UNSW
CCLJ
Centre for Crime,
Law & Justice

31 August 2022

The Hon Mark Speakman SC MP
Attorney General
NSW Government

By email: policy@justice.nsw.gov.au

Dear Mr Speakman

Thank you for the opportunity to make this submission on the Crimes Legislation Amendment (Coercive Control) Bill 2022 (NSW) ('the Bill').

This submission was written by members of the Centre for Crime, Law and Justice (CCLJ), a research centre at the Faculty of Law and Justice, University of New South Wales. CCLJ was established in 2018, building on a long tradition of criminal justice research and scholarship at UNSW. The Centre produces high quality scholarship on important topics in criminal law, criminal justice, criminology, crime prevention and policing that are of pressing local, national and international significance. Core themes for the Centre's research are: the relationship between criminal justice administration and social justice and human rights; and the relevance of race, Aboriginality, gender, disability and socio-economic disadvantage to victimisation, criminalisation, the criminal process and punishment.

Overview

We submit that the available evidence suggests that, if introduced in its current form, in the current policing environment, and without a suite of social welfare supports and services, the Bill will fail to protect those most affected by domestic abuse. The creation of a new offence in the *Crimes Act* gives the appearance of a serious response to a deep and important social issue. Yet, in failing to address (and therefore seek to alter) the social conditions that give rise to domestic abuse, there is

a real risk that the creation of a new offence will generate further harm. This harm will be carried disproportionately by members of the community most in need of support.

We acknowledge the devastating impacts that coercive control practices can have in domestic settings, and the need for change. But we doubt that the criminalisation of coercive control practices in the manner propose by the Bill is likely to bring about the changes required. Governments sometimes tend to overstate the potential for legislative change generally – and the creation of new criminal offences specifically – to 'fix' deep and complex social problems. We believe this is one such occasion.

The criminalisation of coercive control may appeal to some audiences as a 'tough' legal response. It may also appeal because criminalisation is understood by many to be the most serious preventative action that can be taken by lawmakers. However, there is a large body of evidence from NSW, Australia and elsewhere that the creation of a new criminal offence to 'solve' multifaceted, complex and deeply-embedded issues like domestic abuse is, at best, a superficial response.[1]

As criminal law and criminology scholars, we are concerned that a legislative process resulting in the criminalisation of coercive control will foreclose consideration of the range of therapeutic and community-controlled approaches that need to be resourced in order to address the problem of domestic abuse. By failing to treat the complex social forces, including deep structural factors, that give rise to domestic abuse, a criminalisation approach will gloss over these factors and generate more harm.

In this submission, we do not attempt a comprehensive account of the myriad issues raised by the Bill. Rather, we offer a selection of observations drawn from our research and areas of expertise.

1. THE MYTH OF UNINTENDED CONSEQUENCES

The Joint Select Committee on Coercive Control explicitly recognised the potential for coercive control reforms to produce 'unintended consequences' including perpetrator misidentification and systems abuse.[2] In its response to that report, the NSW Government also acknowledges these risks, stating that '[a]ny legislative reform must be approached with great care and caution to ensure it does not unintentionally put in further danger those in our community we are seeking to help'.[3]

Concerns that the new coercive control laws will produce negative outcomes for victim-survivors are particularly acute for First Nations women. As law reform processes in this area have progressed in both NSW and Queensland, First Nations women and organisations have repeatedly

[1] See generally Luke McNamara et al, 'Understanding *processes* of criminalisation: Insights from an Australian study of criminal law-making' (2021) 21(3) *Criminology & Criminal Justice* 387-407; also Julia Quilter, 'Evaluating Criminalisation as a Strategy in Relation to Non-Physical Family Violence' in Marilyn McMahon and Paul McGorrery (eds), *Criminalising Coercive Control* (Springer, 2020).
[2] Parliament of New South Wales Joint Select Committee on Coercive Control, *Coercive Control in Domestic Relationships* (Report 1/57, 30 June 2021).
[3] NSW Government, 'NSW Government Response to NSW Joint Select Committee on Coercive Control' (2021).

emphasised that the new laws are likely to become another means by which First Nations people may become enmeshed in the criminal justice system.[4]

Despite acknowledging that criminalising coercive control may produce unintended consequences for victim-survivors, the NSW Government has committed to this approach without transparently evaluating the risks. The Government now proposes a draft bill without providing implementation details, including how any implementation taskforce may operate or who this taskforce may comprise. Any implementation taskforce will also be unlikely to have the power to wind back the Government's commitment to a criminalisation response. It is concerning that the NSW Government apparently aims to address during 'implementation' what should have been addressed before committing to a criminalisation response.

Using the language of 'unintended consequences' to describe foreseeable risks in this context is problematic. As Buxton-Namisnyk et al recently described in relation to risks the reform poses to First Nations women:

> Saying these consequences are 'unintended' implies these outcomes are also unanticipated. In this case, the consequences of criminalising coercive control for First Nations women are far from unanticipated. They have been repeatedly, explicitly identified and acknowledged during the law reform process. Using the language of 'unintended consequences' seems to be a way to avoid accountability in law and policy making.[5]

We submit that the NSW Government's decision to criminalise coercive control should be deferred until all consequences are identified, analysed and mitigated against through an open, transparent process. The option to resile from criminalisation must be retained if the risks it poses are determined to be too great. This is the only way to ensure that the new laws will reduce, rather than produce, further harm to victim-survivors.

2. DANGER OF MISIDENTIFICATION OF PRIMARY AGGRESSOR

The risks of perpetrator misidentification are also heightened for First Nations women, who may experience over-policing in the context of domestic and family violence as well as racism within police responses, leading to perpetrators being misidentified and victim-survivors being criminalised.[6]

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[4] Emma Buxton-Namisnyk, Althea Gibson and Peta MacGillivray, 'Unintended but not Unanticipated: Coercive Control Laws will Disadvantage First Nations Women', *The Conversation* (online 26 August 2022) https://theconversation.com/unintended-but-not-unanticipated-coercive-control-laws-will-disadvantage-first-nations-women-188285

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

[6] Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (Routledge, 2001); Emma Buxton-Namisnyk, 'Domestic Violence Policing of First Nations Women in Australia: 'Settler' Frameworks, Consequential Harms and the Promise of Meaningful Self-Determination' (2021) *British Journal of Criminology* (advance).

Queensland's ongoing inquiry into domestic and family-violence related policing has reinforced these concerns, with evidence emerging that perpetrator misidentification is common.[7] That ongoing inquiry has also already illuminated profound cultural problems in the Queensland Police Service's approach to domestic and family violence, raising significant concerns about how any new offence in that jurisdiction would be policed.

These findings raise concerns around how a coercive control offence will be policed in New South Wales (a jurisdiction where no equivalent inquiry is presently anticipated). Evidence emerging from the Queensland inquiry continues to highlight the risks associated with introducing a new coercive control offence. This evidence cautions against the NSW Government progressing a new criminal offence proposal without detailing how significant implementation risks and concerns – and particularly those associated with policing – will be addressed.

3. THE NEED FOR COMPLEX, LONG-TERM WRAP-AROUND SUPPORT

Coercive and controlling behaviours are extremely damaging to victims. Domestic and family violence is an unacceptable social harm that warrants a strong societal response. However, even if coercive control is criminalised in NSW, a criminal justice response will not necessarily be of the greatest benefit to victim-survivors.

The NSW Government's decision to release an exposure draft without details of what social welfare supports and services will be available to victim-survivors who choose, or choose not to, engage with the criminal justice system, or the quantum of the government's investment in specific initiatives, is problematic. If criminalisation is to be progressed, it must form part of a complex, wrap-around supportive response to victim-survivors and a broader framework that ensures perpetrator accountability: it cannot be the sole, or even primary, response to domestic abuse.

If the NSW Government is committed to taking coercive control seriously, it must significantly invest in comprehensive, wraparound, culturally-safe and accessible service supports for victim-survivors of violence. This will be fundamental to the success of any reform in this area and meeting the government's objectives in reducing the prevalence of domestic abuse in NSW.

4. THE DRAFTING OF THE BILL

4.1 Over-complexity

The proposed offence and related provisions in the Bill are unusually complex. There is one offence provision (s 54D), three definition provisions (ss 54C, 54F, 54G), one defence (s 54E), and a procedural provision (s 54H). From this framework, it is not entirely clear what the prosecution is required to prove.

What we do know is that the prosecution needs to establish that the defendant engages in a 'course of conduct' against their intimate partner that consists of 'abusive behaviour'. Further, the prosecution needs to prove that when the defendant engaged in that conduct, he or she did so with the intention of causing physical or mental harm to their intimate partner or, at least, that they were

[7] Eden Gillespie, 'Queensland Police Misidentify Domestic Violence Victims as Attackers, Inquiry Told', *The Guardian* (online 19 July 2022) < https://www.theguardian.com/australia-news/2022/jul/19/queensland-police-misidentify-domestic-violence-victims-as-attackers-inquiry-told>.

reckless as to whether the conduct may cause physical or mental harm to their intimate partner. Such consequence does not need to be established. However, whether the reasonable person test in s 54D(1)(d) is part of the fault or the physical elements of the offence is unclear. Does the offence have both a subjective and an objective fault element? Will the defendant only be convicted if he or she held the subjective intention prescribed in s 54D(1)(c) *and* the objective fault element in s 54D(1)(d) is also satisfied? Alternatively, the objective test may be intended to describe the circumstances in which the abusive behaviour occurs; i.e., the abusive behaviour was carried out in circumstances that a reasonable person would considered likely to cause either or both (i) fear that violence will be used against the other person, or (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. If it forms part of the physical elements of the offence, what is the appropriate corresponding fault element? Does the prosecution need to prove that the defendant knew that a reasonable person would hold such a view of the behaviour, or would some other lesser state of mind be sufficient?

Other aspects of the legislation are also unclear. The definition sections contain references to various words and phrases that are broad and vague. Within the definition of 'abusive behaviour' in s 54F, the forms of abusive behaviour listed in sub-section (2) could be interpreted broadly, including (a) behaviour directed at, or marking use of a child of a person to threaten the person; (c) directly or indirectly monitoring or tracking a person's activities, communications or movements, whether by physically following the person, using technology or in another way; (d) repeated derogatory taunts; (g) … unreasonably controlling or regulating a person's day-to-day activities. Our concern about these broadly defined forms of conduct potentially amounting to abusive behaviour is compounded by the lowering of the threshold of proof provided by s 54H, where the prosecution is not required to allege the particulars that would be necessary if the incident were charged as a separate offence but rather only required to allege 'the nature of the behaviours that amount to the course of conduct'. This is considerably imprecise. The definition of a 'course of conduct' in s 54G is equally ambiguous. Does behaviour engaged in by a person once a year amount to a 'repeated' course of conduct? If so, could such behaviour realistically be described as 'coercive' or 'controlling' of another person? It seems that the drafting approach is to cast a very wide net in terms of the type of behaviour that will be captured by the Bill's provisions, with the hope that the objective test in s 54D and the defence in s 54E will operate to restrain the operational parameters of the offence. In our assessment, such a hope is misplaced.

Our point here is not to engage in an exercise of high-level statutory interpretation, but rather to highlight that the complexity of the offence provision and the broad terms and phrases in the related provisions raise serious concerns about how this offence will operate in practice. How unrepresented defendants in the NSW Local Court will manage navigating the complex legislation (see further discussion on Table 2 offences below) is of great concern.

4.2 Overlap and Overcriminalisation

It is clear from the legislative structure that the prosecution could opt to charge a defendant with the s 54D offence for conduct already criminalised by a range of other existing provisions, including assault offences such Common Assault and Assault Occasioning Actual Bodily Harm (*Crimes Act 1900* (NSW) s 61, 59), crimes against property such as Destroying or Damaging

Property (*Crimes Act 1900* (NSW) s 195), and other domestic violence related offences such as Stalking and Intimidation (*Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13).

We reiterate our concern (expressed above) about the risk that the proposed offence, with a maximum penalty of 7 years imprisonment, will be used by police (and prosecutors) to over-criminalise and incarcerate particular groups, especially First Nations people and people from disadvantaged socio-economic backgrounds. That is, individuals may be prosecuted under s 54D for conduct that would ordinarily have been dealt with under existing offences against the person or property – offences with much lower maximum penalties. There is no justification for why the law would treat defendants accused of the same type of conduct so differently: either by way of prosecution for common assault with a maximum penalty of 2 years imprisonment or by way of prosecution for abusive behaviour with a maximum penalty more than three times greater. The considerable differential between the maximum penalties for common assault and abusive behaviour towards current or former intimate partners may provide (police) prosecutors with powerful leverage to extract guilty pleas from defendants, including in cases where the prosecution's evidence is weak, and a defendant ought to exercise their right to put the prosecution's case to test in a court.

4.3 Criminal Procedure –Table 2 Implications

The Bill proposes to amend the *Criminal Procedure Act 1986* (NSW) Sch 1 to insert the s 54D offence as a 'Table 2' offence. An indictable offence listed in Table 2 to Schedule 1 is to be dealt with summarily by the Local Court unless the prosecutor elects to have the offence dealt with on indictment: *Criminal Procedure Act 1986* (NSW) s 260(2). This means that the defendant will not have a choice regarding whether his or her case will be heard before a jury. Given the multiple references to 'reasonableness' (an objective test) in the proposed amendments (specifically the reasonable person test as an element of the offence in s 54D(1)(d) and the reasonable conduct 'shield' in the s 54E defence), we question the appropriateness of denying the defendant the option of having their liability assessed according to community standards as represented by a jury. Of course, there would be advantages for a defendant in having his or her case dealt with summarily – most notably, the prescribed maximum penalty is reduced to 2 years imprisonment compared to a maximum term of 7 years imprisonment if prosecuted on indictment: *Criminal Procedure Act 1986* (NSW) s 268(1A). However, such an advantage would also be afforded to defendants if the s 54D offence was listed as a Table 1 offence while still providing the defendant with a right to elect trial on indictment.[8]

Classifying the proposed s 54D offence as a Table 2 offence (or even a Table 1 offence) will lead to the bulk of these matters being dealt by the Local Court with its high volume of cases, high proportions of defendants from lower socio-economic backgrounds, disproportionate numbers of First Nations defendants, and where many defendants do not have legal representation.[9] Unrepresented defendants would be at a significant disadvantage given the complexity of the proposed offence and related provisions, as discussed above.

[8] David Brown et al, *Criminal Laws* (Federation Press, 7th ed, 2020) 385-6.
[9] David Brown et al, *Criminal Laws* (Federation Press, 7th ed, 2020) 279.

5. EVIDENTIARY ISSUES

Consideration of potential evidentiary issues which may arise in prospective prosecutions are an important, and often neglected, dimension of scrutinising a proposed new coercive control offence.

5.1 Abusive behaviour prior to criminalisation

Where coercive control has occurred over many years, adducing evidence of abusive behaviours prior to the enactment of the offence may lead to contravention of the principle of non-retrospectivity. The Bill does not explicitly address how the offence will operate with regards to such behaviour. Section 54D(2)(b) merely directs the court to consider abusive behaviours in their 'totality'. This is unlikely to be considered an unambiguously clear intention to create an offence with retrospective application.[10] In England and Wales, the equivalent coercive control offence[11] similarly does not address whether evidence of abuse prior to the enactment of the offence can be adduced at trial. This has resulted in an inconsistent approach. In their review of coercive control cases in English courts,[12] McMahon and McGorrery documented cases where abuse occurring prior to the commencement of the offence was adduced, and others where it was not, including a case where an 81-year-old man who had been abusive for 'a number of years', was convicted of 'coercive and controlling behaviour' for the 12-month period between the charges being laid and enactment of the offence.[13] This artificial distinction between pre- and post-criminalisation behaviour will be particularly detrimental in cases where the abuse tactics can be 'explained' by incidents earlier in the relationship, without which the complainant's evidence may seem untruthful.[14]

5.2 Applicability of rules of evidence

Coercive controlling behaviours are varied, cumulative[15] and often tailored to the victim's circumstances and context.[16] Accordingly, certain abusive behaviours may appear innocuous, and the complainant's account fragmented and unbelievable,[17] without a conceptual framework to understand coercive control. Evidentiary rules relating to the admission of expert evidence could impede the court's access to the required contextual evidence. Without the narrative thread provided by expert opinion (eg via social framework evidence), prosecutors may struggle to

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[10] *Polyukhovich v Commonwealth* (1991) 172 CLR 501, [17] (Dawson J); *DPP (Cth) v Keating* (2013) 248 CLR 459, [48] citing Francis Alan Roscoe Bennion, Bennion on Statutory Interpretation: A Code (LexisNexis, 2008) 807.
[11] *Serious Crime Act 2015* (UK) s 76.
[12] Marilyn McMahon and Paul McGorrery, 'Criminalising "the Worst" Part: Operationalising the Offence of Coercive Control in England and Wales' [2019] (11) *Criminal Law Review* 957, 961.
[13] Tara Cox, 'Huntingdon man who forced sick wife to sleep on floor during years of domestic abuse avoids time in jail', Cambridge News (Article, 5 December 2016) <https://www.cambridge-news.co.uk/news/cambridge-news/huntingdon-man-who-forced-sick-12271522> cited in ibid 961.
[14] Heather Douglas, *Women, Intimate Partner Violence, and the Law* (Oxford University Press, 2021) 34.
[15] Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, 1st ed, 2007) 250.
[16] Heather Douglas, *Women, Intimate Partner Violence, and the Law* (Oxford University Press, 2021) 32; Evan Stark, 'Re-Presenting Battered Women: Coercive Control and the Defense of Liberty' (Les Presses de l'Université du Québec, 2012) 20.
[17] Rebecca Bradfield, 'Understanding the Battered Woman Who Kills Her Violent Partner — The Admissibility of Expert Evidence of Domestic Violence in Australia' (2002) 9(2) *Psychiatry, Psychology and Law* 177, 178.

construct an image of persistent abuse[18] and present coercive controlling tactics other than physical or sexual violence as abusive. This is reflected in the prevalence of overt violence in successful prosecutions for coercive control in England and Wales.[19]

5.3 The Section 54E Defence

To successfully raise the s 54E defence, evidence must be adduced that is 'capable of raising an issue as to whether the course of conduct is reasonable in all the circumstances'. It is likely that this defence will create reliance upon the testimony of the defendant to 'explain' their behaviours and why they may be reasonable in all the circumstances. Further, this may encourage defence counsel to attempt to call into question the complainant's behaviour and character. For example, this may take the form of adducing evidence of the complainant's sexual history to 'justify' the defendant's continued accusations of infidelity and suspicion of the complainant's friendships – a common abuse tactic.

Conclusion

Coercive control is a serious and complex social problem that requires sound and sophisticated responses. In this submission we have highlighted a number of ways in which the Crimes Legislation Amendment (Coercive Control) Bill 2022 (NSW) is ill-suited to the task of addressing coercive control.

Yours sincerely

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[18] Rebecca Bradfield, 'Understanding the Battered Woman Who Kills Her Violent Partner — The Admissibility of Expert Evidence of Domestic Violence in Australia' (2002) 9(2) *Psychiatry, Psychology and Law* 177, 178

[19] See UK Home Office, *Review of the Controlling or Coercive Behaviour Offence* (March 2021) 26; Paul McGorrery and Marilyn McMahon, 'Prosecuting Controlling or Coercive Behaviour in England and Wales: Media Reports of a Novel Offence' (2021) 21(4) *Criminology & Criminal Justice* 566, 569.