety and wellbeing of victim-survivors**

88. Research undertaken in jurisdictions with a coercive control offence has not clearly shown that women's and children's safety and wellbeing has improved as a result of the introduction of a new offence. There are [examples](#) where women have expressed increased safety concerns, particularly when the perpetrator was not convicted of an offence.<sup>42</sup> There have been low prosecution rates compared to other possible domestic abuse related charges.<sup>43</sup>
89. It is imperative a new additional coercive and control offence is not seen and treated as the panacea.
90. We strongly believe this is why a phased approach is required. Starting first with the introduction of a definition of domestic and family abuse in the *Crimes (DPV) Act* which forms the grounds for an apprehended violence order. It is also vital that police have experience in applying screening and risk assessment tools to assess patterns of coercive control and prior to legislating for a further coercive control offence, there is clear evidence of a reduction in misidentification of the person most in need of protection and the predominant aggressor.
91. There also needs to be an evidence base that establishes a new offence improves women's and children's and other survivors' safety and wellbeing. This evidence base is not yet established. We note Scotland is currently undertaking a statutory review which includes evaluations of the experience of victim-survivors.
92. Starting first with a definition of domestic and family abuse in the *Crimes (DPV) Act* is taking important action to keep women, children and other survivors safe, while guarding against what Buxton-

<sup>41</sup> Women's Safety and Justice Taskforce (2021) [Hear her voice - Volume One: Addressing coercive control and domestic and family violence in Queensland](#), Recommendation 56

<sup>42</sup> See Nancy Lombard, Katy Proctor & Nel Whiting (2022) [Domestic Abuse \(Scotland\) Act 2018 and the Criminal Justice System: Women's experiences two years in; the emerging findings](#)

<sup>43</sup> See Crown Office and Procurator Fiscal Service, (2021) [Domestic Abuse and Stalking Charges in Scotland 2020-21](#)

Namisnyk, Gibson & MacGillivray describe as “*unintended but not unanticipated consequences*”<sup>44</sup> of a new coercive control offence.

### Recommendation 3

Use the terminology “*domestic and family abuse*” in legislation and policy to ensure inclusivity.

### Recommendation 4

The NSW Government introduces a contextual definition of “*domestic and family abuse*” into our *Crimes (Domestic and Personal Violence) Act (CDPV Act)*. Consistent with the NSWLRC and ALRC 2010 recommendation this could be “*violent, threatening or other behaviour perpetrated by one person against another or others within a “domestic relationship” that coerces or controls or causes fear.*”

### Recommendation 5

Rather than using examples, consider using a “relevant effects” framing with further consultation with priority populations and lived experience experts to ensure language resonates and captures behaviour that may have particular effects for particular priority populations.

### Recommendation 6

If using examples, the NSW Government:

- a. Considers defining terms such as “*coerces*”, “*controls*”, “*economic and financial abuse*” and “*emotional or psychological abuse*”. Further consultation with priority populations and people with lived experience is vital to ensure language that resonates, and people understand.
- b. Makes clear in providing an example of “*damaging or destroying property*” that this includes property owned by the person who damages or destroys it.
- c. Section 6A(1)(e) should refer to “*intimidating*” rather than “*intimidation*”.
- d. Section s6A(1)(f) should remove reference to intention.
- e. Other examples that could be included:
  - i. reproductive coercion,
  - ii. immigration abuse,
  - iii. specific abuse within the LGBTQIA+ community such as outing or threats to out or misgender or other identity-based abuse, and

<sup>44</sup> Emma Buxton-Namisnyk, Althea Gibson & Peta MacGillivray, “[Unintended, but not unanticipated: coercive control laws will disadvantage First Nations women](#)”, *The Conversation*, 26 August 2022

iv. systems abuse

Some of these terms may require a definition.

f. Amend section 6A(2)(h) to “preventing the second person from or forcing the second person to”

### Recommendation 7

The NSW Government incorporates domestic and family abuse as a ground for an AVO and amends s16, s29, s49 and of the *Crimes (Domestic and Personal Violence) Act* and incorporates proposed legislative amendments to limit misidentification.

### Recommendation 8

The NSW Government considers a more detailed review of the *Crimes (DPV) Act*.

## Policing of domestic and family abuse

93. We acknowledge the work of police in responding to sexual, domestic and family abuse on a daily basis – it is demanding and stressful work. We acknowledge there are many police doing the best they can with the limited time and resources they have.
94. We also acknowledge that the nature of our service means that women contact us when things go wrong and so these are the stories and experiences we hear, rather than those of stories of good policing responses. We regularly hear experiences of poor policing of sexual, domestic and family abuse in NSW. A key part of our work involves assisting women by way of advocacy with police on their particular matters. We also raise systemic issues with the NSW Police Force (**NSWPF**) Corporate Sponsor - Domestic Violence and the NSWPF Domestic and Family Violence Team. However, there must be greater transparency and accountability mechanisms.
95. The vital need for cultural change is highlighted through the case studies below.

### Police failing to take action

*Many women tell us about experiencing verbal and psychological abuse most often by a controlling male partner which is often accompanied by relentless unwanted text messages. There may also be threats made to the woman or members of her family, particularly children, including on occasions threats to kill. These women are fearful. Police often respond to women's reports of such abuse by saying they are unable to take action, including taking out an AVO for the woman's protection, because they are unable to prove the text messages originated from their partner/ex-partner's phone or "he hasn't physically assaulted you".*

### An unwillingness to report to police

*A worker's reflections:*

*"It's the judgment and attitudes that makes it difficult for so many women to report to police. And that police often don't believe you when you tell them what you've experienced. When a woman uses force in response to being abused; or has a drug addiction because that's the way she's found to numb the pain for*

*a short while due to all the trauma she's experienced; or police are continually called out to respond to domestic abuse perpetrated by the same abuser against the same woman and the woman may present from the police's perspective as hostile and unco-operative it seems she's written off by police, as not deserving of assistance. Some clients report being told by police to "sit down and shut up while we try to work out what has happened".*

*Police behaving in this way emboldens perpetrators.*

*Similarly, police belittling of victim-survivors, minimising abuse and victim-blaming emboldens perpetrators. It removes accountability from where it should lie – with the predominant perpetrator - and it results in the people women turn to for safety and protection unwittingly colluding with the perpetrator.*

*Police need to be better supported to be trauma informed and responsive. To understand that women who have experienced trauma after trauma may not make good historians. They are generally unable to recall events in a coherent, logical manner because of the trauma.*

*The research shows that where women act differently from the way they are expected to behave as victim-survivors, that is, they don't present as quiet and compliant and do what police tell them to do – they are treated by police with suspicion and scepticism.*

*Some women, especially those with lived experience of the criminal justice system or distrust of police related to intergenerational systemic racism, may also interpret the police attitude as an indication that they are not believed and that they may be arrested. This can be a catalyst for words and actions directed at police by the victim-survivor that may then form the basis for a charge.*

*There is also a great deal of distrust in engaging with police for fear of removal of children.*

*What can be done to challenge this?*

96. The Personal Safety Survey highlights that 82% of women who have experienced violence by a current partner since the age of 15 have never contacted the police. 65% of women who have experienced violence by a former partner since the age of 15 have never contacted the police.<sup>45</sup>
97. Police acknowledge that domestic and family abuse is significantly underreported to them. For this to change we urgently need transformative cultural reform.

### **Experiences of systemic racism**

98. First Nations women and refugee and migrant women also reflect on their experiences of systemic racism. Many First Nations women comment on the delays in police responding, feeling judged and their experiences being minimised.

*One of our First Nations workers describes supporting one Aboriginal woman:*

*Police would not take a statement until we accompanied our client to the police station. Even then our client had a poor experience with police. She felt judged. She felt she was not believed. She felt small and treated as less important because she was an Aboriginal woman. She left the police station feeling worse than when she entered. This was a woman who experienced serious physical abuse and other forms of*

<sup>45</sup> Australia's National Research Organisation for Women's Safety (2018) *Violence against women: Accurate use of key statistics* (ANROWS Insights 05/2018) ANROWS, Sydney, NSW

*ongoing controlling abuse by her non-Aboriginal partner, including him threatening to kill her on several occasions if she left him. She used force to try and stop her partner from continuing to hit her, but she was the one who needed protection and the police were very slow to act. This is all too common for our women.*

99. These case studies highlight a need for a phased approach to responding to coercive control through legislative reform – first introducing a contextual definition of domestic and family abuse to help provide police with the framework and necessary tools to examine context and history of abuse rather than incidents in isolation. If properly implemented with other supports and accountability frameworks outlined below, we believe this could contribute to a reduction in the misidentification of the person most in need of protection and the predominant aggressor. There must be evidence of reduction in misidentification prior to the introduction of any further coercive control offence.

### Embedding cultural and systems reform

100. Massive cultural reform is necessary to fully implement the NSW Coroner's recommendation in the *NSW Domestic Violence Death Review 2017-12 Report* to focus on context in domestic and family abuse rather than incidents in isolation<sup>46</sup> and to better understand, identify and respond to coercive and controlling behaviours. We all have a role to play in this cultural reform; police, judicial officers, lawyers and other professions working across all legal systems, specialist services, health, education, social support services and systems. A whole of Government response is required.
101. Marsha Scott, CEO of Women's Scottish Aid, in recently reflecting on what Scotland could have done differently to ensure more effective implementation of their domestic abuse offence, commented the *"implementation was deeply flawed"*. If they could start again, they needed *"a plan across the justice system, an economic plan, health and education plans about what to do to build infrastructure and understanding of domestic abuse, the gendered nature of domestic abuse and respond appropriately."* Scott gave the example that one off training even training with further training at 6 months was insufficient.<sup>47</sup>
102. As Dr Jane Wangmann notes, for many decades, inquiry after inquiry about domestic and family abuse has recommended increased training and education about domestic and family abuse, including for police, legal practitioners and judicial officers. A critical eye must be brought to the effectiveness of such training which must extend beyond training on the content of new laws. While training is important, of itself, it will not change attitudes and culture. It must be part of a broader strategy for cultural reform which requires strong leadership and proper resourcing.

### Police cultural and systems reforms

103. Cultural reform needs to start with police, because it is police who play a vital role in responding to domestic and family abuse. There must be more transparent accountability mechanisms with regular audits of policing of sexual domestic and family abuse.
104. The NSW Police Force must also introduce accountability frameworks to effectively respond to systemic issues, including systemic racism and sexism and other forms of discrimination.<sup>48</sup>

<sup>46</sup> NSW Government (2017) *NSW Domestic Violence Death Review Team Report 2015-17*, Sydney, p v.

<sup>47</sup> Marsha Scott, Coercive Control and NSW Legislation forum organised by DV NSW, Wirringa Baiya Aboriginal Women's Legal Centre and City of Sydney, 20 July 2022.

<sup>48</sup> For more information see Women's Legal Service NSW (2021) *Submission to the Audit Office of NSW*:

105. Greater self-reflection within police is vital, as are steps taken to address barriers to reporting domestic and family abuse to police arising from bias and prejudice. More women, including First Nations women, refugee and migrant women, women with disability and non-binary, trans and gender diverse people need to be recruited, supported and retained in leadership positions within the police.

### Regular audits of policing of domestic and family abuse

106. In the Edwards Coronial Inquest into Jack and Jennifer Edwards, the NSW Coroner recommended:

107. That the NSW Police Force give consideration to implementing an annual, comprehensive audit process of officer compliance with the [Domestic Violence Standard Operating Procedures] which includes the results of 'dip sampling' conducted by Domestic Violence Officers in each Police Area Command. The results of the audit should be published and should include information as to any material variations or trends between Police Area Commands, and measures that will be taken to resolve any concerns.<sup>49</sup>

108. We support this recommendation, noting the importance of publishing these results to help promote continuous improvement and build further public confidence in policing of domestic and family abuse.

109. It is important to have both internal and independent audits of policing of domestic and family abuse cases. Independent auditing should occur at least every 2 years. These mechanisms do not just rely on those who are willing to make a complaint and can highlight gaps in police responses and identify steps which can be taken to improve policing and ultimately, the safety of victim-survivors of such abuse. Audits would increase trust in police because they signal that police take seriously their responsibilities and are interested to reflect and continuously improve practices where it is required.

### Accountability framework to correctly identify the person most in need of protection

110. The issue of police misidentification of the person most in need of protection and the predominant aggressor is not an issue unique to NSW.

111. This issue was highlighted in the Royal Commission in Family Violence in Victoria. Despite efforts to implement the recommendations of the Royal Commission this problem has continued. The first thematic report of the independent Family Violence Reform Implementation Monitor, published in December 2021, was *Accurate identification of the predominant aggressor*.

112. The fact this is an ongoing issue indicates the complexity of the issue but also highlights the vital need for ongoing independent monitoring and evaluation. The report recommended a whole of systems response, an agreed approach to monitoring key indicators of misidentification and the updating of manual and guidelines. It also recommended specific actions to be undertaken by Victoria Police as well as the courts and legal services. Actions for Victoria Police include:

*112.1 Re-examine and potentially redesign the Family Violence Report and associated processes and guidance to:*

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Review of Police responses to sexual, domestic and family violence and abuse; This recommendation is consistent with the recommendation by Aboriginal and Torres Strait Islander Social Justice Commissioner, June Oscar AO in Australian Human Rights Commission (2020) *Wiyi Yani U Thangani (Women's Voices): Securing Our Rights, Securing Our Future Report*, p 103 (105). It is also a recommendation of the NSW Women's Alliance in their *2023 NSW Election Platform*

<sup>49</sup> Coroner's Court of NSW, (2021) *Inquest into the deaths of John, Jack and Jennifer Edwards*, Recommendation 3



- 112.1.1 *support officers to identify the predominant aggressor before beginning the risk assessment*
- 112.1.2 *clearly differentiate between the risk assessment (and referral) function for civil protection purposes, and any criminal incidents (particularly in cases where a victim has used force)*
- 112.1.3 *ensure alignment with Victoria Police policies and the Family Violence Multi-Agency Risk Assessment and Management (MARAM) Framework.*
- 112.2 *Trial a review process, involving the specialist family violence sector, for any Family Violence Report where a woman is identified as a respondent (and possibly for other targeted cohorts) before it is committed to Victoria Police's LEAP database*
- 112.3 *Urgently review how family violence records are captured in LEAP to ensure that where misidentification is found, the record can be amended so a person doesn't continue to be incorrectly listed as a respondent.*
- 112.4 *Establish and communicate clear processes to guide police responses where there is new information that suggests misidentification has occurred, including:*
  - 112.4.1 *a contact point at Victoria Police that other agencies can use to raise misidentification*
  - 112.4.2 *an agreed process to make a determination that misidentification has occurred*
  - 112.4.3 *specific guidance for police on the actions they need to take once this determination has been made.*
- 112.5 *Develop clear guidance for withdrawing family violence intervention order applications or criminal charges in cases of misidentification and give police prosecutors the authority to quickly facilitate this.<sup>50</sup>*

113. Similar actions must be implemented by NSW Police.

### **Policy about domestic and family abuse perpetrated by police employees**

- 114. There has been media coverage over the past few years across Australia about the low rates of prosecution of police employees for domestic violence offences and lack of information about numbers of domestic violence protection orders taken out against police employees.<sup>51</sup>
- 115. There are many barriers to victim-survivors reporting domestic and family abuse perpetrated by police employees. These barriers include a fear of not being believed by police, confusion about where to report domestic and family abuse when they do not want to approach the area command where the

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<sup>50</sup> Family Violence Reform Implementation Monitor (2021)

[Monitoring Victoria's family violence reforms Accurate identification of the predominant aggressor](#), p 6 (10)

<sup>51</sup> Hayley Gleeson, 'Australian police forces have a domestic violence problem and we're only seeing the tip of the iceberg', *ABC News*, 19 October 2020; Hayley Gleeson, 'Victoria's 'staggering' record: 82 cops charged with family violence in five years, but only one found guilty', *ABC News*, 21 October 2020, Hayley Gleeson, 'More NSW Police officers charged with domestic violence as victims face ongoing problems getting help', *ABC News*, 21 May 2021; Hayley Gleeson, 'Catherine's ex was one of few police officers charged with domestic violence, but she'll never get justice', *ABC News*, 6 September 2021

perpetrator works, a fear of the police officer's access to firearms and insider information and a fear that appropriate action will not be taken.

116. The NSWPF must have clear and transparent policies and procedures to safely report domestic and family abuse alleged to be perpetrated by a police employee and those policies and procedures must address conflict of interest issues which must include independent oversight of such investigations.
117. This is important as a means of building trust and confidence in policing of domestic and family abuse.
118. We have raised this issue with the NSWPF Corporate Sponsor-Domestic Violence and the NSWPF Domestic and Family Violence Team and appreciate the ongoing constructive conversations on this important matter. We hope the NSWPF will provide us with a written policy on which we can provide comment.
119. We note the Auditor-General's recommendation for NSW Police to:

*review the process for investigating allegations of domestic and family violence against current and former serving police personnel and implement procedures to ensure processes are independent of interested parties and mitigate conflicts of interest.*<sup>52</sup>

### Education and support

120. While training has an important role to play in cultural reform, close attention needs to be paid to what training is provided, to whom, by whom, for how long, how often, in what form, how is it informed by the lived experience of victim-survivors, how often does it address victim-blaming attitudes and conscious and unconscious bias, does it encourage people to reflect on their own practice and is the training independently evaluated to measure changes in attitudes and changes in practice as a result of the training?
121. Police training about domestic and family abuse 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.
122. Given a substantial amount of police work involves responding to domestic and family abuse, the training in these areas needs to be commensurate with this. It is also important that training is not limited to or primarily focused on those in domestic and family abuse specialist roles and teams. It must target all first responders – those who take the calls about domestic and family abuse, those who attend the call outs relating to domestic and family abuse, those at the front desk when victim-survivors come to a police station to report domestic and family abuse and those who oversee or supervise the officers in these roles. A positive first response will determine whether or not victim-survivors report again to police.
123. Current training of the NSWPF in identifying and responding to domestic and family abuse must be evaluated for its effectiveness and any future training must also be regularly evaluated for its effectiveness with evaluation reports made public.

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<sup>52</sup> NSW Auditor-General (2022) *Performance Audit on Police responses to domestic and family violence*, Recommendation 8.

124. We also note the NSW Auditor-General's [Performance Audit on Police responses to domestic and family violence](#) raised with concern that the only mandatory training by police relating to domestic and family abuse occurs at the academy. The Auditor-General recommended the development of a

*framework to guide police training in domestic and family violence policing that identifies intervals for refresher training, modes for course delivery, and protocols for integrating course evaluations and workforce capability assessments into the training design*<sup>53</sup>

### Screening and risk assessment tools

125. The NSW Bureau of Crime Statistics and Research (**BoCSaR**) undertook a review of the effectiveness of both the police Domestic Violence Safety Assessment Tool (**DVSAT**) as well as the DVSAT used by all other workers. This tool is a screening and risk assessment tool used to help determine the seriousness of the threat to a victim-survivor. Police conduct a DVSAT when they attend a call out relating to domestic abuse or take a report of domestic abuse at the counter.<sup>54</sup> The matter is then referred to the Local Co-ordination Point (a specialist domestic and family abuse service) who undertake a further DVSAT. If a matter is assessed to be at serious risk, it is referred to a multi-agency Safety Assessment Meeting (**SAM**).

126. BoCSaR found the DVSAT to be little better than chance at identifying who is at greater risk of repeat victimisation.<sup>55</sup>

127. Both the police DVSAT and general DVSAT are currently under review.

128. ANROWS research found “no jurisdiction [in Australia] currently has tools for police to assess patterns of coercive control that would detect which party is the perpetrator and which is acting in self-defence or violent resistance”.<sup>56</sup>

129. Updated screening and risk assessment tools are critical to ensuring effective screening for coercive and controlling abuse (domestic and family abuse) and for ensuring police and others are supported to better understand the types of questions to elicit information to identify coercive and controlling behaviours.

130. It is vital that police have training and experience in applying screening and risk assessment tools to assess patterns of coercive control.

### Co-responder model

131. A co-responder approach to responding to domestic and family abuse involves different disciplines working together to support the victim-survivor and hold the men using abuse accountable.

132. We support a model of co-locating police with specialist sexual, domestic and family abuse community-based workers so they can provide a holistic response. The benefit of co-location and a co-response is that specialist sexual, domestic and family abuse workers can provide police with ongoing professional development in identifying and responding to sexual, domestic and family abuse.

<sup>53</sup> NSW Auditor-General (2022) [Performance Audit on Police responses to domestic and family violence](#), Recommendation 3.

<sup>54</sup> NSW Police Force, *Code of Practice for the NSW Police Force Response to Domestic and Family Violence*, p19.

<sup>55</sup> Clare Ringland (2018) [The Domestic Violence Safety Assessment Tool \(DVSAT\) and intimate partner repeat victimisation](#) (Crime and Justice Bulletin No. 213) NSW Bureau of Crime Statistics and Research, Sydney.

<sup>56</sup> Heather Nancarrow, et al (2020) *Accurately identifying the “person most in need of protection” in domestic and family violence law* (Research report, 23/2020) ANROWS, Sydney, p12.

Similarly, police can help the sexual, domestic and family abuse workers to better understand police powers, procedures and practices.

133. The Joint Select Committee recommended co-location of domestic abuse services with police stations.<sup>57</sup> The Government has recently announced funding for co-locating specialist domestic and family abuse workers in 5 police stations. While this is a very positive step these services must be able to operate outside business hours and include more than one specialist domestic and family abuse worker at each of the pilot sites. There must also be funding for an evaluation and subject to a positive evaluation, the program should be rolled out across NSW.
134. We note the success of a co-responder model with police and specialist mental health workers responding to people in a mental health crisis in NSW. Following a successful pilot of the Police, Ambulance and Clinical Early Response program, 36 specialist mental health clinicians were employed across 10 police area commands and districts in Sydney.<sup>58</sup> It is also important that such support is available in regional, rural and remote areas.

### Functionality of police information technology system

135. The Auditor-General also identified issues with the functionality of the police information technology system, noting the significant time investment to enter material into the system and that the same material has to be repeatedly entered and, that while there is capacity to get an overview of previous history with police, the detail needs to be accessed manually.<sup>59</sup>

136. The Auditor-General notes:

*The NSW Police Force is in the early stages of replacing COPS with the Integrated Policing Operational System (IPOS). The IPOS system has been approved and funded. It is currently in the first of three implementation phases. IPOS will be used for recording, reviewing, and managing multiple crime types. According to the NSW Police Force, activity to add domestic and family violence functionality to the IPOS system, will commence in phase two, and be implemented in June 2025.<sup>60</sup>*

137. The Auditor-General recommends police:

*commence work on the domestic and family violence component of the Integrated Policing Operational System (IPOS) with a focus on improving functionality for streamlining event recording processes and automated alerts to identify related prior events or individuals<sup>61</sup>*

138. The Auditor-General acknowledges

*It was not possible to assess the effectiveness of IPOS as part of this audit, as it is still in the development phase.<sup>62</sup>*

139. Once the system is in place it will be important to assess its effectiveness.

<sup>57</sup> Joint Select Committee Report, Recommendation 16

<sup>58</sup> Alexandra Smith, 'Mental health nurses to be based at police stations', *SMH*, 10 June 2020

<sup>59</sup> NSW Auditor-General (2022) *Performance Audit on Police responses to domestic and family violence*, p5 (10)

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid*, Recommendation 5

<sup>62</sup> *Ibid*, p5.

140. It is prudent to ensure the functionality of information technology systems prior to further criminalising coercive control, including information about previous history of abuse.

**Recommendation 9**

NSW Police must successfully implement cultural and system reforms prior to the introduction of a new coercive control offence including by the following actions:

- a. Publish the results of regular audits of policing of sexual, domestic and family abuse and steps police will take for continuous improvement.
- b. Introduce accountability frameworks to effectively respond to systemic issues, including systemic racism, sexism and other forms of discrimination.
- c. Outline the work police is undertaking with community to try to address barriers to reporting domestic and family abuse to police.
- d. Strengthening mechanisms to ensure greater diversity within the NSW Police Force, including in leadership positions.
- e. Noting similar systemic causes for misidentification in NSW as there is in Victoria, implement the recommendations of the Family Violence Reform Implementation Monitor (2021) in the report: *Accurate identification of the predominant aggressor in NSW*, including the following recommendations relating to police:

- i. Improving guidance to police to:

- i. *Support officers to identify the predominant aggressor before beginning the risk assessment.*
  - ii. *Clearly differentiate between the risk assessment (and referral) function for civil protection purposes, and any criminal incidents (particularly in cases where a victim has used force).*

- ii. Trial a review process, involving the specialist domestic and family abuse sector, for any domestic and family abuse report where a woman is identified as a respondent (and possibly for other targeted cohorts) before it is committed to NSW Police database.
  - iii. Urgently review how domestic and family violence and abuse records are captured in the NSW Police system to ensure that where misidentification is found, the record can be amended so a person does not continue to be incorrectly identified.
  - iv. Establish and communicate clear processes to guide police responses where there is new information that suggests misidentification has occurred, including:

- i. A contact point at NSW Police that other agencies can use to raise

misidentification.

- ii. An agreed process to make a determination that misidentification has occurred.
- iii. Specific guidance for police on the actions they need to take once this determination has been made.

- v. Develop clear guidance for withdrawing apprehended violence order applications or criminal charges in cases of misidentification and give police prosecutors the authority to quickly facilitate this.

- f. There needs to be clear evidence of reduction in police misidentification of the person most in need of protection and the predominant aggressor prior to the introduction of any new coercive control offence.
- g. Develop clear and transparent policy and procedures to ensure safe reporting and response to allegations of police employees' perpetration of domestic and family abuse and address conflict of interest issues which must include independent oversight of such investigations.
- h. Regular and ongoing training for all police in how to identify and respond to domestic and family abuse, 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 domestic and family abuse 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 made public.
- i. Funding for co-responder model with specialist sexual, domestic and family abuse community-based workers co-located with police who are available outside business hours and include more than one specialist domestic and family abuse worker at each of the pilot sites. There must also be funding for evaluation and subject to positive evaluation funding to expand across NSW.
- j. Training and support for police in identifying and responding to vicarious trauma.
- k. Implementation of operation information technology systems that enable police easy access to information about history and context of previous violence and abuse.

### *Cultural and systems reform for actors in the legal system*

141. With the introduction of a definition of domestic and family abuse in the *CDPV Act*, it is vital to embed cultural and systems reform in the legal response to domestic and family abuse. Domestic and family abuse impacts across many areas of law, which means that all actors in the legal system need to have an understanding of domestic and family abuse.
142. The comments in the section above about a critical analysis of training, steps required to address conscious and unconscious bias and prejudice as well as recruiting, supporting and retaining greater diversity in leadership positions also apply in the legal system.

143. The Honourable Margaret McMurdo AC, Queensland's Women's Safety and Justice Taskforce Chair observed in *Hear Her Voice - Volume One: Addressing coercive control and family violence in Queensland*:

*I expected to hear from women about their mistreatment at the hands of perpetrators. I did not expect to hear that women perceived their perpetrators are emboldened by police, legal practitioners and judicial officers. Many feel the justice system is failing them.*<sup>63</sup>

144. Many women in NSW similarly feel this.

### Recommendation 10

The Department of Communities and Justice supports the legal system to undertake the following cultural and systems reform including:

- a. Regular and ongoing training for judicial officers, legal practitioners, court staff and interpreters in how to identify and respond to domestic and family abuse, 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 domestic and family abuse 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.
- b. There must also be compulsory training in identifying and responding to domestic and family abuse and identifying and responding to trauma for law students.
- c. Training and support for actors in the legal system in identifying and responding to trauma and vicarious trauma.
- d. Implement the Domestic Violence Review Team recommendation to “*enhance and promote domestic violence specialist court practices*”.<sup>64</sup>
- e. ANROWS research found that “*police sometimes err on the side of caution in making [protection order] 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*”. Implement ANROWS recommendation for greater role clarity and accountability of police and the courts with safeguards to address misidentification.
- f. Clear pathways to quickly address misidentification through court processes as recommended in the Family Violence Reform Implementation Monitor report: *Monitoring Victoria's family violence reforms Accurate identification of the predominant aggressor* (2021). These include:
  - i. *Develop a clear process for an urgent return to court in matters where misidentification has*

<sup>63</sup> Women's Safety and Justice Taskforce (2021) *Hear her voice - Volume One: Addressing coercive control and domestic and family violence in Queensland*, p ix (9)

<sup>64</sup> NSW Government (2017) *NSW Domestic Violence Death Review Team Report 2015-17*, Sydney, p xiv (16)

*been found.*

- ii. *Integrate legal services in the family violence response model to ensure timely legal advice in misidentification cases, and provide these services with appropriate training to ensure they are familiar with and work consistently with multi-agency risk assessment and management framework.*
- iii. *Give urgent attention to exploring legislative options to provide courts with the power to find that misidentification has occurred and to issue a court order for all records to be corrected.*
- iv. *Roll out the core features of the specialist family violence court model across the state to ensure more magistrates and court workers can engage effectively with respondents and affected family members and recognise misidentification.*
- v. Consider interaction with child protection systems in ensuring the perpetrator is made visible and held accountable and misidentification corrected.
- vi. Ensure that the solutions developed adequately respond to First Nations victim-survivors.

### **Recommendation 11**

The NSW Judicial Commission updates benchbooks consistent with Recommendation 67 of the Queensland Women's Safety and Justice Taskforce: *Hear Her Voice – Volume One*, including to:

- a. *provide guidance on how to identify the person most in need of protection in the relationship*
- b. *provide guidance on using plain English and trauma informed language*
- c. *content to address myths about domestic and family abuse*

### **General cultural and systems reform**

145. The Joint Select Committee acknowledges that extensive work must be undertaken prior to the introduction of a new coercive control offence.

### **A multi-agency risk assessment and management framework**

146. It is vital that all services and systems are able to identify and respond to domestic and family abuse and people have the tools, frameworks and training to do so.<sup>65</sup>

147. We need a multi-agency risk assessment and management framework to improve a common understanding and consistency in identifying and responding to domestic and family abuse and working effectively with victim-survivors as well as people, primarily men, who use violence and abuse to exert power and control and holding those who use violence and abuse accountable for their behaviour. It is not appropriate to only consider a criminal justice response.

<sup>65</sup> Joint Select Committee Report, Recommendation 15



148. It is important that existing tools, such as the updated DVSA, are consistent with any multi-agency risk assessment and management framework.

### Improving service and justice response prior to a further coercive control offence

149. The Queensland Women's Safety and Justice Taskforce supports further criminalising coercive control, but in a phased approach with an important precondition:

*The Taskforce recommends that no new offences to criminalise domestic and family violence commence until service and justice system responses are improved. The Taskforce is satisfied that to do so would involve an unacceptable risk of unintended consequences, which could cause more harm to those whom the reforms are intended to protect, particularly First Nations peoples.*<sup>66</sup>

150. Improvements to services and systems and the justice system requires workforce development, additional funding and accountability frameworks.

### Workforce development

151. All workers across all disciplines should meet minimum practice standards in working with victim-survivors and those who use domestic and family abuse. Meeting additional practice standards should be required for those specialising in responding to sexual, domestic and family abuse. We note [DVNSW Good Practice Guidelines](#).

152. 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.

### Proper resourcing

153. The specialist sexual and domestic abuse sector, other specialist services, broader social support system and legal assistance services must be properly and sustainably funded to support everyone subjected to domestic and family abuse. Failing to properly resource the specialist sexual and domestic abuse services, broader social support service system and legal assistance services to respond to domestic and family abuse and denying women and children access to the support they need, such as women experiencing abuse on temporary protection visas and access to safe and affordable housing, makes governments complicit in entrapping women and children in domestic abuse.<sup>67</sup> The Joint Select Committee recommendations 11, 12, 13 and 17 relate to this. For more detail on what is required, see the NSW Women's Alliance 2023 Election Platform recommendations.<sup>68</sup>

154. There must be continued efforts to provide a more trauma informed, culturally responsive legal response, including, but not limited to a criminal justice response.

<sup>66</sup> Women's Safety and Justice Taskforce (2021) [Hear her voice - Volume One: Addressing coercive control and domestic and family violence in Queensland](#), p xxx(30)

<sup>67</sup> Stella Tarrant, Julia Tolmie & George Giudice (2019) [Transforming legal understandings of intimate partner violence](#) (Research report 03/2019) ANROWS: Sydney, NSW

<sup>68</sup> NSW Women's Alliance (2022) [Action to End Gendered Violence – A Safe State for NSW: NSW Women's Alliance 2023 Election Platform](#), p22-26 (23-27), p29-30 (30-31)

### Establish a Lived Expertise Advisory Group

155. We also support the NSW Women's Alliance recommendation for the "introduction of a Lived Expertise Advisory Group to the NSW Government that can represent a number of diverse groups, ages and backgrounds is necessary to provide policy advice".<sup>69</sup>

### Accountability frameworks

156. It is imperative there are accountability frameworks for all professions. These frameworks must also address systemic racism, sexism and other forms of discrimination.

### Community awareness campaigns and primary prevention

157. Community awareness campaigns on coercive and controlling abuse (domestic and family abuse), including targeted campaigns that are co-designed and co-delivered with priority populations, will play a critical role. We note Joint Select Committee recommendation 9 recognised the importance of such campaigns, irrespective of whether there is a new coercive control offence introduced. It is also important campaigns go beyond awareness raising and also seek to drive social change.

158. It is important the messaging in such campaigns is consistent with the meaning of domestic and family abuse proposed in the *Crimes (DPV) Act*. We make suggestions on how to improve the definition above.

159. We also note the important prevention and early support work required and acknowledged in Joint Select Committee recommendations 8 and 10.

### Recommendation 12

There must be broad cultural and systems reform with the independent implementation taskforce having oversight of this work, including:

- a. Development of a multi-agency risk assessment and management framework to assist all systems and services in identifying and responding to domestic and family abuse, including training in the development and implementation of this framework.
- b. Ensuring existing tools, such as the updated Domestic Violence Safety Assessment Tool are consistent and aligned with any multi-agency risk assessment and management framework.
- c. All workers across all disciplines should meet minimum practice standards in working with victim-survivors and those who use domestic and family abuse. Meeting additional practice standards should be required for those specialising in responding to sexual, domestic and family abuse. We note [DVNSW Good Practice Guidelines](#).
- d. Training to support these practice standards must be up-to-date, evidence-based, developed by sexual and domestic abuse experts including lived experience experts, culturally safe, disability aware, LGBTIQ+ aware and ongoing and jointly delivered by relevant agency/department and sexual and domestic abuse experts including lived experience experts.
- e. Proper resourcing of the sexual, domestic and family abuse sector and other sectors to properly

<sup>69</sup> NSW Women's Alliance (2022) *Action to End Gendered Violence – A Safe State for NSW: NSW Women's Alliance 2023 Election Platform, Recommendation 1c*.

respond to sexual, domestic and family abuse and to ensure an integrated, holistic response. Funding for specialist women's services including specialist women's legal services.

- f. Continued efforts for all working in the legal system to provide a more trauma informed, culturally responsive legal response, including, but not limited to a criminal justice response.
- g. 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.
- h. Accountability frameworks, including to address systematic racism, sexism and other forms of discrimination.
- i. Community awareness campaigns, co-designed and co-delivered with sexual, domestic and family abuse experts including lived experience experts and priority populations.

### Safeguards and accountability

160. If despite our very strong objection to proceeding this year in passing a new coercive control offence, the NSW Government nonetheless proceeds, essential safeguards must be introduced.

#### Recommendation 13

We recommend the following safeguards:

- a. A legislative requirement to table a report to Parliament outlining the steps taken towards cultural and systems reform implementation prior to the commencement of a new offence. Include a provision to mandate delay of the commencement date if implementation preparation is insufficient as determined by the independent taskforce. We note the NSW Women's Alliance recently recommended this in [Action to End Gendered Violence](#).
- b. A contextual definition of domestic and family abuse which is a ground for an apprehended violence order commences in the *Crimes (Domestic and Personal Violence) Act* within 2 years of the passing of legislation.
- c. A new coercive control offence does not commence until at least 4 years from the passing of legislation and subject to successful implementation of cultural and systems reform outlined above as assessed by the independent taskforce.
- d. Annual reports about the operation of the new definition of domestic and family abuse in the *Crimes (DPV) Act*, where domestic and family abuse is a ground for an ADVO including:
  - i. Number of reports to police.
  - ii. Number of police ADVOs applications made.
  - iii. Number of police ADVOs made and number of private ADVOs made (in total for each category, as well as a breakdown of how many name children).

- iv. Length of ADVO.
- v. Breakdown of gender, age, background and relationship context of the person most in need of protection and the predominant aggressor, including if they identify as Aboriginal and/or Torres Strait Islander.
- vi. Other relevant data.
- vii. The experience of victim-survivors and input from support services.

e. Commissioning research to measure outcomes, use and effectiveness of a contextual definition of domestic and family abuse. This work needs to be commissioned immediately so there are systems in place to collect the necessary data prior to commencement.

f. Once the new offence commences, annual reports about the operation of the new offence including:

i. Number of reports to police, number of charges laid and what charges, prosecutions commenced, dismissals, early guilty pleas, convictions (and for what offence(s)), findings of not guilty or other outcomes with a breakdown of gender, age, background and relationship context of the person most in need of protection and the predominant aggressor, including if they identify as Aboriginal and/or Torres Strait Islander.

ii. The length of time between reporting a course of conduct of domestic and family abuse to police and a final outcome.

iii. A breakdown of the length of time between:

i. Reporting behaviour to police and charges laid.

ii. Charges laid and prosecution commences.

iii. Prosecution commences and conviction or another outcome.

iv. The number of coercive control offence charges laid:

i. on their own.

ii. in conjunction with other offences and what are these offences.

v. The number of coercive control offence prosecutions undertaken

i. on their own.

ii. in conjunction with other offence(s) and what are these offence(s).

vi. The number of matters where charges for other offence(s) and a coercive control offence were originally laid but

i. Only the coercive control offence is prosecuted.

ii. Only the other offence(s) is prosecuted.

vii. The number of matters where there is a conviction for a coercive control offence in the alternative.

viii. Number of coercive control offences prosecuted by police and number of coercive control offences prosecuted by the Office of the Director of Public Prosecutions (**ODPP**).

ix. Other relevant data.

x. Independent research about the extent to which the offence is being used and could be used by police and the ODPP, this must include information about the extent to which the offence is addressing coercive and controlling behaviours not captured by existing offences.

xi. The experience of victim-survivors and input from support services.

g. In addition to annual reports, include a legislative requirement for regular and ongoing statutory reviews following commencement, with the first review no more than 18 months after commencement. What should be included in the statutory review must be outlined in legislation to ensure a comprehensive review. It must include a review of the effectiveness of the proposed new definition in the *Crimes (DPV) Act* as well as a review of any new provisions relating to the introduction of new offence in the *Crimes Act*. This includes an assessment of the effectiveness of training<sup>70</sup> and examination of transcripts<sup>71</sup> as included for the sexual consent reforms and consideration of provisions in Scotland's legislation.<sup>72</sup> Evaluations of the experience of victim-survivors must be integral to these reviews. We support reviews including additional data as outlined in Dr Wangmann's submission. Ongoing legislative reviews must commence every 2 to 3 years after the commencement of the previous review or earlier if an issue of concern is identified with a report tabled in each House of Parliament within 12 months of the commencement of each review.

### New Coercive control offence

161. If the NSW Government proceeds to introduce a new coercive control offence despite the strong opposition, we make the following additional recommendations.

<sup>70</sup> *Crimes Act 1900 (NSW)*, section 583(6)

<sup>71</sup> *Crimes Act 1900 (NSW)*, section 583(2), *Criminal Procedure Act 1986 (NSW)*, section 368(2)

<sup>72</sup> *Domestic Abuse (Scotland) Act 2018*, section 14

*Expand the offence to include all “domestic relationships”*

162. There has been significant concern expressed about limiting a new coercive control offence to “intimate partners”.

163. We acknowledge that a very significant majority of domestic and family abuse homicides in NSW occur in the context of intimate partners and that separation is a very dangerous time for many women leaving an abusive partner. However, coercive control is not limited to such relationships.

164. Feedback from First Nations communities and culturally and linguistically diverse communities highlight that extended family members, community members and kin also perpetrate coercive and controlling abuse (domestic and family abuse). To limit an offence to only intimate partners will enable and embolden extended family members, community members and kin to perpetrate such abuse either in their own right or on behalf of another, largely with impunity.<sup>73</sup>

165. The NSW Ageing and Disability Commission (**ADC**), established in 2019, is an independent statutory body, which is “*focused on protecting adults with disability and older adults from abuse, neglect and exploitation, and protecting and promoting their rights*”. In their submission to the Joint Select Committee they noted:

*Over half (54.7%) of all reports to the ADC about older people in 2020 pertained to the person’s adult children. All up, family members were the subjects of allegations in almost two-thirds (64%) of the reports about older people in that period. Allegations against a spouse or partner featured in 12.1% of the reports about older people.*<sup>74</sup>

166. In relation to people with disability, ADC comments:

*family members were the subjects of allegation in 51% of reports about adults with disability in [2020]. In 11.5% of matters, the adult’s spouse or partner was the subject of the allegations.*<sup>75</sup>

167. The United Kingdom has a strong focus on intimate partner abuse. It is notable that Northern Ireland introduced an offence to criminalise coercive control (domestic abuse) in 2021. Having the benefit of examining the legislation of England & Wales (2015), Scotland (2018) and Republic of Ireland (2018), Northern Ireland’s offence extends to include “*members of the same family*.”<sup>76</sup>

168. In NSW we have a well-established understanding that domestic and family abuse is perpetrated by a wide range of people, including extended family members and paid and unpaid carers where people are in a relationship of dependence. It is important this is recognised in the framing of this offence. To do otherwise is to introduce a “*hierarchy of harm*”<sup>77</sup> where some forms of harm are recognised and criminalised and other forms of harm are not recognised, which may in turn, have the effect of condoning such abuse.

<sup>73</sup> We note such behaviour may be captured by existing stalking and intimidation offences or other offences. See for example, Settlement Services International (2021) *Submission in response to the Joint Select Committee on Coercive Control Inquiry into Coercive Control in domestic relationships*

<sup>74</sup> NSW Ageing and Disability Commission (2021) *Submission in response to the Joint Select Committee on Coercive Control Inquiry into coercive control in domestic relationships*, p5

<sup>75</sup> Ibid.

<sup>76</sup> *Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021 UK (Northern Ireland Act) s 5(2)(e)*

<sup>77</sup> Kate Fitzgibbons, Coercive Control and NSW Legislation forum hosted by Domestic Violence NSW, Wirringa Baiya Aboriginal Women’s Legal Centre and City of Sydney, 20 July 2022.

### *The same definition of “domestic and family abuse” use in the Crimes (DPV) Act and the Crimes Act*

169. It is confusing to have two different definitions – “*domestic and family abuse*” in the *Crimes (DPV) Act* and “*abusive behaviour*” in the *Crimes Act*.
170. The purpose of having two different definitions is not clear. We note the meaning of “*abusive behaviour*” on its own is not an offence – there are several additional elements to the proposed offence.
171. It is essential the definition be a contextual definition as we advocate above. We strongly recommend the same term be used in both the *Crimes (DPV) Act* and the *Crimes Act* and prefer a “relevant effects” framing rather than the use of examples.

### **If including examples, include a range of examples**

172. If using examples, we are concerned that the examples included in the meaning of “*abusive behaviour*” are primarily non-physical forms of abuse. While we recognise it is important to raise awareness about non-physical forms of coercive control, there is continued confusion more broadly in society that coercive control is limited to non-physical forms.<sup>78</sup> It needs to be made clear that coercive control can include physical, sexual and non-physical forms of abuse.
173. It appears that section 54F(2)(g) relates more to the overarching framework of abusive behaviour and if examples are retained, should be included in the framing in s54F(1).
174. We repeat the need to define terms such as “*coercion or control*” and “*mental harm*” in section 54D.

### Potential for misuse

175. Considerable concern has been raised about section 54F(2)(a) which includes as an example of abusive behaviour:
- behaviour directed at, or making use of, a child of a person to threaten the person*
176. There are significant concerns this provision will be misused against protective parents who may limit contact due to safety concerns and will also encourage systems abuse.
177. This highlights again the vital importance of a contextual definition.
178. Further consideration is required on redrafting this provision to specifically exclude protective parents withholding children for safety reasons.

### **Naming sexual violence**

179. We also note with concern the absence of specific reference to sexual violence in section 54F. Sexual violence is often made invisible. Naming sexual violence and abuse will assist people to name and speak out about it.
180. We note an example of s54F(2)(g) includes reference to sexual autonomy, but this is insufficient.

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<sup>78</sup> See for example, ABS, Media Release: [3.6 million people experienced partner emotional abuse](#), 24 August 2022

181. We also express concern about the wording of the first example of s54F(2)(g) to include “*making unreasonable demands ... on sexual autonomy*”. This seems to imply there can be “*reasonable demands*”. We would prefer a word other than “*demands*” which may inadvertently support beliefs about male entitlement. It is important that care is taken not to undermine the important sexual consent reforms.
182. We recognise the principle that the facts of a charge cannot include facts for an offence with a higher sentence. However, there are some sexual offences which could be included, such as sexual touching, aggravated sexual touching, sexual act, aggravated sexual act and image-based abuse.
183. In circumstances of sexual offending and other forms of abusive behaviour as part of a course of conduct, we support a stand-alone charge(s) for sexual offending in addition to an abusive behaviour course of conduct offence.
184. This also raises questions about the adequacy of a maximum penalty of imprisonment for 7 years. We acknowledge this is a complex issue on which we have not yet reached a final position.
185. We are concerned that if in the course of plea-bargaining in relation to sexual offence charges and abusive behaviour course of conduct, the prosecution ultimately only pursues the abusive behaviour course of conduct offence, the sexual violence and abuse will be made invisible.
186. It is unclear how this will be addressed.
187. We also support an accused being convicted of an alternative offence if the facts proved do not amount to the relevant offence, such as that provided by s8 of the *Domestic Abuse (Scotland) Act 2018*.

### **8 Alternative available for conviction**

*(1) In proceedings for an offence under section 1(1), A may be convicted of an alternative offence if the facts proved against A—*

- (a) do not amount to the offence under section 1(1), but*
- (b) do amount to the alternative offence.*

*(2) An alternative offence as referred to in subsection (1) is one or other of these—*

- (a) an offence under section 38(1) (threatening or abusive behaviour) of the Criminal Justice and Licensing (Scotland) Act 2010,*
- (b) an offence under section 39 (offence of stalking) of that Act.*

### **A more straight-forward offence**

188. If an offence is introduced, we support the inclusion of:
- 188.1 Intention or reckless as to whether the course of conduct would be likely to cause physical or psychological harm; and
  - 188.2 A reasonable person test – that a reasonable person would consider the course of conduct to be likely to cause the person to suffer physical or psychological harm.
189. We recognise the role of a reasonable person test to provide an objective standard rather than to allow a person to assert their behaviour is normal. We also recognise shortcomings of the reasonable person test - that it is historically centred on the norms and perspectives of a white, middle class male. Efforts can be made to address this, for example, by educating facts finders about the nature and dynamics of



domestic and family abuse and a social entrapment model of understanding domestic and family abuse through expert evidence and jury directions.

190. We note s 38 of the *Evidence Act 1906 (WA)* outlines what may constitute evidence of family violence and this draws on a social entrapment framework. Benchbooks must also be reviewed and updated. There are also provisions for the giving of expert evidence of family violence in any criminal proceeding where evidence of domestic and family abuse is relevant to a fact in issue and provisions relating to directions about family violence.<sup>79</sup> Similar provisions should be considered in NSW.

191. We also support reference to “relevant effects” as this centres focus on the actions of the accused.

192. It is essential there is no requirement to prove harm. We acknowledge one of the provisions of the proposed offence in section 54D(1)(d) attempts to do this stating:

*(d) a reasonable person would consider the course of conduct would be likely, in all the circumstances, to cause either or both of the following, whether or not the fear or impact is in fact caused—*

*(i) fear that violence will be used against the other person,*

*(ii) a serious adverse impact on the capacity of the other person to engage in some or all of the person's ordinary day-to-day activities.*

193. However, section 54D(1)(d) is confusing. “Violence” suggests physical violence.

194. The intention of section 54D(a)(d)(ii) may be to reflect the wide-ranging impacts of coercive control, including undermining a sense of autonomy and self. Further the provision stipulates that a reasonable person would consider the course of conduct in all the circumstances to cause “either or both” fear or a serious adverse impact whether or not in fact either or both were caused. However, this is a higher threshold to meet than in the Scottish legislation. We are concerned about how this threshold will impact on resilient survivors.

195. We wonder if section 1(2) of the *Domestic Abuse (Scotland) Act* combined with section 4 of the *Domestic Abuse (Scotland) Act* which stipulates actual harm and actual relevant effects do not need to be proved, may be a more straightforward approach? We outline s1(2) of *Domestic Abuse (Scotland) Act* below.

**1 Abusive behaviour towards partner or ex-partner**

2 *The further conditions are—*

*(a) that a reasonable person would consider the course of behaviour to be likely to cause B to suffer physical or psychological harm,*

*(b) that either—*

*(i) A intends by the course of behaviour to cause B to suffer physical or psychological harm, or*

*(ii) A is reckless as to whether the course of behaviour causes B to suffer physical or psychological harm.*

196. We recommend further consideration of this issue.

<sup>79</sup> See s39 and provisions about directions relating to family violence s39A-39F.

197. We also question why “*course of conduct*” is defined as engaging in behaviour “*repeatedly or continuously*” without reference to a minimum number of occasions. Perhaps this is to shift away from focusing on incidents. However, by not stipulating a number we are concerned this may encourage unnecessary legal argument.
198. We also note concerns about the potential to misidentify the predominant aggressor and the adequacy of the defence in such circumstances. Section 54E provides a defence “*if the course of conduct was reasonable in all the circumstances*”. As raised above, there may be a role for social framework evidence to help educate the fact finder.

### Additional issues to consider

#### *Protections against misidentification of the predominant aggressor*

199. Concerns have been raised about the potential to misidentify the predominant aggressor as well as the potential for any new offence to be underutilised.
200. It is not clear what protections will be put in place, through guidelines and other measures, to guard against the new offence being used against people being subjected to coercive control as a continuation of the abuse. It is also unclear how the success of these mechanisms will be measured?
201. We note the [Joint Protocol between Police Scotland and the Crown Office and Procurator Fiscal Service: In partnership challenging domestic abuse](#) includes instructions on how to respond to counter allegations.<sup>80</sup> The Joint Protocol requires police to “*thoroughly investigate the full circumstances of the incident in order to identify and report the principal perpetrator to the Procurator Fiscal*”.<sup>81</sup> Further, the protocol outlines relevant factors to be considered, including context, history and nature of the relationship and criminal history<sup>82</sup> and that “*Every effort must always be made to identify the principal perpetrator and only in limited circumstances and where it is justified should both parties be reported to the Procurator Fiscal*”.<sup>83</sup>
202. We anticipate most offences will likely be prosecuted by police prosecutors in Local Court. It would be helpful to know what oversight mechanisms will be in place to mitigate against misidentification.

#### **Codifying relationship and context evidence**

203. We note the Joint Select Committee recommended the codifying of common law principles on context and relationship evidence.<sup>84</sup> The Government supported this recommendation. It is not clear when this codification will take place.
204. We note the Queensland Women's Safety and Justice Taskforce has recommended removing restrictions on admissibility of evidence of domestic violence, so admissibility is no longer restricted to limited offences, and is available for any offence.<sup>85</sup>

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<sup>80</sup> [Joint Protocol between Police Scotland and the Crown Office and Procurator Fiscal Service: In partnership challenging domestic abuse](#), paragraphs 33-37.

<sup>81</sup> *Ibid*, paragraph 33

<sup>82</sup> *Ibid*, paragraph 34

<sup>83</sup> *Ibid*, paragraph 36

<sup>84</sup> Joint Select Committee, Recommendation

<sup>85</sup> Women's Safety and Justice Taskforce (2021) [Hear her voice - Volume One: Addressing coercive control and domestic and family violence in Queensland](#), recommendation 63

## Inclusion of children

### Children experiencing domestic and family abuse in their own right

205. The detrimental impact of domestic and family abuse on children is well known. Yet the language in the Bill does not recognise domestic and family abuse or abusive behaviour perpetrated against children in their own right.
206. The proposed definition of domestic and family abuse in section 6A(3) refers to behaviour a child “hears”, “witnesses” or is “exposed” to. The language should recognise children are subjected to domestic and family abuse in their own right.
207. As the offence is limited to intimate partner violence, a course of conduct of abusive behaviour perpetrated by an adult who is in an intimate relationship with someone under the age of 18 years is captured, while abusive behaviour by a parent against the child (for example) is only captured indirectly through section 54F(2) “*behaviour directed at, or making use of, a child of a person to threaten the person*”. This is another reason to expand the offence to include all “*domestic relationships*”.

### Children and young people using domestic and family abuse

208. We are also concerned about children and young people using domestic and family abuse against each other, particularly in intimate partner relationships as well as, for example, adolescent boys using domestic and family abuse against their mothers and/or other children and young people.
209. We do not believe the answer is to criminalise children and young people, but we do consider it important to monitor this issue and it is vital that tailored, gendered violence informed, trauma informed, culturally safe early support is available to children and young people who use domestic and family abuse to help change their behaviour at an early stage and address any underlying trauma.
210. It is important there are necessary and appropriate supports to break the cycle of violence and abuse.
211. It is also important that awareness campaigns and primary prevention work includes targeted work with young people and is evaluated for its effectiveness in evidencing behavioural change.

#### Recommendation 14

If despite strong opposition to passing legislation this year, the NSW Government proceeds in doing this anyway, we make the following additional recommendations.

- a. Expand the offence to cover all domestic relationships, as defined under section 5 of the *Crimes (Domestic and Personal Violence) Act*.
- b. Have a single definition of domestic and family abuse that is used in both the *Crimes (DPV) Act* and the *Crimes Act* which must be a contextual definition and should consider a “relevant effects” framework rather than providing examples.
- c. Define “*coercion*” and “*control*” and “*mental harm*” (or use the term “*psychological harm*” and define this).
- d. If retaining the list of examples approach, consider moving section 54F(2)(g) to section 54F(1) as part of a contextual definition.

- e. Redraft section 54F(2)(a) to clearly exclude protective parents withholding children from contact for safety reasons.
- f. Specifically name sexual violence as an example of domestic and family abuse.
- g. Consider a more straight forward framing of the offence and make clear you do not need to prove harm.
- h. If retaining the framing of the offence in section 54D(1)(d)(i) do not use the terminology “*violence*”.
- i. Have a provision for alternative available for conviction.
- j. A new coercive control offence does not commence prior to at least 4 years from the passing of legislation and subject to successful implementation of cultural and systems reform, including what is outlined in this submission.
- k. Outline the safeguards and protections in place against misidentification of the predominant aggressor.
- l. Codify the common law principles on context and relationship evidence as recommended by the Joint Select Committee.
- m. Properly fund early support for children and young people.
- n. Monitor and evaluate the effectiveness of awareness campaigns and primary prevention work in changing behaviour.

### Conclusion

212. Much more can and must be done to ensure the safety and support of women, children and other victim-survivors experiencing domestic and family abuse. It requires strong leadership, significant cultural change, necessary tools and multi-agency risk assessment and management framework, extensive education that is evidence-based, developed and delivered by experts and regularly evaluated for its effectiveness, proper and sustainable funding, an integrated response, better accountability mechanisms and political will.
213. We strongly advocate for a phased approach to responding to coercive control. Starting first with a definition of domestic and family abuse in the *Crimes (DPV) Act* is taking important action to keep women, children and other survivors safe, while guarding against what Buxton-Namisnyk, Gibson & MacGillivray describe as “*unintended but not unanticipated consequences*”<sup>86</sup> of a new coercive control offence.

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<sup>86</sup> Emma Buxton-Namisnyk, Althea Gibson & Peta MacGillivray, “[Unintended, but not unanticipated: coercive control laws will disadvantage First Nations women](#)”, *The Conversation*, 26 August 2022