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Public consultation on Exposure draft:

Crimes Legislation Amendment (Coercive Control) Bill 2022

Thank you for this opportunity to make a submission on the public exposure bill to criminalise coercive control and to insert a definition of domestic abuse into the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

I am an Associate Professor in the Faculty of Law at UTS with extensive experience in legal responses to domestic and family violence. This experience has been multiple and varied over more than 25 years: as a legal practitioner with the then Domestic Violence Advocacy Service, in law reform positions with the Australian Law Reform Commission (ALRC), as a government policy officer in the then NSW Attorney General's Department's Violence Against Women Specialist Unit, and as a researcher and academic. In my academic work I focus on a wide range of legal responses to domestic and family violence (including civil protection orders, criminal law and family law). I am interested in how the law conceives of, understands and responds to this harm and have written about the limitations of the incident-focus in the context of civil protection orders.[1] Since 2014, I have been a non-government sector expert member of the NSW Domestic Violence Death Review Team (DVDRT).

My submission is divided into five parts:

1. Summary of key points and recommendations
2. The need for more time and more transparent consultation methods
3. The need to consider 'implementation' is an expansive and comprehensive way
4. Proposed amendments to the *Crimes (Domestic and Personal Violence) Act 2007* (NSW)
5. Proposed amendments to the *Crimes Act 1900* (NSW).

My overarching submission is that more time needs to be allocated to this reform in order to benefit those it is intended to benefit, to avoid the problems of misidentification and over-policing of certain communities about which we are already aware, and to improve the legal processes.

This is not a reform to 'do quickly' but to 'do well'.

Please do not hesitate to contact me if you require further information or have any questions arising from my submission.

Yours faithfully

Dr Jane Wangmann

[1] See Jane Wangmann, 'Incidents v Context: How Does the NSW Protection Order System Understand Intimate Partner Violence' (2012) 34 *Sydney Law Review* 695.

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Summary of key points

1. The Government should immediately establish an independent implementation and monitoring taskforce to oversee the drafting of the proposed legislation, the implementation framework, and the monitoring of the amendments once legislated. Ideally this taskforce should have oversight of all the recommendations made by the NSW Joint Select Committee on Coercive Control. A useful model is the Victorian Family Violence Reform Implementation Monitor.

2. The consultation period for the exposure Bill needs to be extended, at least to the end of the year. This should involve the public release of a revised Bill following this first round of consultation.

3. Submissions and roundtable consultation notes should be made public (unless confidential) to increase transparency and knowledge across the sector about different viewpoints. This facilitates an understanding of the approach ultimately adopted by the NSW Government.

4. Implementation needs to be considered expansively and not narrowly focused on the new offence. It needs to include cultural and institutional change for all key actors; police, legal practitioners, judicial officers and support workers. It is recommended that the NSW Government consider the detailed four-year phased implementation plan outlined in the work of the Queensland Women's Safety and Justice Taskforce, and that such a four year period be applied in NSW.

5. As part of the implementation framework current training and education of police, judicial officers and legal professionals needs to be evaluated to ensure that we build on strengths and do not replicate unsuccessful approaches.

6. The Government should start with amendments to the *Crimes (Domestic and Personal Violence) Act 2007* before legislating a new offence as recommended by the NSW Joint Select Committee.

7. There should be inserted in the *Crimes (Domestic and Personal Violence) Act 2007* a definition of 'domestic and family abuse'. This definition should be:

   a) Contextual;

   b) Do work in the legislative scheme; namely be a ground for the making of an ADVO (s 16), and a basis on which a police office can apply for an ADVO on behalf of a person (s 49).

8. The proposed new offence of 'domestic abuse between current or former intimate partners' should be amended in the following ways:

   a) Not limited to intimate partners to take account of the jurisdictional context of NSW which has a longstanding definition of domestic relationships that is much broader than this;

   b) Rely on the new definition of 'domestic and family abuse' to be inserted in the *C(D&PV) Act* rather than including a different definition here. To have two definitions creates confusion, and undermines one of the key goals for legislating in this area which is to increase community awareness of, and understanding about, coercive control.

   c) Remove the current reasonable person test and insert a provision similar to *Domestic Abuse (Scotland) Act 2018* (Scot) s 1(2)(a); and *Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021* (NI) s 1(2(a). It does not make sense for the proposed 'reasonable person' test to require a higher level of impact (ie 'serious adverse impact') than that required in the behavior of the accused.

   d) Insert a provision making it clear that it is not necessary to establish that the victim actually experienced physical or mental harm. See *Domestic Abuse (Scotland) Act 2018* (Scot) s 4; and *Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021* (NI) s 3.

9. The proposed statutory review of the offence needs to be more expansive and detailed; such a review also needs to be included for any amendments made to the *Crimes (Domestic and Personal Violence) Act 2007.*

The need for more time and more transparent consultation methods

The NSW Government has provided a 6 week consultation period for the exposure Bill. Given the necessity of doing this reform well, with as few negative consequences as possible, it is unfortunate that the Government has determined not to provide additional time for this stage in the process despite being **requested to do so by multiple leading domestic and family violence organisations and individuals**.[2]

The six week time frame is inadequate for a number of reasons.

While that the Government argues that it is building on consultations that commenced in October 2020,[3] **each stage in the development of the proposed new laws needs sufficient time** – consulting on the wording of the proposed offence is different to consulting about whether such an offence should be introduced. While they are clearly related they necessarily have a different focus and ask different questions.

It also **assumes that the earlier processes were adequate**. I have a forthcoming article in which I explore the strengths and limitations of various law reform processes that were tasked to investigate whether coercive control should be criminalised in various Australian jurisdictions: namely, the work of the NSW Joint Select Committee, the Queensland Women's Safety and Justice Taskforce, and the then South Australian exposure Bill. In that article I point to a number of the limitations in the consultation process adopted by the NSW Joint Select Committee. These included: the timing of the call for submissions over the 16 days of Activism against Gender-based Violence and the summer holiday break; the emphasis on written submissions; the fact that overwhelmingly it was only those who made written submissions who were invited to give oral evidence;[4] a single site visit; the absence of any measures to enhance accessibility; and the failure to attend to or respond to the debates that were taking place outside the work of the Committee (but of which I suggest that the Committee should have been aware), particularly in regard to how these proposed laws might impact on Aboriginal and Torres Strait Islander peoples.[5] This article will soon be published in the *Australian Feminist Law Journal* and I will forward a copy when it is available.

The lack of coherence in the exposure Bill (for example the proposal to include a different definition of 'abusive behavior between intimate partners' in the *Crimes Act 1900* and another definition of 'domestic abuse' in the *Crimes (Domestic and Personal Violence) Act 2007* ('*C(D&PV) Act*'), and the fact that this proposed definition of 'domestic abuse' appears to do no work) also suggests that inadequate time has been allocated to responding to the recommendations of the NSW Joint Select Committee and considering how they would work in practice.

While I appreciate that multiple roundtables are being held about the exposure Bill it is a missed opportunity to not also bring different stakeholders together or at the very least provide communication about the points and issues that are raised by the different roundtable groups; we can learn a great deal from each other by **sharing different concerns and issues**. It is in the sharing of different views about strengths and weaknesses

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[2] Letter from the NSW Women's Safety Alliance, DVNSW (a total of 61 signatories) to the Hon Natalie Ward MLC (26 July 2022).

[3] Letter from the Hon. Natalie Ward MLC (Minister for Metropolitan Roads, Minister for Women's Safety and the Prevention of Domestic and Sexual Violence) to Ms Elise Phillips Interim CEO DVNSW (sent via email 15 August 2022).

[4] The NSW Government also seeks to characterise the written submissions and oral evidence to the NSW Joint Select Committee as two separate stages in the consultation processes – this is not the case they simply form two methods of gathering evidence as part of a single consultation process.

[5] See for example the extensive discussion taking place on social media between Aboriginal and Torres Strait Islander scholars and activists that culminated in a piece written by Chelsea Watego that was published while the Committee was still conducting its inquiry: Chelsea Watego and others, 'Carceral Feminism and Coercive Control: When Indigenous Women Aren't Seen as Ideal Victims, Witnesses or Women' *The Conversation* (25 May 2021) <https://theconversation.com/carceral-feminism-and-coercive-control-when-indigenous-women-arent-seen-as-ideal-victims-witnesses-or-women-161091> (accessed 24 August 2022).

that a better articulation of the offence and its implementation might be achieved. **Submissions and roundtable notes should be made public (unless marked confidential).**

If the time frame is not extended on this current exposure Bill, **at the very least a revised Bill should be made public for further comment** following this initial round of consultation on the wording of the Bill.

The need to consider 'implementation' in an expansive and comprehensive way

Implementation should be an integral component of the drafting of the legislation – not something that is considered afterwards.

It is in practice and implementation that the law comes to life, both in its intended and unintended consequences. This is why there is a need to **establish an independent implementation and monitoring taskforce now** to advise the government about the preferred wording of the Bill and the implementation work that needs to accompany the Bill.

A key concern is the way in which this new offence may impact on marginalised communities. Particular concern has been raised about the risk that Aboriginal and Torres Strait Islander women will be misidentified as offenders, the general risk of this offence adding to the over incarceration of Aboriginal and Torres Strait Islander people, and linkages with the child protection system. As Emma Buxton-Namisnyk, Althea Gibson and Peta MacGillivray recently pointed out while these are often described as 'unintended outcomes' they are not 'unanticipated'.[6] The 'anticipated' nature of these risks are clearly demonstrated in: the submissions made to the NSW Joint Select Committee; research by the NSW Bureau of Crimes Statistics and Research on the use of the stalking or intimidation offence;[7] research by Heather Douglas and Robyn Fitzgerald,[8] Heather Nancarrow,[9] and Ellen Reeves;[10] and the work of the ALRC on the high incarceration rate of Aboriginal and Torres Strait Islander peoples.[11] Because these risks are foreseeable, more time needs to be dedicated to the appropriate drafting of the offence and its implementation prior to its introduction to ensure that they can be avoided.

The Queensland Women's Safety and Justice Taskforce provides a useful outline of the steps and time required to ensure that the systems and institutional change needed to appropriately support a new offence of coercive control are in place. **The Taskforce recommended a four-year phased plan** that attended to the need for cultural change, institutional supports, training and education, capacity building, monitoring and

[6] Emma Buxton-Namisnyk, Althea Gibson and Peta MacGillivray, 'Unintended but not unanticipated: Coercive control laws will disadvantage First Nations women', *The Conversation* (26 August 2022) <https://theconversation.com/unintended-but-not-unanticipated-coercive-control-laws-will-disadvantage-first-nations-women-188285> (accessed 27 August 2022).

[7] Stephanie Ramsey, Min-Taec Kim and Jackie Fitzgerald, *Trends in domestic violence-related stalking and intimidation offences in the criminal justice system: 2012 to 2021*, (BOCSAR, Bureau Brief No. BB159, June 2022).

[8] Heather Douglas and Robin Fitzgerald, 'The Domestic Violence Protection Order System as Entry to the Criminal Justice System for Aboriginal and Torres Strait Islander People' (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 51.

[9] Heather Nancarrow, *Unintended Consequences of Domestic Violence Law: Gendered Aspirations and Racialised Realities* (Springer, 2019); Heather Nancarrow et al, *Accurately identifying the 'person most in need of protection' in domestic and family violence law* (Research Report, Issue 23, ANROWS, 2020).

[10] Ellen Reeves, 'I'm not at all protected and i think other women should know that, that they're not protected either': Victim–survivors' experiences of 'misidentification' in Victoria's family violence system' (2021) 10(2) *International Journal for Crime, Justice and Social Democracy* ; Ellen Reeves and Silke Meyer, 'Marginalized women, domestic and family violence reforms and their unintended consequences' in E. Erez, & P. Ibarra (Eds.), *The Oxford Encyclopedia of International Criminology* (Oxford University Press, 2021).

[11] Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, (ALRC Report No 133 (2017), esp. [11.69]-[11.72].

evaluation frameworks.[12] While not all the recommendations made in Queensland are relevant to the NSW context,[13] many are.

Implementation with a focus on key actors

It is critically important that implementation is considered in an expansive way – this means thinking about implementation beyond the confines of the exposure Bill.

The work of the Queensland Taskforce on Women's Safety and Justice Taskforce is again instructive. It paid a great deal of attention to the various legal actors – police, lawyers, and judicial officers – and the **extent of work that needs to be done at a general level to improve understandings about domestic and family violence.** Focusing on a new offence and training and education around a new offence represents a missed opportunity to improve legal and policing responses to all reports of domestic and family violence (many of which will continue to be charged under existing offences, and some which might be subject to a new offence).

The recent prominence of discussions about coercive control have been very useful in our community, however, it has also been marked by **misunderstandings about what coercive control is** (discussed in more detail below). Most concerning is the tendency to discuss coercive control as though it is a new thing, and something separate to domestic and family violence. This is simply not the case – understandings of domestic and family violence that describe the use of violence and abuse as a pattern of behaviour used to exert power and control are long-standing and date from the 1970s.[14] Importantly these understandings of domestic and family violence have also been prominent within NSW policy and educational frameworks. As I pointed out in my submission to the NSW Joint Select Committee, both the NSW Police[15] and NSW judicial bench book on *Equality Before the Law*[16] already encompass this broader understanding of the nature of domestic and family violence. In 2012 the NSW DVDRT recommended the NSW Government undertake a community education campaign about domestic and family violence that incorporated coercive control.[17] As I explained in my submission to the NSW Joint Select Committee the reason for highlighting these things:

> …is to draw our attention to the fact that there is knowledge amongst the community and key professional groups that non-physical behaviours form part of domestic violence, as well as knowledge about the way in which these behaviours function to control the victim. The new language of coercive control may be confusing in this context; by coming across as something new, rather than something that has long been known, this potentially shifts attention away from questions about why this knowledge is not being currently actioned. The deeper and more challenging questions are:

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[12] Queensland Women's Safety and Justice Taskforce, *Hear Her Voice: Report One – Addressing coercive control and domestic and family violence in Queensland* (2021) xxix-xxxii, xivi, Rec 4.

[13] For example, the recommendation to establish a Queensland Judicial Commission: Ibid Rec 3

[14] See Rebecca Dobash and Russell Dobash, *Violence Against Wives: A Case Against the Patriarchy* (Free Press, 1979); Ellen Pence and Michael Paymar, *Education Groups for Men who Batter: The Duluth Model* (Springer, 1993); James Ptacek, *Battered Women in the Courtroom: The Power of Judicial Responses* (Northeastern University Press, 1999); and Susan Schechter, *Women and Male Violence: The Visions and Struggles of the Battered Women's Movement* (Pluto Press, 1982). And of course Evan Stark's significant work: *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, 2007).

[15] NSW Police Force, Code of Practice for the NSW Police Force Response to Domestic and Family Violence (2018), p. 2. Available at https://www.police.nsw.gov.au/__data/assets/pdf_file/0016/165202/Code_of_Practice_for_the_NSWPF_response_to_Domestic_and_Family_Violence.pdf . See also the statement by Assistant Commission Mark Jones APM, Corporate Sponsor for Domestic and Family Violence in the NSW Police Force, Domestic and Family Violence Policy (2018), p. 7. Available at https://www.police.nsw.gov.au/__data/assets/pdf_file/0006/477267/Domestic_and_Family_Violence_Policy_2018.pdf

[16] https://www.judcom.nsw.gov.au/publications/benchbks/equality/section07.html#p7.5 (accessed 29 August 2022).

[17] NSW DVDRT, *Annual Report 2011-2012* (NSW Attorney General and Justice, 2012) Rec 10. The Government indicated that it supported this recommendation.

- **Why has this knowledge not translated into better and more substantive outcomes for victims across a range of social, legal and other policy responses?** Does this failure to translate perhaps point to more entrenched problems than is able to be addressed through the creation of a discrete offence?
- **How do we improve and transform education and training for key professionals so that this knowledge is able to be translated and actioned in the work setting?** This is far more than content delivery, but rather content that is responsive and adaptive to the workplace setting.

In considering implementation of the proposed new offence, **an essential first step is to undertake an assessment and evaluation of the training and education that has been provided to police, judicial officers and the legal profession to date.** The call for training and education of these professional groups is one of the most repeated recommendations made since government inquiries started to be conducted into the problem of domestic and family violence in the 1980s – yet they continue to be repeated. Why? Why has the training and education that has gone before not effected the change that was sought or to the degree it was sought? Surely we need to investigate these questions before we simply introduce more training and education. One of the issues being revealed through the evidence before the Independent Commission of Inquiry into Queensland Police Services Responses to Domestic and Family Violence is that **it is about cultural change, not merely training and education to support legislative amendments.** Cultural change needs to take place on multiple intersecting levels – understanding and responding effectively to coercive control, and addressing sexist, racist, ableist, homophobic or transphobic attitudes. I draw to your attention the submissions made to the Queensland Independent Commission by Professor Heather Douglas,[18] Professor Silke Meyer[19] and Associate Professor Marlene Longbottom.[20] I submit that many of the issues that are raised in these submissions/expert evidence equally apply to policing of domestic and family violence in NSW.

The reason why an expansive approach to implementation needs to be adopted is because **it is misconceived to only approach the criminalisation of coercive control as a legislative gap to be filled.** While a new offence may well provide a mechanism to be able to criminalise patterns of behavior and forms of behavior that are currently beyond the purview of the criminal law – this is not necessarily the main or only issue faced regarding criminal law responses to domestic and family violence. Any review of the NSW DVDRT reports[21] and recent coronial inquests in NSW and other Australian jurisdictions[22] reveal inconsistency in responses and the failure to do what is required by law and policy by key actors within the legal system. As I commented in my submission to the NSW Joint Select Committee:

> While a new charge of coercive control might have been able to be laid in these cases, this was not the most substantial 'gap'. The gap was the failure to do what is already required and possible despite limitations in the current legislative framework. One of the risks of focusing on a new offence as the measure that will fill the gap in legal responses to domestic and family violence is that this "may impliedly endorse the idea…that physical family violence is currently well policed and adequately addressed by the criminal law". This is simply not the case. [footnotes omitted]

[18] https://www.qpsdfvinquiry.qld.gov.au/public-hearings/assets/exhibits/week-3/heather-douglas.pdf (accessed 25 August 2022).

[19] https://www.qpsdfvinquiry.qld.gov.au/public-hearings/assets/exhibits/week-3/silke-meyer-report.pdf (accessed 25 August 2022).

[20] https://www.qpsdfvinquiry.qld.gov.au/public-hearings/assets/exhibits/week-3/marlene-longbottom-annexure-a.pdf (accessed 25 August 2022).

[21] Available at https://www.coroners.nsw.gov.au/coroners-court/resources/domestic-violence-death-review.html#Reports2 (accessed 29 August 2022).

[22] For example, see Non Inquest finings into the death of Fabiana Yuri Nakamura Palhares, Coroners Court (Southport, Qld), 20 January 2021; Inquest into the deaths of John, Jack and Jennifer Edwards, Coronoers Court of NSW (Lidcombe, NSW), 7 April 2021; Inquest into the deaths of Doreen Gail Langham and Gary Matthew Hely, Coroners Court (Southport, Qld) 27 June 2022.

To ensure that the proposed new offence meets its intended outcomes, it is necessary to focus on improving all policing and legal responses to domestic and family violence. This includes the new offence, existing offences and the ADVO system. Across all these levels a deep understanding of coercive control is required (whether or not that particular charge is laid) if we are to start to see legal responses that are effective and appropriate in responding to domestic and family violence.

Implementation with a focus on the broader community

It is clear from various discussions in the media and other forums that **there are widespread misunderstandings about what coercive control is**. These misunderstandings include:

- That coercive control is a 'new' concept (discussed above);
- That coercive control describes only non-physical forms of violence;
- That coercive control is a precursor to more serious forms of violence and abuse.

These effectively fail to understand that coercive control is a contextual understanding of domestic and family violence, and that what the term seeks to describe is the way in which various acts or behaviours (eg physical violence, sexual violence, property damage, financial abuse, surveillance, isolation, denigration and many other behaviours individually designed for a victim) function to keep the victim controlled, isolated and with no 'space for action'.[23] Other terms have been used in the past to capture this architecture – power and control, social entrapment and coercive control.[24]

The most recent and concerning example of the level of misunderstanding comes from the Australian Bureau of Statistics which in its release on data from the Personal Safety Survey equated the use of emotional abuse as coercive control.[25] This was repeated in media reports on this study,[26] and was eventually corrected.

The level of misunderstanding not only means that there is work to do in terms of community education (as recommended by the NSW Joint Select Committee), but also that any legislation needs to wait until we have a shared understanding about coercive control. It does appear premature to legislate and design community attitude and awareness campaigns prior to agreement on a National Framework.

Amendments to the *Crimes (Domestic and Personal Violence) Act 2007*

The exposure Bill proposes to insert a definition of 'domestic abuse' into the *Crimes (Domestic and Personal Violence) Act 2007* ('*C(D&PV) Act*') acting on the NSW Joint Select Committee recommendation.[27] However, it is important to note that in formulating this recommendation, the Joint Select Committee had emphasised that 'this should be done as a priority, *before* criminalising coercive control' [emphasis added]. While it is gratifying that the Government is acting on this recommendation, in integrating it in the Bill that also seeks to

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[23] This concept was developed by Liz Kelly: 'The wrong debate: Reflections on why force is not the key issue with respect to trafficking in women for sexual exploitation' (2003) 73 *Feminist Review* 139. Most recently see Nicola Sharp-Jeffs, Liz Kelly and Renate Klein, 'Long journeys to freedom: The relationship between coercive control and space for action – Measurement and emerging evidence' (2018) 24(2) *Violence Against Women* 163.

[24] See references (n 14).

[25] This was corrected on 25 August and the media release now refers to emotional abuse rather than coercive control: See https://www.abs.gov.au/media-centre/media-releases/36-million-australians-experienced-coercive-control

[26] Claudia Long, 'Nearly a quarter of women have experienced emotional abuse by a partner' *ABC News* (24 August 2022) which states "Emotional abuse, also known as coercive control". <https://www.abc.net.au/news/2022-08-24/nearly-quarter-of-women-experience-emotional-abuse-by-partner/101366202> (accessed 25 August 2022).

[27] NSW Joint Select Committee on Coercive Control, *Coercive Control in Domestic Relationships*, Report 1/57 (2021) Rec 2.

criminalise coercive control it undermines the purpose of commencing with this definitional work first. As the NSW Joint Select Committee noted:

> Amending a definition of domestic violence to include coercive control, together with the measures discussed in Chapter 4 ['a whole of government response', community awareness, education for young people, resourcing for services etc] will ensure that when a criminal offence is introduced, the legal system is prepared to implement it.[28]

The NSW Government should reconsider actioning the offence and definition in the C(D&PV) Act simultaneously, and instead adopt the staged approach envisaged by the NSW Joint Select Committee.

It is important to have a definition of 'domestic and family abuse' in the C(D&PV) Act

At present, the NSW legislation does not include a definition of domestic violence, instead the Act and its powers revolve around the concept of a 'domestic violence offence' and 'domestic relationships'. This offence-based approach has remained unchanged since ADVOs were first legislated in 1982.[29] While there have been multiple significant amendments to the ADVO scheme since that time, its basic structure and nature has remained the same, unlike other Australian jurisdictions which have modernised their respective legislative schemes in recent years.

The proposal to introduce a definition of 'domestic abuse' into the *C(D&PV) Act* is much needed. It was first recommended in 2003 by the NSWLRC which also recommended that the definition form the grounds for the making of an ADVO.[30] In 2010 the ALRC and NSWLRC in their joint inquiry into family violence again noted the absence of a definition in NSW and the need to move away from an offence-based approach.[31] The absence of a definition has also been commented on by the NSW DVDRT.[32] In 2021 the NSW Joint Select Committee again drew attention to the fact that NSW is the only jurisdiction without a definition of domestic violence or abuse in its protection order legislation.[33] While it is gratifying to see that the Government is finally acting on these recommendations, simply inserting the definition, without more thoroughly considering how or why a definition was needed means that **this amendment as currently proposed will do almost nothing**; indeed, it may add to confusion.

It appears that the proposed section 6A seeks to combine elements of civil protection order legislation from Victoria, ACT, Queensland, as well as features of the *Family Law Act 1975* (Cth) definition of family violence. This ultimately means that the **proposed provision is confused**.

The need for a contextual definition

The proposed definition is not a contextual definition. While the proposed definition seeks to provide a non-exhaustive list of a wide range of types of acts and behaviours that might form domestic and family abuse, the **failure to tie those acts and behaviours to the context in which they are perpetrated means that the definition remains incident-based** and is therefore open to victims being misidentified as offenders when

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[28] Ibid, [3.46]

[29] *Crimes (Domestic Violence) Amendment 1982* (NSW).

[30] NSWLRC, *Apprehended Violence Orders* (Report 103, 2003) rec 8-9.

[31] ALRC & NSWLRC, Family Violence – A National Legal Response (ALRC Report 114, NSWLRC Report 128, 2010) [5.77]-[5.82], [5.167]-[5.169], [5.175]-[5.176] and Recs [5-1]-[5-4]. I note that the 2015 statutory review of the ADVO scheme considered this recommendation and instead of including a definition of domestic violence decided to expand the definition of 'domestic violence offence' 'to include any other NSW criminal offence or offence under the Commonwealth Criminal Code when committed in a "domestic relationship" and arising from substantially the same circumstances as those from which a "personal violence offence" has arisen.': NSW Department of Justice, Justice Strategy and Policy, *Statutory Review of the Crimes (Domestic and personal Violence) Act 2007 (NSW)* (2015) [4.22].

[32] NSW DVDRT, *Report 2017-2019* (NSWDVDRT, 2020) 71.

[33] NSW Joint Select Committee (n 27) [1.17].

they use the same acts/ behaviours in response or retaliation.[34] As the ALRC and NSWLRC explained in their joint report:

> the Commissions are persuaded by arguments that the definition of family violence needs to describe the context in which acts take place—rather than merely listing specific incidents of violence or abuse. The imperative to provide a contextual background in the definition of family violence is heightened by the recommended broadening of the definition to include non-physical forms of violence, particularly emotional and economic abuse.[35]

The Commissions' continued:

> Emphasising the coercive, controlling nature of family violence and how it engenders fear serves an important educative function, as well as a dual pragmatic function. First, it allows new behaviours—including seemingly 'minor' events which may have a particular significance to victims—to be included, provided that they meet this definition. As stated by one stakeholder, having a definition based on the dynamics and impact of family violence avoids the technicalities of definitions becoming obstacles to protection, especially given that a common form of family violence is the use of strategies of intimidation and symbolic actions which have specific meaning for the victims, but may appear relatively harmless to others.
>
> Secondly, it can filter out instances of abuse committed outside the context of controlling or coercive behaviour—for example, by excluding verbal abuse committed by men or women in the course of an intimate relationship or acts of violent resistance by victims, where such abuse or resistance does not engender fear or does not form part of a pattern of controlling or coercive behaviour. To focus only on discrete incidents of violence devoid of context risks the civil protection order scheme replicating the limitations of the criminal law in responding to family violence. It further risks trivialising the meaning of family violence and having the definition being co-opted and misused in contexts to which it was never intended to apply.[36]

This conclusion led the Commissions to recommend that:[37]

> State and territory family violence legislation should provide that family violence is violent or threatening behaviour, or any other form of behaviour, that coerces or controls a family member or causes that family member to be fearful.

The ALRC recommended this be followed by a non-exhaustive list of acts and behaviours.

The VLRC in its *Review of Family Violence Laws Report* (2006) similarly recommended a contextual definition:[38]

> The new legislative definition of family violence should be:
>
> > Family violence is violent or threatening behaviour or any other form of behaviour which coerces, controls and/or dominates a family member/s and/or causes them to be fearful.
> >
> > Family violence includes causing a child to see or hear or be otherwise exposed to such behaviour.

[34] See Heather Nancarrow et al, Accurately identifying the 'person most in need of protection' in domestic and family violence law, Research Report 23/2020 (ANROWS 2020) 95.

[35] ALRC & NSWLRC (n 31) [5.166].

[36] Ibid [5.168]-[5.169] footnoted omitted.

[37] Ibid Rec 5-1. This definition was ultimately adopted under the *Family Law Act 1975* (Cth) s 4AB.

[38] VLRC, *Review of Family Violence Laws: Report* (2006) Rec 14.

Again the VLRC recommended that this be followed by a non-exhaustive list of acts and behaviours that might amount to family violence. This, however, is not the approach that was legislated in Victoria which ended up removing the contextual frame from the start of the provision.[39]

A contextual framework is essential if we are to deepen community understandings about the nature of domestic and family violence, and also to ensure that misidentification does not occur.

To demonstrate the difference a contextual definition can make it is useful to refer to one of the first cases decided under the then new contextual definition of family violence inserted into the *Family Law Act 1975* (Cth) in 2012. In *Carra & Shultz*[40] the applicant father was seeking time with his daughter. At the time he lodged his application, the father also lodged a Notice of Child Abuse, Family Violence or Risk of Family Violence form alleging that the mother's refusal to allow him to spend time with their daughter or to communicate with her amounted to family violence under the new definition ('preventing the family member from making or keeping connections with his or her family…'[41]). In her decision Hughes FM explains that section 4AB(1) and (3) are the substantive parts of the definition of family violence, with sub-section (2) simply setting out a non-exhaustive list of examples.[42] The work that the contextual definition performs is made clear in Hughes FM's determination that the father's allegation did not amount to family violence:

> This example [s 4AB(2)(i)] appears to be directed at a situation where one party coerces or controls another by keeping them in a state of social and/or emotional isolation by cutting them off from family and friends. The father in this case argued that, by preventing him from spending time with his daughter, the child's mother was engaging in family violence. In my view, however, the argument is misconceived. The withholding of time or communication with a child, without more, does not constitute family violence. The essence of the definition of family violence is behaviour which "coerces or controls" a family member "or causes [them] to be fearful". There is no evidence in this case that the father was coerced, controlled or felt fearful.
>
> It is possible to envisage a different context within which the withholding of a child may amount to family violence. One can imagine, for example, a scenario in which a parent flees from violence and does not take a child with him or her through lack of opportunity or because they have no immediate arrangements for appropriate alternative accommodation. If the other parent prevents the fleeing parent from spending time or communicating with the child as a means to coerce or control the fleeing parent or to cause them to be fearful about their own or the child's safety, it may well amount to family violence.
>
> In this case, there is no evidence that the mother is seeking to coerce or control the father. On the contrary, there is evidence in the father's own material that there may be good reason for the mother preventing the child spending time or communicating with him.[43]

The approach in this case – and the illustration of the way in which contextual definitions function – is of particular importance to the current exposure Bill where a proposed example of behaviour (suggested for inclusion in the new offence) 'behaviour directed at, or making use of, a child of a person to threaten the person'[44] has raised concern amongst stakeholders about how this type of example, without a contextual framework, could be used against protective parents.

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[39] See *Family Violence Protection Act 2008* (Vic) s 5.

[40] (2012) 48 Fam LR 535.

[41] *Family Law Act 1975* (Cth) s 4AB(2)(i).

[42] *Carra & Shultz* (n 40) [6].

[43] Ibid [7]-[9].

[44] Crimes Legislation Amendment (Coercive Control) Bill 2022 (NSW), Schedule 1, 54F(2)(a).

The need for a definition to 'do work'

At present **the proposed new definition does very little work** in the *C(D&PV) Act*. All it does is potentially expand the scope of offences that fall under the definition of a 'domestic violence offence'. It is very difficult to identify offences not already captured by the existing sections 11(1)(a)-(b), or the proposed new offence s 54D(1).

This very limited approach **undermines the intention and purpose of including a definition** in the *C(D&PV) Act*. To have **a role within the Act and to perform the educative function** intended it must at the very least be a ground for the making of an ADVO (necessitating an amendment to s 16) and a ground for police to seek an ADVO on behalf of the person in need of protection (s 49).

Perhaps revealing the limited time available to drafting these amendments there is also a lack of coherence between the provision and its linkage to s 11. Namely, what is the function of s 6A(5) if the definition remains tied to an offence? It seems superfluous if the definition has no work beyond being the context for the perpetration of an offence.

I submit that **the preferred approach here is to include a new contextual definition in the *C(D&PV) Act* and that this should be linked to the grounds on which an ADVO is made (s 16) and that it is also specified as the basis on which the police are required to make an application for an ADVO (s 49).**

While I make this suggestion, I am very aware of the way in which civil protection orders have the potential to operate as a net-widening process to the criminal legal system, particularly for Aboriginal and Torres Strait Islander people.[45] A contextual definition, rather than an incident-based approach, should assist in preventing such net-widening but it must be closely monitored and assessed (see discussion of review of the provisions at the end of this submission).

Given these concerns, I do not recommend that the new definition be included as a term/condition of an order under *C(D&PV) Act* s 35. The reasons for this are multiple: duplication of the proposed new offence in the *Crimes Act*, the potential criminal net-widening particularly for marginalised groups. Raising these concerns again emphasises the need for more time to carefully consider and identify the many ways in which these proposed provisions may interact with each other and the need to consider how negative impacts can be avoided and prevented.

Consideration should be given to modernising the ADVO legislation

The limited approach adopted in the exposure Bill reveals the need for a more comprehensive approach to modernising the NSW ADVO legislation. Given the extent to which the *C(D&PV) Act* retains the framework adopted in 1982 while other jurisdictions have adopted broader and deeper understandings about domestic and family violence within their legislative schemes, suggests that there is a need to have a more detailed examination of the ADVO scheme.

Amendments to the *Crimes Act 1900*

Definition of 'abusive behaviour'

At a very basic level **it is confusing to have two different definitions of 'abusive behaviour' and 'domestic abuse'** even if contained in different pieces of legislation. A key aim of legal reform in response to coercive control is to perform an educative function for people experiencing violence and abuse, people perpetrating

[45] Douglas and Fitzgerald (n 8).

such behaviours, the general community and for the key professionals and service system that interact with and provide a response to domestic and family violence. The inclusion of these two different definitions undermines this important aim.

There should be one definition of 'domestic and family violence and abuse'. The suggested approach is that the *Crimes Act* cross references to the definition contained in the *C(D&PV) Act*. For example that s 54C provides that:

> In this Division –
>
> '***domestic and family abuse***' has the same meaning as 'domestic and family abuse' has in the *C(D&PV) Act*;
>
> …

Section 54D(1) would then provide something along the lines of:

> An adult commits an offence if –
>
> (a) The adult engages in a course of conduct against another person that consists of domestic and family abuse…

This provides simplicity and clarity as to what amounts to 'domestic and family abuse' in NSW across the key pieces of legislation that respond to this harm. If the Government were to favour this approach more time and consideration needs to be given as to how the single definition operates and functions across the two pieces of legislation and any related procedural legislation that might also need to be considered. It is suggested that it would be **useful to map existing cases on the proposals to see how they might operate in practice before the passage of the legislation.**

At the very least the examples of acts and behaviours provided in the proposed *Crimes Act 1900* s 54F and *C(D&FV) Act* s 6A should be similar – it is highly confusing to providing lists that are somewhat similar but also with distinct differences.

Alternatively, the Government may like to more thoroughly consider the effects based approach adopted in Scotland and Northern Ireland which effectively shift attention away from the types of behaviours (for which it is never possible to provide a comprehensive list) to instead focus on the effects of those acts and behaviours. The key benefit of this approach is that it moves away from incidents (the different types of acts and behaviours) to instead focus on the effects (ie the context of coercive control). No information has been provided by the NSW Government about why the list approach has been preferred to an effects based approach.

Further investigation also needs to be conducted about how this new offence will interact with:

- **The offence of stalking or intimidation**[46] particularly given recent findings from BOCSAR which indicates that this offence has been used to cover similar forms of behaviour that are likely to be captured by the proposed offence (threats to harm; verbal abuse; unwanted contact, stalking/trespass; threats of suicide; threats to damage/destroy property; threats against children, other people and animals).[47]
- **The offence of contravening an ADVO.**

[46] *C(D&PV) Act* s 13.

[47] Ramset, Kim and Fitzgerald (n 7) 6.

Reasonable person test

The reasonable person test contained in section 54D(1)(d) should not require a more difficult standard than that required for the alleged offender's actual behaviour. At present it is unclear why the reasonable person test requires fear that violence will be used and/or a 'serious adverse impact on the capacity of the other person…'. In addition these terms are undefined and open to interpretation. The preferred approach is that adopted in Scotland and Northern Ireland. For example, the *Domestic Abuse (Scotland) Act 2018* s 1(2)(a) sets out the reasonable person test in the following terms:

> That a reasonable person would consider the course of behaviour to be likely to cause B to suffer physical or psychological harm.

The same direct and simplified approach should be adopted in NSW.

Making it explicit that physical and mental harm does not need to be proved

There is no provision in the exposure Bill that makes it clear that the course of behaviour does not have to actually cause physical or mental harm. At present it is only in the reasonable person test (which it is recommended needs to be simplified) that there is any mention of 'whether or not the fear or impact is in fact caused'. This is highly limited and only applies to the reasonable person test and not the other components of the offence set out in s 54D(1). It is important that such a provision is included to ensure that resilient or strong victims are not excluded from this offence, and to ensure that victim's testimony is not centralised in the new offence. The need to prove harm has proved to be a key limitation in the offence in England and Wales, and one of the strengths of the Scottish approach.[48] In addition the need to establish 'serious effect' in England and Wales has also highlighted limitations of that approach:

> The requirement that the behaviour has a 'serious effect' on the victim in England/Wales and Ireland may unduly turn the focus on the victim—How did she respond? How did she react?—rather than on the accused's behaviour. This risk is evidenced in a recent English case[49] in which the man who was accused of verbally abusing his former partner (for example, telling her to 'fuck off' and calling her a 'slag' and spitting in her face) was acquitted. While the judge found that the man's behaviour was 'disgraceful', the judge was not of the view that it had had a 'serious effect' on the victim who was described as 'too "strong and capable" to be under his control'. This requirement of 'serious effect' raises questions about whether judicial officers are adequately equipped to make this assessment and the risk that they may draw on stereotypical notions about who is a victim, and how victims might behave and respond to the violence and abuse that they experience—one can still be 'strong and capable' yet experience coercive control that has had a serious effect on one's life.[50]

To avoid this problem, and to keep the focus on the alleged offender's course of conduct, it is recommended that the NSW Government include a provision along the lines of *Domestic Abuse (Scotland) Act 2018* (Scot) s 4 and *Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021* (NI) s 3 that make it explicit that such harm does not have to have taken place. For example the Northern Ireland provision is in the following terms:

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[48] See discussion of benefits of Scottish approach in Marsha Scott, 'The making of the new 'gold standrard': The Domestic Abuse (Scotland) Act 2018) in Marilyn McMahon and Paul McGorrery (eds), *Criminalising Coercive Control: Family violence and the criminal law* (Springer 2020) 187; Iain Brennan and Andy Myhill, 'Coercive control: Patterns in Crimes, Arrests and Outcomes for a new domestic abuse offence' (2022) 62 *British Journal of Criminology* 468, 480

[49] Reported in Jeremy Armstrong, 'Violent boyfriend cleared after judge says partner is 'too strong' to be a victim' *The Mirror*, UK (23 November 2018).

[50] Jane Wangmann, 'Coercive control as the context for intimate partner violence: The challenge for the legal system' in McMahon and McGorrery (eds) (n 48) 234. Footnotes omitted.

> 3.—(1) The domestic abuse offence can be committed whether or not A's behaviour actually causes B to suffer harm of the sort referred to in section 1(2).
>
> (2) A's behaviour can be abusive of B by virtue of section 2(2)(c) whether or not A's behaviour actually has one or more of the relevant effects set out in section 2(3).
>
> (3) Nothing in this Chapter prevents evidence from being led in proceedings for the domestic abuse offence about—
>
> (a) harm actually suffered by B as a result of A's behaviour,
>
> (b) effects which A's behaviour actually had on B.

Limitation to intimate partners

The jurisdictional context of NSW is very different to the UK jurisdictions we are looking at to inform the development of the criminal law in response to coercive control. While I agree with DCJ[51] that the theoretical and clinical work that is the basis for understandings of coercive control is from work on intimate partner violence, and not from other relationship contexts;[52] and the findings of the NSW DVDRT also concern coercive control in intimate partner homicides; the jurisdictional context may well require a more expansive approach. NSW has long had a much broader understanding of domestic relationships grounding the ADVO system than other jurisdictions, and to suddenly limit an offence of abusive behaviour to one relationship setting and not others may well serve to leave people without recourse and send a message that in some relationship settings this behavior is acceptable and tolerated, whilst in others it is potentially illegal.[53]

Statutory Review of Division 6A (the new criminal offence)

The proposed review provision – section 54I – requires far more detail. At present the review provision is limited to determining whether 'the policy objectives of the Division remain valid' and 'whether the terms of the Division remain appropriate for securing those objectives'. By contrast the review provision contained in the *Domestic Abuse (Scotland) Act 2018* (Scot) s 14 is detailed, importantly requiring 'information about the experiences of witnesses'. In NSW a useful approach to a detailed review provision is also set out in the recently amended sexual assault consent provisions,[54] which includes review of the transcripts of trials, and review and evaluation of the training provided to support the new law on consent.[55]

Any review of the proposed offence must be comprehensive and move beyond simply data on the use of the provision (reports to the police, number of charges laid, charges progressed, outcomes). It must include data on:

- the use (or lack thereof) of the provision by different groups of people (as victims and accused);
- the types of behaviours being captured by the offence (and whether charges are being laid that concern non-physical forms of coercive control only);
- the extent to which the offence is used as a stand-alone offence or in combination with other charges;
- the use of the defence contained in s 54E;

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[51] DCJ, Guidance to the elements in the Exposure Draft Bill (2022).

[52] For example see Stark (n 14).

[53] Presentation by Kate Fitz-Gibbon, 'The ciminalisation of coercive control: what does safe implementation look like from the vantage of victim-survivors', Coercive Control and NSW Legislation, forum organised by DV NSW and Warringa Baiya, Customs House, Sydney (20 July 2022).

[54] See *Crimes Act 1900* (NSW) s 583.

[55] Ibid, s 583(6).

- any variations in the use of the offence across different police areas;
- victim/survivors' experience of the criminal legal process when involved in offences under s 54D.

In recent research on the use of the England and Wales offence of coercive control, Iain Brennan and Andy Myhill note that generally when a new offence of this kind is introduced the data recording systems put in place tend to monitor usage with an 'inherent bias[] to reflect the effective use of the law' and that few 'count how their new law might be failing'.[56] Given the extent to which cautions have been raised about the potential misuse of this new offence it is vital that data is captured that includes an ability to capture any 'failings in legislation'.[57] Reflecting Buxton-Namisnyk and colleagues emphasis that potential negative outcomes for Aboriginal and Torres Strait Islander communities are not 'unanticipated',[58] Brennan and Myhill also draw attention to the fact that given many 'victims, advocates and practitioners' draw attention to 'legislative abuses and failings' in law reform processes such as this one, then:

> Any legislature that chooses to criminalize coercive control cannot plead ignorance to the possible abuses and failings of such a law. The myriad ways in which legal systems abuse is perpetrated have been clearly demonstrated. Therefore, the future criminalization of coercive control s**hould be accompanied by mechanisms to measure the failings and potential abuses of this legislation as well as its use and successes.** An obvious first step would be to extend the analysis of Barlow et al. (2019) and conduct a dip-sample both of 'non-crime' domestic incidents and incidents recorded as domestic assaults or criminal damage to get an indication of the extent of underrecording. More generally, **listening and responding meaningfully to early signs of abuse and failings will allow unanticipated consequences to be identified and measured**.[59]

This necessarily involves the NSW Government giving detailed consideration to how the provision will be monitored and assessed, and what data collection systems need to be in place to be able to effectively gather this information. It will necessitate not only 'in-house' reviews within DCJ of data, but also the commissioning of research to capture this more detailed and important qualitative data on the use and experience of the new laws.

There also needs to be a similarly expansive statutory review of the changes made to the *C(D&PV) Act*. There is already considerable evidence that Aboriginal and Torres Strait Islander people are over-represented in charges for contravention of an ADVO,[60] as well as for changes of stalking and intimidation,[61] and that protection order schemes are having a net-widening effect for entry to the criminal legal system.[62] These findings emphasise that any amendments made to the *C(D&PV) Act* also need to be monitored and evaluated for adverse impacts.

The need for greater time before the offence becomes operational

Throughout this submission I have emphasised the need for more time to consider the wording of the proposed provision, and more time for the implementation process, to ensure that the new offence operates

[56] Brennan and Myhill, (n 48) 480.

[57] Ibid.

[58] Buxton-Namisnk, Gibson and MacGillivray (n 6)

[59] Brennan and Myhill (n 48) 480 (emphasis added).

[60] Don Weatherburn and Jessie Holmes, *Indigenous imprisonment in NSW: A closer look at the trend*, Bureau Brief No 126 (BOCSAR, 2017).

[61] Ramsey, Kim and Fitzgerald (n 7).

[62] See Douglas and Fitzgerald (n 8).

as intended and avoids unintended consequences, there are a number of other matters that also point to the need for far longer than a 12 month lead time. These include:

- The NSW Auditor General's report (2022) found that the police computerised system is unable to provide the kind of systemic and historical relationship context required to support domestic and family violence policing. The Auditor General noted that the police are to replace the current system, but that the new system – the Integrated Policing Operational System (IPOS) – will not be 'fully functional [until] June 2025'.[63]
- The need to address the full package of reforms recommended by the NSW Joint Select Committee.
- The need to further investigate the way in which the criminal legal system operates for victims of domestic and family violence.

It is recommended that the NSW Government adopt the four-year phased approach recommended by the Queensland Women's Safety and Justice Taskforce.[64]

[63] NSW Auditor General, *Police responses to domestic and family violence* (Audit Office of NSW, (2022) 30.

[64] Queensland Women's Safety and Justice Taskforce (n 12).