Full Stop Australia

Coercive Control Draft Exposure Bill.

Full Stop Australia's Submission on the *Crimes Legislation Amendment (Coercive Control) Bill 2022*
August 2022

Full Stop Australia acknowledges the Traditional Custodians of Country throughout Australia, and their continuing connection to land, sea and community. We pay our respects to them and their cultures, and to Elders, past, present and emerging.

Introduction

Full Stop Australia is an accredited, nationally focused, not-for-profit organisation which has been working in the field of sexual, domestic and family violence since 1971. We offer expert and confidential telephone, online and face-to-face counselling to people of all genders who have experienced sexual, domestic or family violence, and specialist help for their supporters and those experiencing vicarious trauma. We also provide best practice training and professional services to support frontline workers, government, the corporate and not-for-profit sector and advocate with governments, the media and the community to prevent and put a full stop to sexual, domestic and family violence.

Full Stop Australia, as a national service, draws upon the experiences of our counsellors supporting people impacted by sexual, domestic and family violence in different jurisdictions, as well as our clients who are part of our National Survivor Advocate Program, to advocate for consistent approaches to family, domestic and sexual violence nationally.

We are grateful for the opportunity to provide feedback on the exposure draft of the *Crimes Legislation Amendment (Coercive Control) Bill 2022* (**Exposure Draft**).

This submission was prepared by Laura Henschke and Taran Buckby. We would be very happy to provide any further feedback on any aspect of this submission. You can contact us at any time if you have any further questions at info@fullstop.org.au

Summary

Full Stop Australia supports the criminalisation of coercive control and welcomes the NSW Government's leadership in not only committing to criminalising coercive control but also in developing the Exposure Draft.

However, we are of the view that the package of reforms contained within the Exposure Draft need work. Schedules 1 and 2 of the Exposure Draft require significant amendments to ensure that they operate as intended, being fully and effectively utilised with minimal unintended consequences (particularly with respect to the misidentification of primary aggressors).

It is also important to note that Full Stop Australia's position is that criminalisation is just one piece of a broader plan of action that **must** be implemented to properly and meaningfully respond to the scourge of coercive control. It is imperative that the Exposure Draft be accompanied by whole-of-government reforms and policies to comprehensively improve the criminal justice system response to coercive control, and to increase community education and awareness of coercive control in the context of sexual, domestic and family violence.

Finally, Full Stop Australia also calls on the NSW Government to urgently increase sector funding for NSW sexual, domestic and family violence specialist services who work with victim-survivors of coercive control to support them following implementation of the Exposure Draft.

Background

The law which criminalises domestic and family violence centres around two pieces of legislation:

- Crimes (Domestic and Personal Violence) Act 2007 (**CDPV Act**); and
- Crimes Act 1900 (**Crimes Act**).

The CDPV Act defines what constitutes a "domestic violence offence" and a "personal violence offence" for the purposes of that Act. It also sets out the grounds on which a Court can make an Apprehended Domestic Violence Order (ADVO) and an Apprehended Personal Violence Order (APVO).

In NSW, the CDPV Act provides a legislative framework to address domestic and family violence. Section 11 of the CDPV Act defines a "domestic violence offence" as an offence committed against a person with whom the offender has had a domestic relationship. Domestic violence offences include:

- A personal violence offence;
- An offence, other than a personal violence offence, that arises from substantially the same circumstances as those from which a personal violence offence has arisen; or
- An offence, other than a personal violence offence, the commission of which is intended to coerce or control the person against whom it is committed or to cause that person to be intimidated or fearful or both.

Current section 16(1) of the CDPV Act sets out when a Court can make an ADVO (our emphasis):

16 Court may make apprehended domestic violence order

(1) A court may, on application, make an apprehended domestic violence order if it is satisfied on the balance of probabilities that a person who has or has had a domestic relationship with another person *has reasonable grounds to fear and in fact fears*—

(a) the commission by the other person of *a domestic violence offence* against the person, or

(b) the engagement of the other person in conduct in which the other person—

(i) *intimidates the person* or a person with whom the person has a domestic relationship, or

(ii) *stalks the person*,

being conduct that, in the opinion of the court, *is sufficient to warrant the making of the order*.

Section 17 of the CDPV Act sets out matters for the court may take into account when making an ADVO.

What does the Exposure Draft do?

Schedule 2 of the Exposure Draft inserts a new meaning of "domestic abuse" into section 6A of the CDPV Act and alters the meaning of "domestic violence offence" in that Act to incorporate the new coercive control offence in section 54D(1) and any other *offence* not already mentioned in that Act in which the relevant conduct comes under the new definition of "domestic abuse".

This means that the Court now has power to make an AVO in relation to any *offences* (including the new coercive control offence in section 54D(1)) which fit under the new "domestic abuse" provision in section 6A. Importantly, Schedule 2 does not allow the Court to make an AVO in circumstances where there may be domestic and family violence that does not otherwise (on the balance of probabilities) constitute a domestic violence offence or otherwise involve stalking or intimidation of the other person. The important point to note is that, *despite the new changes implemented in the Exposure Draft*, in order for an AVO to be granted, the charging officer will still need to be satisfied that the conduct complained about occurred in the context of an offence or otherwise occurred in the context of stalking and intimidation.

In our view, there are multiple problems with this approach:

- It leaves the new definition of "domestic abuse" with much less work to do.
- It doesn't integrate meaningfully with the definition of "abusive behaviour" in the new coercive control offence in section 54D(1) - making it confusing for not only police, prosecutors and other actors in the justice system, but the community at large.
- The AVO legislation remains problematic for victim-survivors to obtain an AVO in circumstances of domestic and family violence that a police officer does not consider rises to the standard of meeting an offence (or is otherwise stalking or intimidation).

We will discuss these points in future detail below, however we strongly recommend that **as part of the Exposure Draft reforms, the AVO legislation be amended so that the granting of an AVO is not tied to the commission of an offence (like for example, the approach adopted in Victoria).**

The Exposure Draft also inserts a new offence under Division 6A of the Crimes Act of "Abusive Behaviour towards intimate partners" (**Abusive Behaviour Offence**). The Abusive Behaviour Offence is intended to criminalise coercive control but requires significant amendments which will be discussed in detail below.

Proposed Schedule 2 Crimes (Domestic and Personal Violence) Act 2007

Consequential amendments required to the AVO legislation

Full Stop Australia warmly welcomes the NSW Government inserting a definition of "domestic abuse" and acknowledges that this is an important first step. However, the proposed provision highlights the need to reform the existing AVO legislation, which, as flagged above, remains tied to the commission of an offence.

This is problematic for a number of reasons. Firstly, because the Abusive Behaviour Offence is currently only limited to intimate partners, this means that victim-survivors of coercive control in other situations may find it difficult to obtain an AVO. Secondly, because the new Abusive Behaviour Offence in the Exposure Draft will not necessarily always capture *all* forms and incidences of domestic abuse. This is notwithstanding the fact that any amendments to the Abusive Behaviour Offence may be made as a result of this consultation.

We note that in Victoria, the making of an AVO is not tied to the commission of an offence at all, but rather the grounds for making a final order rely upon whether the court is satisfied, on the balance of probabilities, that "the respondent has committed family violence against the affected family member and is likely to continue to do so or do so again".[1]

We submit that the **NSW Government should consider further reforms to the CDPV Act to further broaden the circumstances in which AVOs can be granted as part of the package of the Exposure Draft reforms.**

We note that this approach is overwhelmingly supported by victim-survivors. In a survey conducted by Women's Safety NSW, when asked the best way to reform the civil and criminal justice system to better respond to coercive control, the overwhelming majority of frontline domestic and family violence specialists 91% (or N = 41/45) maintained that we should both create a criminal offence of coercive control *and update the ADVO system to cover a wider range of behaviours*.[2]

As a suggested course, section 16 could be amended as follows:

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[1] *Family Violence Protection Act 2008* (Vic), section 74.

[2] Women's Safety NSW, *Submission to the NSW Select Joint Committee on Coercive Control in Domestic Relationships* (Submission, 12 February 2021).

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(1) A court may, on application, make an apprehended domestic violence order if it is satisfied on the balance of probabilities that a person who has or has had a domestic relationship with another person has reasonable grounds to fear and in fact fears—

(a) the commission by the other person of a domestic violence offence against the person, or
(b) the engagement of the other person in conduct in which the other person—
(i) intimidates the person or a person with whom the person has a domestic relationship, or
(ii) stalks the person*, or*
(iii) otherwise constitutes domestic abuse as defined in section 6A,

being conduct that, in the opinion of the court, is sufficient to warrant the making of the order.

Alternatively, section 16(1) could be transformed entirely and replaced with similar wording as occurs in Victoria i.e. the court may make an apprehended domestic violence order "if the court is satisfied, on the balance of probabilities, that the respondent has committed domestic abuse as defined in section 6A and is likely to continue to do so or do so again".

We note however that these reforms would only be effective *once we have a robust definition of domestic abuse in section 6A* that is agreed upon by the sector and by victim-survivors. See further our comments on section 6A below.

Meaning of "domestic abuse"

As outlined by the NSW Law Reform Commission (**NSWLRC**) and the Australian Law Reform Commission (**ALRC**), whilst the definition of domestic abuse "may not appear to be a practically important issue, it is necessary to understand precisely what constitutes family violence" and offer clarity on how the laws interact with both criminal law and the family law, and the nature of this interaction.[3]

In its findings, both the NSWLRC and ALRC recommended a uniform definition across States and Territories which would remove any confusion about the meaning of domestic abuse and provide an educative role in communicating domestic abuse to both legal systems as well as the broader community.[4] **Full Stop Australia agrees with this position and recommends a uniform definition of domestic abuse be applied not only within the NSW legislative scheme**

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[3] Australian Law Reform Commission, *Family Violence: Improving Legal Frameworks* (Consultation Paper, April 2010), <https://www.alrc.gov.au/wp-content/uploads/2019/08/CP_1.pdf>, 155.
[4] Ibid 167.

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but also nationally, to ensure gaps in definitional parameters do not translate to gaps in protection in practice.

Importantly, Full Stop Australia calls on the NSW Government to clarify the extent to which "domestic abuse" is directly linked to specific offences, such as when abusive behaviour forms the basis for an ADVO, as well as a prosecution for a criminal offence. Given the overlap between conduct that constitutes coercive control as grounds for obtaining an ADVO and the conduct that forms the basis for criminal prosecution, the scope of the definition of "domestic abuse" is unfortunately unclear.

We agree with our colleagues in the sector who made the following comments on the definition of domestic abuse in the consultations for the Exposure Draft:[5]

- The importance of a contextual definition, not just one that comprises a mere list of behaviours that are primarily incident based. We also agree that inserting a chapeau might assist to provide this context.
- All terms like "emotionally abusive" or "sexually abusive" should be defined.
- The definition needs to be more inclusive of all forms of abuse experienced by marginalised groups including (but not limited to):
    - specific forms of abuse suffered by LGBTQIA+ people including specific threats to 'out' another person in relation to their sexuality or gender identity;
    - specific forms of abuse suffered by people on temporary visas including immigration abuse, threatening deportation of child/ren and persons, and threats of revoking visa sponsorship;
    - specific forms of abuse suffered by faith-based communities including forced marriage and dowry abuse;
    - specific forms of abuse suffered by people with disability including withholding or forcing medication, withholding assistance with essential tasks and threats to withdraw care;
    - specific forms of abuse suffered by people living in rural, regional and remote areas including threats of public humiliation in smaller communities and restricting or removing access to the internet; and
    - reproductive coercion.
- The definition omits any reference to systems abuse. This is a significant form of abuse that must be specifically acknowledged.
- Subsection (h) should be amended to "preventing the second person from, or forcing the second person to-".

[5] In particular, we are grateful for having had the opportunity to view the draft recommendations of Women's Legal Service NSW.

- Subsection (h)(i) should be amended to "making or keeping connections with the person's *or another person's* family, friends or culture, or".
- Subsection (h)(iii) should be amended to "expressing the person's *or any other person's* cultural identity".

We also note that the only example of emotional abuse in section 6A appears to be "repeated derogatory taunts". Emotional abuse is much more extensive than this and includes behaviour such as gaslighting. There is also no mention (for example) of threats to commit suicide.

Finally, we strongly recommend (as will be discussed further below) that the definition of "abusive behaviour" in the Abusive Behaviour Offence, needs to align more closely and interact more seamlessly with the definition of "domestic abuse". We are concerned that the definition of "domestic abuse" differs quite substantially from the definition of "abusive behaviour" in a number of key respects and this will be problematic, not only for the actors in the justice system who are required to interpret and apply the legislation, but also for the community more broadly.

Proposed Division 6A Abusive Behaviour Offence

We have significant concerns with the proposed Abusive Behaviour Offence in the Exposure Draft. We will start with some general comments about how we think the Abusive Behaviour Offence should interact with existing domestic violence offences. We will then deal with each element of the Abusive Behaviour Offence in turn.

How the Abusive Behaviour Offence interacts with existing domestic violence offences

One of the objectives of the Abusive Behaviour Offence is to move towards a course of conduct view of domestic abuse rather than the current incident-based approach to domestic violence. In addition, the Abusive Behaviour Offence constitutes important recognition that coercive and controlling behaviours are a criminal offence. In our view therefore, in order to more properly fulfil these functions, the Abusive Behaviour Offence must not merely operate as a stand-alone offence but rather it should act as a catalyst for further recognition of coercive control in the broader scheme of domestic violence offences.

This means that, not only must the definition of abusive behaviour interact meaningfully with the meaning of domestic abuse, but we recommend that **the Government's reforms in the Exposure Draft go even further by incorporating coercive control as a partial or full defence to domestic violence offences to ensure that any potential misidentification of the primary aggressor is addressed**. A notable example of where this might operate is as a partial or full defence to intimate partner homicide.

It is well established that misidentification of the primary aggressor is an important issue for victim-survivors of domestic and family violence and has not been addressed fully by the criminal justice system - in large part because coercive and controlling behaviours have been not been properly defined or acknowledged as a form of domestic abuse in the criminal law, and the law has, up till now, only consider domestic abuse in the context of a series of isolated incidents, rather than looking at broader conduct as a whole. This problem is particularly acute for victim-survivors from marginalised groups.

Given this, we strongly encourage the NSW Government to consider implementing a partial or full defence in Part 11 of the Crimes Act. We note that this would require further consultation as to how this might be implemented legislatively. We recommend that in the short term, at the very least, that **coercive control be officially recognised as a mitigating factor in sentencing**.

Section 54D(1)(a)

We refer to our comments in relation to the definition of course of conduct at section 54G below.

Section 54D(1)(b)

We echo the serious concerns of the sector that this provision states that the Abusive Behaviour Offence only applies to intimate partners.

For the criminalisation of coercive control to afford meaningful protection to victim-survivors, it must be recognised that abuse can occur in a range of different domestic relationships. Controlling and coercive behaviours are not only used in intimate partner contexts. Indeed, they can be used in a wide range of family and caring relationships whereby the harm may be just as dangerous and damaging.

We are concerned that this is taking a backwards step when we already have a good definition of domestic relationships in the CDPV Act.

We understand from our participation in the consultation process, that the Government's rationale behind this includes:

- This was a recommendation of the Joint Select Committee on Coercive Control.
- This is the current approach in Scotland.
- A large portion of the evidence base considers coercive control in the context of intimate partners

Nevertheless, we respectfully disagree with the Government's rationale for a number of important reasons:

- The Joint Select Committee process is just one process of consultation by the Government which could not be said to cover the field. We also note that since those recommendations there have been extensive and unified calls by the sector in NSW and nationally to have the offence extended.[6]
- Just because a large portion of the evidence base currently considers coercive control in the context of intimate partners, this does not mean it does not exist in other contexts. Coercive control in other contexts is under-researched, for example coercive control which occurs in caring relationships for people with a disability.
- Criminal laws should always aim to protect all persons from all forms of coercive control as much as possible – not just certain forms of coercive control experienced by the majority.
- In Scotland, while the decision was made by the Government to confine the offence to intimate partners, there were extensive calls from the sector to have the offences extended beyond intimate partners.[7] We are also aware from our consultation with the sector that this is now the position of Scottish Women's Aid, who were a key agency driving the reforms there.

Full Stop Australia therefore recommends that **the new domestic abuse offence extend to "domestic relationships" as currently defined in the CDPV Act**.

Section 54D(1)(c)

We approve in principle the use of intent and recklessness in section 54D(1)(c). However, we are very cautious to ensure that this provision is monitored carefully to ensure that proving intent or recklessness does not place too high a burden and additional pressure on victims-survivors as witnesses.

This is so for a number of reasons including:

- In respect to intent, many perpetrators may not actually say or believe that their behaviour is harmful. The inclusion of recklessness may ameliorate this issue however this again would need to be monitored closely.

[6] Wendy Tuohy, 'The war on intimate terrorism heats up with national talks on coercive control' (Online Article, 12 August 2022), *Sydney Morning Herald*, <https://www.smh.com.au/national/the-war-on-intimate-terrorism-heats-up-with-national-talks-on-coercive-control-20220812-p5b9cr.html> ; Charmayne Allison and Sandra Moon, 'Victim survivors fear NSW coercive control legislation could be used against them' (Online Article, 27 July 2022), *ABC News*, <https://www.abc.net.au/news/2022-07-27/domestic-violence-survivors-respond-to-draft-bill/101256732>.

[7] Scottish Women's Aid, *Domestic Abuse and the Law* (Webpage, 2021) <https://womensaid.scot/information-support/domestic-abuse-and-the-law/>.

- We understand from our consultation with the sector that proving intent in practice is often very difficult for offences such as stalking and intimidation.

Section 54D(1)(d)

Full Stop Australia supports the inclusion of a reasonable person test in this section, provided the new provision be accompanied by robust training of every actor in the criminal justice system to ensure that the test is not used to perpetuate harmful gender stereotypes and norms that to this day persist throughout, not only the justice system, but broader society.

Evidence from Tasmania demonstrates the dangers of criminalising coercive control without implementing community awareness and education programs. In Tasmania, it took three years for charges to be brought under the new legislation, and one of the key reasons for this was the lack of community awareness about the offence.[8] Further, there was little media coverage in relation to the new offence and a lack of support provided to legal and non-legal victim services.[9] We submit that the NSW Government could learn from this experience, in ensuring a comprehensive education and awareness campaign so that all actors in the justice system, key institutions and the community more broadly obtain an understanding of this insidious aspect of domestic abuse.

ANROWS' National Community Attitudes towards Violence Against Women survey (NCAS) found that there is a great deal of work to do in educating the community that domestic abuse can be psychological.[10] Indeed, nearly 1 in 5 Australians do not believe financial control is a serious problem.[11] These results make it clear that there are still widely held beliefs in our society that domestic abuse is merely physical violence.

To achieve substantial community awareness and understanding, right throughout the community, it is necessary to resource and support this activity at the community level. It is only community leaders themselves, in families, schools, workplaces, sporting clubs and religious and cultural institutions that can generate significant and lasting understanding and cultural change. Engagement with state-wide and local community organisations, including First Nations communities, multicultural communities, people with disability, LGBTIQA+ communities, and people of all ages will be essential in ensuring widespread understanding and empowerment.

Further, for the criminalisation of coercive control to be effective, there must be a commitment to robust and comprehensive orientation and training and ongoing reflective practice of all actors

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[8] Women's Legal Service Tasmania, *Inquiry: Submission into Family, Domestic and Sexual Violence* (Submission, 2020), 6.
[9] Ibid.
[10] Australia's National Research Organisation for Women's Safety, *Are we there yet? Australians' attitudes towards violence against women & gender equality: Summary findings from the 2017 National Community Attitudes towards Violence against Women Survey (NCAS)* (Research to policy and practice, 03/2018).
[11] Ibid.

in the justice system. This training must be trauma-informed and led by expert organisations like Full Stop Australia.

See more below in relation to our comments on implementation.

Maximum Penalty

We hold concerns that the maximum penalty for the Abusive Behaviour Offence is 7 years.

We consider that very careful consideration must be given to the penalties imposed under Abusive Behaviour Offence. Coercive control is a toxic and often highly damaging offence that can inflict life-long harm on victims/survivors. We know from our work with victim-survivors that the principles of protection, denunciation and deterrence are vitally important. This necessarily requires that judges and magistrates be able to impose appropriate penalties, including custodial sentences, on serious offenders. However, Full Stop Australia also acknowledges that the inclusion of high penalties may reduce the rates at which this offence is utilised by prosecutors.[12] It is therefore necessary to strike the right balance between the inclusion of penalties that are sufficiently strong, without being prohibitively high.

We understand that part of the Government's rationale in setting the penalty at 7 years was that the penalty for the Abusive Behaviour Offence is higher than for some individual offences which could arguably encompass coercive control (for example, assault occasioning actual bodily harm which is 5 years). We note that these offences are primarily incident based and occur at a single point in time. If a perpetrator was charged with 10 or more counts of assault occasioning actual bodily harm, for example, the overall maximum penalty could be much higher.

In our view, in setting the maximum penalty, it is important to bear in mind that coercive control often occurs over a significant period of months (and years) and constitutes a broad range of behaviours which impact on every aspect of a victim's life. For individual perpetrators, the Abusive Behaviour Offence must necessarily capture the totality of these behaviours over the entire period of the relationship as presumably, you would not have multiple counts of an Abusive Behaviour Offence between one perpetrator and one complainant in the course of one relationship. As such, at least for significant and harmful instances of coercive control, the maximum penalty should be higher to reflect this.

It is also important to note that because of the maximum penalty that is set, the majority of the prosecutions of this offence will be in the Local Court and therefore prosecuted by police prosecutors. This means that from a policing perspective, coercive control is likely to be investigated by a frontline general duties police officer, rather than a detective. Given, for

[12] Women's Safety NSW, 130.

example, the findings of the Audit Office Report into Police Responses to Domestic Violence, this highlights the need to ensure that all frontline officers are rigorously trained in identifying, addressing and evidencing domestic violence and coercive control. Otherwise, we run the risk that the provision will remain underutilised.

We would suggest that the Government consider raising the maximum penalty and or instituting differing levels of penalty depending upon the seriousness of the offence with the most serious offences having a maximum penalty of 10 years.

Section 54D(2)

We consider that this provision is slightly confusing when read in conjunction with the definition of "course of conduct" in section 54G, particularly so for the general community. However, we do agree that the jury or finder of fact should be directed to consider the totality of the behaviours. We also consider it useful to clarify that the course of conduct can be by any combination of abusive behaviours. We query however whether there is some way that these points could be more integrated with the rest of the Abusive Behaviour Offence.

Section 54E Defence

Firstly, while we understand that the defence has been taken from the Scottish legislation, we are concerned that, notwithstanding this, the defence sets too low a bar for defence counsel to establish and correspondingly, too high a bar for the prosecution to refute. As such, the defence itself could be a significant disincentive for prosecutors. In particular, we are concerned that for the defence to be enlivened, all that needs to occur is that evidence "adduced *is capable of raising an issue* as to whether the course of conduct is reasonable in all the circumstances". Given what we already know about harmful gender myths and stereotypes that already exist not only in the justice system but also the broader community, we are concerned that the defence could be enlivened in practically every case of coercive control to come before the court system that doesn't involve instances of physical harm. This then puts the onus on the prosecution to prove that the course of conduct was not reasonable beyond reasonable doubt.

While we appreciate that it is common for defences to act in this way, we are very concerned that prosecutors will be significantly disincentivised to prosecute more difficult or complex cases of coercive control or similarly less serious cases of coercive control that aren't accompanied by physical harm or other types of harm that are harder to justify as being reasonable in the circumstances. Arguably (especially in complex cases) it will be much harder for a prosecutor to establish that certain cases of financial abuse (by way of example) are not reasonable beyond a reasonable doubt. Especially in circumstances where perpetrators are effective at manipulating people and systems to gaslight victim-survivors by, for example, accusing them of suffering from

a mental illness or taking advantage of their drug and alcohol misuse (which may arise as a result of significant trauma arising from the abuse itself).

In our respectful submission therefore, that through the inclusion of this defence, we run the risk of ending up in a situation where only coercive controlling offences accompanied by multiple instances of physical harm are likely to be prosecuted, which arguably doesn't differ that substantially from the criminal law prior to the enactment of the Exposure Draft.

Secondly, in order to avoid misidentification of the primary aggressor in an Abusive Behaviour Offence, we recommend that there be included a list of situations where the Abusive Behaviour Offence doesn't apply. We consider this particularly important in situations where parents or caregivers are making genuine efforts to protect their children.

Specifically, this may also be situations where:

- There is a lack of capacity to understand the behaviour (such as a person with an intellectual disability or significant mental illness);
- There is a genuine caring reason (for example, where the person is protecting their partner or family member from self-harm under medical guidance);
- There is consent for a particular activity without the associated harm (such as role play); or
- Some other genuine protective reason (for example, where the person is acting to protect a child, relative, friend or animal from abuse).

Section 54F Meaning of "abusive behaviour"

We have serious concerns with this definition and suggest it requires re-working.

Some general concerns we have with the definition are:

- We don't understand why this definition is different to the definition of domestic abuse. As previously stated, it is our position that both definitions should be meaningfully integrated.
- There appears to be no rhyme or reason to the ordering of the subsections, and the subsections don't necessarily interact in a simple and easy to understand way. Emotional and financial abuse (for example) aren't separately identified as types of abuse in the list yet "making derogatory taunts" makes the list which is only one example of a very large list of emotionally abusive behaviours that could be inflicted upon a person.
- It is unclear why a large number of abusive behaviours comes under one subsection – with the result that there is a long list of examples set out in the notes section of the provision. This means that police officers and the community would need to sort through

two layers of legislation (subsection and then note section) before deciding whether or not certain behaviour would come within the definition.

- The definition does not include a specific reference to sexual violence.

Full Stop Australia suggests that the NSW Government consider, rather than having actual examples of abusive behaviour in the definition, examples be incorporated into the statutory guidance or explanatory notes. Statutory guidance of this kind may be found in the UK Statutory Guidance Framework which accompanied the enactment of the new laws in England and Wales[13], or in the explanatory notes to the Scottish legislation.[14]

Furthermore, we note that in Scotland, a different approach is taken to the definition of abusive behaviour, one at which the effects are considered rather than looking at the actual behaviour itself. **Full Stop Australia submits that this draws the finder of fact away from an incident-based framing of the evidence and more about how the behaviour has impacted upon the person. In this sense, it assists the investigating officer to accurately identify the primary aggressor as it requires an assessment of the power imbalance between the parties such that the abusive behaviour of one party is reasonably likely to have the damaging effect on the other party in the circumstances.** It also obviates the need to ensure the list of behaviours is comprehensive and covers the field entirely. That provision states as follows (relevantly):

> *(2) Behaviour which is abusive of B includes (in particular)—*
> *(a) behaviour directed at B that is violent, threatening or intimidating,*
> *(b) behaviour directed at B, at a child of B or at another person that either—*
> *(i)has as its purpose (or among its purposes) one or more of the relevant effects set out in subsection (3), or*
> *(ii)would be considered by a reasonable person to be likely to have one or more of the relevant effects set out in subsection (3).*
> *(3) 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.*
> *(4) In subsection (2)—*
> *(a) in paragraph (a), the reference to violent behaviour includes sexual violence as well as physical violence,*
> *(b) in paragraph (b), the reference to a child is to a person who is under 18 years of age.*

[13] Statutory Guidance Framework, Controlling or Coercive Behaviour in Intimate or Family Relationships, Home Office UK 3.

[14] *Domestic Abuse (Scotland) Act 2018*, Explanatory Notes.

Thus, Full Stop Australia recommends that the types of behaviours captured in the Scottish model, that is, "violent, threatening or intimidating" conduct, or "conduct which would be reasonably likely to have one or more of the effects" as follows:

> **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**

form the basis of the new domestic abuse offence, with forms of abuse specifically recognised such as emotional abuse, sexual abuse, financial abuse, and abuse directed at children, relatives and animals. This could occur (for example) by combining the two approaches and weaving in the new definition of "domestic abuse".

This could look something like

54F Meaning of "abusive behaviour"

(1) In this Division, abusive behaviour means behaviour that consists with or involves —

(a) violence, threats or intimidation,
(b) coercion or control of the person against whom the behaviour is directed, or
(b) behaviour directed at the person or at a child, relative or animal of the person that either—
(i) has as its purpose (or among its purposes) one or more of the relevant effects set out in subsection (3), or
(ii) would be considered by a reasonable person to be likely to have one or more of the relevant effects set out in subsection (3).

(3) 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.

(4) Without limiting subsection (1) abusive behaviour includes engaging in or threatening to engage in behaviour which constitutes "domestic abuse" within the meaning of section 6A.

This weaves together the definitions, creates consistency and certainty and also ensures that all coercive controlling behaviours are captured in the offence. For this approach to be successful, however, there would need to be consensus as to the definition of domestic abuse.

Section 54G Meaning of "course of conduct" and Section 54H Procedural Requirements

A balance must be struck between ensuring accessibility of the offence whilst safeguarding against misuse, in particular by primary aggressors in situations of misidentification. In this regard, Full Stop Australia considers the Scottish definition of 'course of behaviour' as an appropriate threshold to establish a pattern of abuse. More specifically, the course of conduct element of the offence should be established on the basis of at least two occasions of the prescribed forms of abusive conduct (or of abusive conduct with the prescribed effects).

We agree there should be no time limitations forming the course of conduct. As has been seen in Tasmania, this can put the provisions out of reach for many victim-survivors. It is important to acknowledge for this type of offence that there can be a long period between particular definable acts of coercive control, and a long period between an act occurring and the victim-survivor being in the position to report it.

Section 54I Review of Division

Given the implications for people's safety, Full Stop Australia recommends a shorter initial review period for the new division of 12 months. We further recommend that there be a concurrent, ongoing review process that occurs immediately following implementation to safeguard against unintended consequences. In this regard, we suggest that this might be undertaken by BOCSAR and independent researchers engaged by BOCSAR for qualitative research, with oversight from a panel of cross-agency representatives including gender-based violence experts.

Implementation Considerations

As flagged above, Full Stop Australia submits that it is essential for there to be strong and holistic implementation considerations in the process of criminalising coercive control.

In this regard, we refer and endorse the recommendations made by our colleagues, Women's Legal Service NSW in relation to implementation and in particular (with minor amendments):

- **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 LGBTIQA+ 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 such as Full Stop Australia, cultural safety experts, disability**

experts, LGBTIQA+ 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.**
- **Training and guidelines to assist police in accurately identifying the person most in need of protection and the predominant aggressor, including working with specialist sexual, domestic and family violence services to assist with accurate identification as recommended in the Family Violence Reform Implementation Monitor report: Monitoring Victoria's family violence reforms Accurate identification of the predominant aggressor (2021).**
- **Funding for a co-responder model with specialist SDFV community-based workers co-located with police which also operates outside business hours.**
- **Training and support for police to manage the impacts of vicarious trauma, burnout and compassion fatigue.**
- **Information technology systems that enable police easy access to information about history and context of previous violence and abuse.**
- **Publishing of the results of regular audits of policing of sexual, domestic and family abuse and steps police will take for continuous improvement.**
- **The NSW Police Force 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.**
- **Regular and ongoing training for all actors in the criminal justice system including 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 LGBTIQA+ 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 such as Full Stop Australia including lived experience experts, cultural safety experts, disability experts, LGBTIQA+ experts and specialist legal services and should primarily be face-to-face training.**
- **There must also be compulsory training in identifying and responding to domestic and family abuse and identifying and responding to trauma for law students.**
- **Training and support for actors in the legal system in responding in a trauma-informed way and managing the impacts of vicarious trauma, burnout and compassion fatigue.**

- **Implement ANROWS recommendation for greater role clarity and accountability of police and the courts with safeguards to address misidentification. [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".**
- **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.**
- **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.**
- **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.**
- **Training to support these practice standards must be up-to-date, evidence-based, developed and delivered on an ongoing basis by sexual and domestic abuse experts such as Full Stop Australia, in a culturally safe, disability aware, LGBTIQA+ aware way.**
- **Continued efforts to provide a more trauma informed, culturally responsive legal response, including, but not limited to a criminal justice response.**
- **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.**
- **Accountability frameworks, including to address systematic racism, sexism and other forms of discrimination.**
- **Community awareness campaigns, co-designed and co-delivered with sexual, domestic and family abuse experts such as Full Stop Australia including lived experience experts and priority populations.**