Submission No 3

INQUIRY INTO CRIMES LEGISLATION AMENDMENT (COERCIVE CONTROL) BILL 2022

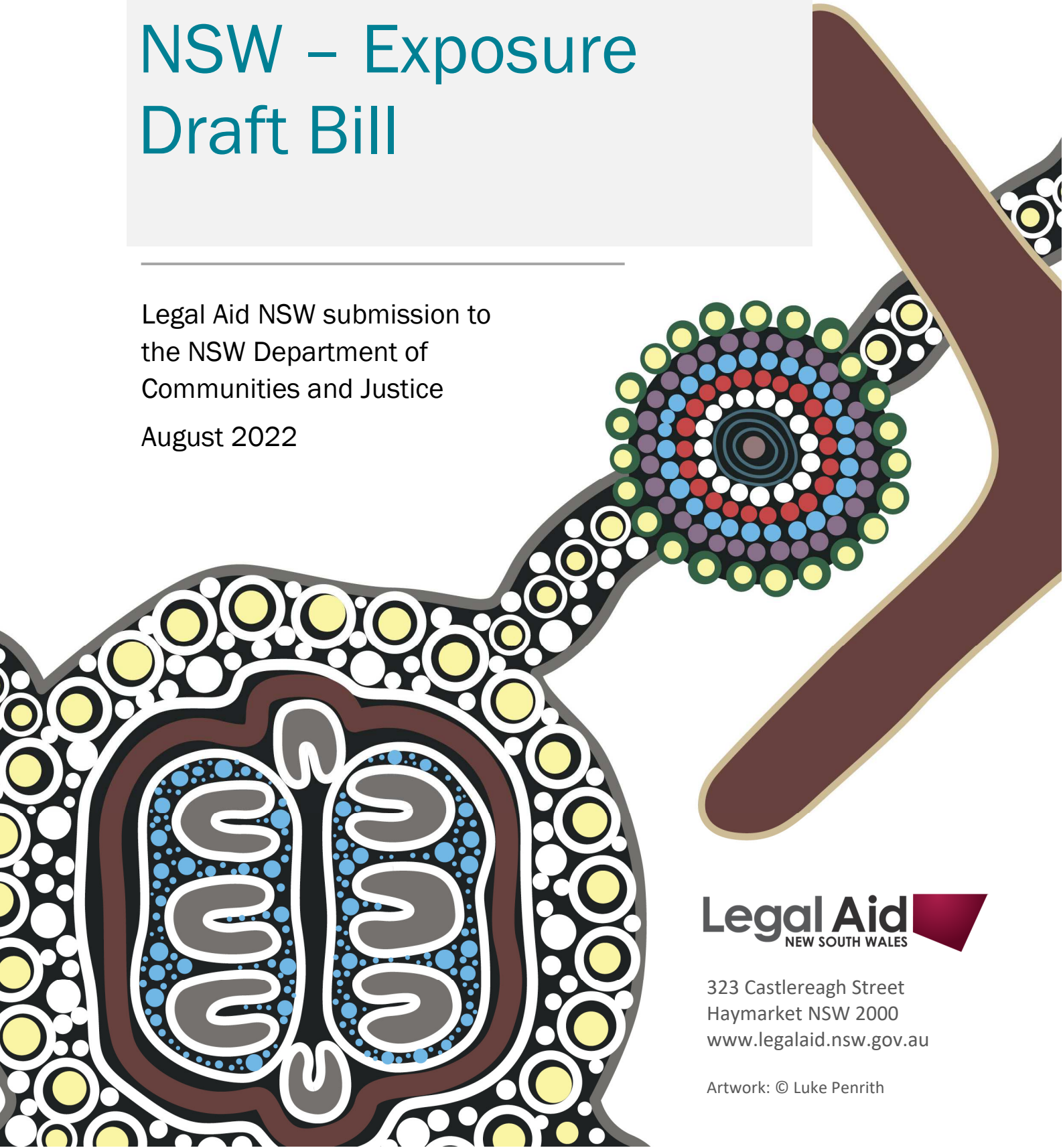
Organisation: Legal Aid NSW

Date Received: 26 October 2022

Criminalising Coercive Control in NSW – Exposure Draft Bill

Legal Aid NSW submission to the NSW Department of Communities and Justice

August 2022



Legal Aid NEW SOUTH WALES

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Acknowledgement

We acknowledge the traditional owners of the land we live and work on within New South Wales. We recognise continuing connection to land, water and community.

We pay our respects to Elders both past and present and extend that respect to all Aboriginal and Torres Strait Islander people.

Legal Aid NSW is committed to working in partnership with community and providing culturally competent services to Aboriginal and Torres Strait Islander people.

1. About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 25 offices and 243 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged. We offer telephone advice through our free legal helpline LawAccess NSW.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 27 Women's Domestic Violence Court Advocacy Services, and health services with a range of Health Justice Partnerships.

The Legal Aid NSW Family Law Division provides services in Commonwealth family law and state child protection law.

Specialist services focus on the provision of Family Dispute Resolution Services, family violence services and the early triaging of clients with legal problems through the Family Law Early Intervention Unit.

Legal Aid NSW provides duty services at a range of courts, including the Parramatta, Sydney, Newcastle and Wollongong Family Law Courts, all six specialist Children's Courts and in some Local Courts alongside the Apprehended Domestic Violence Order lists. Legal Aid NSW also provides specialist representation for children in both the family law and care and protection jurisdictions.

The Civil Law Division provides advice, minor assistance, duty and casework services from the Central Sydney office and 20 regional offices. It focuses on legal problems that impact on the everyday lives of disadvantaged clients and communities in areas such as housing, social security, financial hardship, consumer protection, employment, immigration, mental health, discrimination and fines. The Civil Law practice includes dedicated services for Aboriginal communities, children, refugees, prisoners and older people experiencing elder abuse.

The Criminal Law Division assists people charged with criminal offences appearing before the Local Court, Children's Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court. The Criminal Law Division also provides advice and representation in specialist jurisdictions including the State Parole Authority, Drug Court and the Walama List.

Should you require any further information, please contact:

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2. Executive Summary

Legal Aid NSW welcomes the opportunity to comment on the draft Crimes Legislation Amendment (Coercive Control) Bill 2022 (**draft Bill**).

Legal Aid NSW acknowledges the findings of the report of the Joint Select Committee on Coercive Control's Inquiry into coercive control in domestic relationships (**Joint Select Committee Inquiry**), that NSW laws do not respond well to coercive control as a type of abuse, and there is poor understanding of it in our community.[1] We strongly support the Committee's recommendations for public education about all forms of domestic abuse, increased funding for domestic abuse and housing services, improved policing responses to domestic abuse and better training for frontline staff to support the creation of a new criminal offence. The criminal law cannot perform an educative function alone, and more fulsome education and training across our community is vital to drive cultural change, and to support victim-survivors.

First and foremost, we are concerned that, as currently drafted, the proposed offence is complicated, too broad and will likely cause difficulties in the proper direction of juries and set up victims and defendants for lengthy appeals. Legal Aid NSW supports a new offence of coercive control being limited to adults (18 years and over) who are or have been in an intimate partner relationship. We also support the inclusion of the reasonable person test as an element of the offence. However, we submit that the proposed offence should be simplified, taking into account the existing domestic violence legislative framework in NSW. To better capture the nature of coercive and controlling behaviour, the offence should instead focus on behaviour where the person intends the course of conduct to coerce or control the other person.

If the proposed offence is framed in broad terms, as currently set out in the draft Bill, we are concerned that it will target behaviour that does not warrant a criminal sanction, and risk primary victims being misidentified as perpetrators. It will also likely disproportionately impact vulnerable communities, especially Aboriginal and Torres Strait Islander women and culturally and linguistically diverse women. We are also concerned that it will undermine the positive efforts targeted to reducing the overrepresentation of Aboriginal and Torres Strait Islander people in the criminal justice system, under the National Agreement to Closing the Gap. It is particularly important to ensure that the draft Bill contains sufficient safeguards to mitigate this risk, supported by increased training for police, taking into the account the pronounced effect that the policing of the stalk/intimidation offence has had on Aboriginal and Torres Strait

[1] Joint Select Committee on Coercive Control Report 1/57, *Inquiry into coercive control in domestic relationships* (June 2021), vi.

Islander people, who accounted for 28% of court finalisations and 52% of custodial penalties for that offence in 2021.[2]

We are also concerned that the NSW Government is proceeding to criminalise coercive control at the same time as introducing a new concept and definition of domestic abuse, contrary to recommendation 2 of the report of the Joint Select Committee Inquiry.[3] We consider that a more cautious approach, where the impact of the expanded concept of domestic violence offences to include domestic abuse is first assessed, is preferable, given the risks of overreach identified by the Committee.[4]

The current consultation on the draft Bill lacks any information about the implementation of the new offence. We reiterate the need for an extensive education and training package to support the implementation of any offence, consistent with the recommendations of the Joint Selection Committee Inquiry.[5] Specifically, we support the delivery of training for frontline justice staff regarding the dynamics of domestic and family violence, the complex nuances of coercive control and approaches to identifying the primary victim, particularly for police, supervising police officers and other criminal justice participants including prosecutors, defence lawyers and lawyers working with victims, court staff and judicial officers. A different and more comprehensive approach to police training is especially critical, given the risk of primary victims being misidentified as perpetrators.

We also strongly support the implementation of an extensive primary prevention and awareness-raising campaign for the broader NSW community that acknowledges the gendered drivers of domestic and family violence, and seeks to change the behaviours and norms, in all areas of society that excuse, justify or even promote violence against women and their children.

To enable the above to occur, Legal Aid NSW supports a delayed commencement of the new offence, to ensure that comprehensive education and training can be rolled out, alongside ongoing consultation with key stakeholders, to support implementation. We provide more specific recommendations below, to amend the draft Bill to address the identified concerns.

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[2] NSW Bureau of Crime Statistics and Research, Stephanie Ramsey, Min-Taec Kim and Jackie Fitzgerald, Crime and Justice Statistics Bureau Brief: Treads in domestic violence-related stalking and intimidation offences in the criminal justice system: 2012-2021(June 2022).

[3] Joint Select Committee on Coercive Control Report 1/57, *Inquiry into coercive control in domestic relationships* (June 2021), Recommendation 2.

[4] Joint Select Committee on Coercive Control Report 1/57, *Inquiry into coercive control in domestic relationships* (June 2021), 29

[5] Joint Select Committee on Coercive Control Report 1/57, *Inquiry into coercive control in domestic relationships* (June 2021), vii.

Recommendations

1. The impact of the expanded concept of domestic violence offences to include domestic abuse is assessed prior to the new abusive behaviour towards intimate partners offence commencing.

Education and training

2. Comprehensive training be provided for frontline justice staff regarding the dynamics of domestic and family violence, the complex nuances of coercive control and approaches to identifying the primary victim prior to the commencement of any new legislation on coercive control. This training should be provided to police, supervising police officers and other criminal justice participants including prosecutors, defence lawyers and lawyers working with victims, court staff and judicial officers.
3. The NSW Police Force develop a framework to guide police training in domestic and family violence policing that identifies intervals for refresher training, modes for course delivery, and protocols for integrating course evaluations and workforce capability assessments into the training design
4. NSW Police Force training about identification of the primary aggressor be designed with representatives from the domestic and family violence sector.
5. Consideration be given to providing additional training to police in relation to taking evidence via the Domestic Violence Evidence in Chief (DVEC) recording, to ensure that questions to the victim include sufficient detail to prosecute any offence.
6. Education and training on the specific amendments to *Crimes (Domestic and Personal Violence) Act 2007* make it clear that there is no expansion of the civil Apprehended Domestic Violence Order scheme except via the introduction of the new offence
7. An extensive primary prevention and awareness-raising campaign is implemented for the broader NSW community prior to the commencement of any new legislation on coercive control. This campaign should acknowledge the gendered drivers of domestic and family violence, and seek to change the behaviours and norms, in all areas of society that excuse, justify or even promote violence against women and their children.

Delayed implementation and creation of taskforce

8. The commencement of the new offence of abusive behaviour towards intimate partners is delayed to ensure that comprehensive education and training can be rolled out, alongside ongoing consultation with key stakeholders, to support implementation.

9. The NSW Government consider establishing an implementation taskforce to manage the introduction of a criminal offence of coercive control. The taskforce should consult with stakeholders including NSW Police, victim survivors, the domestic abuse sector, disability advocacy organisations, and representatives of culturally and linguistically diverse, Aboriginal and Torres Strait Islander and LGBTQ communities.

Offense of abusive behaviour towards intimate partners

10. The proposed offence of abusive behaviour towards intimate partners should require a minimum number of incidents of abusive behaviour be specified.
11. The prosecution should be required to allege the particulars of the specific incidents of abusive behaviour that are alleged to form part of the course of conduct. This could be achieved by adding the words “and description” after “nature” in section 54H(1)(b)(i) (Schedule 1[1]) of the draft Bill so that it reads “the prosecution is required to allege – (i) the nature and description of behaviour that amount to the course of conduct”.
12. The prosecution be required to establish beyond reasonable doubt that the specific incidents of abusive behaviour alleged to form part of the course of conduct occurred.
13. The word “persistent” be added in the title and/or as an element of the offence of abusive behaviour towards intimate partners.
14. The proposed offence of coercive control should apply to knowing and persistent behaviour, and not apply to reckless conduct.
15. The Department consider the potential impact of including “repeated derogatory taunts” in the non-exhaustive list of the examples of domestic abuse on Aboriginal and Torres Strait Islander incarceration rates, and over-policing in these communities.
16. The examples of abusive behaviour under section 54F(2)(g) (Schedule 1[1]) of the draft Bill should include threatening a person’s visa or immigration status.
17. The draft Bill is amended to make clear that the offence is limited to behaviour in respect of the same parties (as opposed to different complainants).
18. The offence is redrafted to focus on behaviour where the person intends the course of conduct to coerce or control the other person. This could be achieved by replacing section 54D(1)(c) (Schedule 1[1]) of the draft Bill with the following formulation “(c) the person intends the course of conduct to coerce or control the other person”.
19. The penalty for the proposed offence of abusive behaviour towards intimate partners should match the penalty for intimidation, destroy/damage property or actual bodily harm (i.e. five years).

20. The proposed new offence of abusive behaviour towards intimate partners in section 54D (Schedule 1[1]) of the draft Bill should be a Table 1 offence, for the purpose of Chapter 5 of the *Criminal Procedure Act 1986* (NSW), rather than a Table 2 offence, as currently set out in Schedule 4 of the draft Bill.
21. The draft Bill is amended to confirm that the new offence will only apply to conduct or abusive behaviour which occurred following the commencement of the legislation.
22. The NSW Government consider evaluations of the coercive control offences in other jurisdictions, such as Ireland and Scotland, before introducing any proposed offence of coercive control in NSW.
23. Regular and ongoing reviews of the new offence should be legislated, to monitor its implementation and to support the early identification of any unintended consequences. The outcome of these reviews should be required to be tabled in Parliament within a specified time period.

Definition of domestic abuse

24. The definition of 'domestic abuse' in section 6A (Schedule 2[2]) of the draft Bill should also explicitly capture psychological abuse (contrasted with emotional abuse), isolation, and reproductive coercion.
25. Section 6A(3) (Schedule 2[2]) of the draft Bill regarding behaviour that causes a child to hear or be exposed to domestic abuse should be clarified to make clear whether this provision could be used to prosecute primary victims who do not leave abusive relationships or do not adequately protect their child, and the child is subsequently exposed to violence perpetrated on the primary victim.
26. The list of behaviour that may constitute domestic abuse in section 6A (Schedule 2[2]) of the draft Bill should include threatening a person's visa or immigration status.

3. General comments

3.1 Impact of any new offence on Aboriginal and Torres Strait islander communities

Legal Aid NSW remains concerned about the potential negative impact of the new offence on Aboriginal and Torres Strait Islander communities, who are already over-policed and who experience layers of intergenerational disadvantage and trauma.[6]

In NSW, Aboriginal and Torres Strait Islander adults are imprisoned at a rate that is nearly 10 times higher than non-Indigenous adults.[7] While Aboriginal and Torres Strait Islander people comprise 3.4 per cent of the NSW population,[8]Aboriginal and Torres Strait Islander adults comprise 27.8 per cent of the adult prison population.[9]

We also note the June 2022 BOCSAR findings regarding the trends in domestic violence-related stalking and intimidation offences over the period 2012 to 2021, which found that over that period, domestic violence-related stalking/intimidation incidents recorded by NSW Police increased 110 per cent, and police legal proceedings for domestic violence-related stalking/intimidation incidents, increased 163.8 per cent.[10] Most concerning are BOCSAR's findings that the increase in stalking/intimidation has had a pronounced effect on Aboriginal people who accounted for 28 per cent of court finalisations and 52 per cent of custodial penalties in 2021, and the number of Aboriginal people receiving a custodial penalty increased 101 per cent in eight years from 158 in 2014 to 317 in 2021.

At a time where there is renewed national focus to reduce the over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system, through initiatives under the National Agreement on Closing the Gap, and the NSW Government's recent increased funding targeted to justice initiatives to achieve this goal, we are concerned that no evidence has been provided to stakeholders about the

[6] See for example: Don Weatherburn and Stephanie Ramsey, What's causing the growth in Indigenous Imprisonment in NSW?', *NSW Bureau of Crime Statistics and Research Bureau Brief*, (August 2016). 2; Australian Law Reform Commission, *Pathways to Justice – an inquiry into the incarceration rate of Aboriginal and Torres Strait Islander Peoples*, (December 2017), 92.

[7] NSW Bureau of Crime Statistics and Research, NSW Criminal Justice Aboriginal Over-Representation Quarterly Report, (Report, March 2022).

[8] Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians June 2016* (August 2018).

[9] NSW Bureau of Crime Statistics and Research, NSW Criminal Justice Aboriginal Over-Representation Quarterly Report, (Report, March 2022).

[10] NSW Bureau of Crime Statistics and Research, Stephanie Ramsey, Min-Taec Kim and Jackie Fitzgerald, Crime and Justice Statistics Bureau Brief: Treads in domestic violence-related stalking and intimidation offences in the criminal justice system: 2012-2021(June 2022).

impact of this proposed offence on the Closing the Gap targets, or what will be done to mitigate these risks.

We would welcome further information from the Department on what is being done to ensure that the offence does not disproportionately target Aboriginal and Torres Strait Islander people.

3.2 Misidentification of primary victims as perpetrators

We are also concerned that the proposed offence, as currently drafted, risks primary victims being misidentified as perpetrators, and will likely disproportionately impact vulnerable communities, especially Aboriginal and Torres Strait Islander women and culturally and linguistically diverse women. For more information, see our submission to the NSW parliamentary inquiry into coercive control.[11]

Misidentification of primary victims as perpetrators is a serious issue. Women's Domestic Violence Court Advocacy Services (**WDVCASs**) report that there has been an increase in the number of female defendants of ADVOs that they assist, which is likely due to incident-based policing practice.

This is consistent with the trend in Victoria. The Family Violence Reform Implementation Monitor's report dated December 2021 found that misidentification continues to occur, and rectification is extremely challenging.[12] The report identified several impacts of being misidentified, including:

- the actual perpetrator is not being held to account for their violence and may continue to inflict family violence on the actual victim and others, uninhibited
- the person most in need of protection is not being protected and may instead have court processes initiated against them
- a record as a perpetrator may influence the police response to future incidents
- if Child Protection assesses that a child is in need of protection and progresses a protective application, the Children's Court may decide to remove the child from the care of the parent who has been labelled the perpetrator (but who is actually a victim survivor), and in some cases place them with the actual perpetrator
- the misidentified victim survivor may be excluded from the home and forced into crisis accommodation or homelessness, and

[11] Legal Aid NSW, *Submission to the Joint Select Committee on Coercive Control* (19 February 2021) 3, 11.

[12] Family Violence Reform Implementation Monitor, *Monitoring Victoria's Family Violence Reforms: Accurate Identification of the Predominant Aggressor* (Report, December 2021) 5.

- employment prospects may be limited with a record of family violence perpetration or related criminal convictions.[13]

As the Victorian Family Violence Reform Implementation Monitor noted, even if there is a chance that the misidentified victim would be found not guilty, or the misidentification could be rectified at court, the victim may not have legal support to understand or defend the charges and may plead guilty 'just to get it over and done with'.

Additionally, there are no guarantees that the misidentification would be picked up further along in the legal process. We hold significant concerns that there are inadequate safeguards in NSW law and NSW Police procedure to protect victim-survivors, particularly Aboriginal and culturally and linguistically diverse women, from being misidentified in a charge of coercive control. This risk is further heightened with the proposed amendment to the *Crimes (Domestic and Family Violence) Act 2007* to deem the offence of coercive control to be a 'domestic violence offence' for the purpose of section 11 of that Act. We are concerned that where police take out an Apprehended Domestic Violence Order against the misidentified victim, there may be an increased risk of breach and therefore imprisonment.

As the NSW Audit Office found in its recent performance audit of police responses to domestic and family violence, "the NSW Police Force has limited mandatory or routine refresher training in domestic and family violence policing skills for frontline police".[14]

We strongly support better education for police, to address these risks and we provide further detail of our recommendations below.

3.3 Education and training

We submit that systemic reforms to training for the police and judiciary, and extensive community education should precede the commencement of any new legislation on coercive control.

As stated above, we support the delivery of training for frontline justice staff regarding the dynamics of domestic and family violence, the complex nuances of coercive control and approaches to identifying the primary victim, particularly for police, supervising police officers and other criminal justice participants including prosecutors, defence lawyers and lawyers working with victims, court staff and judicial officers. This should aim to improve the way domestic and family violence is responded to by the justice and domestic and family violence service system as a whole.

[13] Ibid 14.

[14] NSW Audit Office, *Police Responses to Domestic and Family Violence* (Report, 4 April 2022) 25.

Of particular importance is police training about identification of the primary aggressor, which should be designed with representatives from the domestic and family violence sector. We agree with the statements of the Domestic Violence Death Review team in its evidence to the Joint Select Committee Inquiry, that embedding law and policy requires regular, repeated, innovative and routine training, as well as training and education that combats pre-existing attitudes or stereotypes that responders may have as members of society'.[15] Regular and ongoing training for all police is particularly crucial, given that police rotate and leave, and new staff regularly join the organisation.

The recent NSW Audit Office performance audit of police responses to domestic and family violence found that while the NSW Police Force provides a structured training program for Probationary Constables on domestic and family violence policing, it does not monitor the training or skill levels of the broader workforce. This limits the ability of NSW Police Force managers to understand whether the workforce has the required skills and knowledge in this area.[16] We strongly support the Audit Office's recommendation that the NSW Police Force develop a framework to guide police training in domestic and family violence policing that identifies intervals for refresher training, modes for course delivery, and protocols for integrating course evaluations and workforce capability assessments into the training design.[17] Again, police training must be transparent, and developed and delivered in consultation and collaboration with representatives from the domestic and family violence sector, including victim-survivors.

In addition, as police currently respond to domestic and family violence in an incident-based manner, they will require training about recognising and understanding patterns of abusive behaviour. Consideration will also need to be given to provide additional training to police in relation to taking evidence via the Domestic Violence Evidence in Chief (DVEC) recording, to ensure that questions to the victim include sufficient detail to prosecute any offence.

We also suggest that education and training on the specific amendments to *Crimes (Domestic and Personal Violence) Act 2007* should make it clear that there is no expansion of the civil Apprehended Domestic Violence Order scheme except via the introduction of the new offence. That is, education materials should clarify that the new definition of domestic abuse in the *Crimes (Domestic and Personal Violence) Act 2007*

[15] Joint Select Committee on Coercive Control Report 1/57, *Inquiry into coercive control in domestic relationships* (June 2021), 75

[16] NSW Audit Office, *Police Responses to Domestic and Family Violence* (Report, 4 April 2022) 2.

[17] NSW Audit Office, *Police Responses to Domestic and Family Violence* (Report, 4 April 2022) 8.

serves an educative function, rather than changing the Apprehended Domestic Violence Order regime.

3.4 Delayed implementation and creation of a taskforce

Legal Aid NSW strongly supports delayed commencement of the new offence, to ensure that comprehensive education and training can be rolled out, alongside ongoing consultation with key stakeholders, to support implementation.

We also support Recommendation 20 of the Joint Select Committee Inquiry:

> That the NSW Government gives consideration to establishing an implementation taskforce to manage the introduction of a criminal offence of coercive control. The taskforce should consult with stakeholders including NSW Police, victim survivors, the domestic abuse sector, disability advocacy organisations, and representatives of culturally and linguistically diverse, Aboriginal and Torres Strait Islander and LGBTQ communities.[18]

As the Committee stated in its report, there is a need for a careful and considered approach to implementation of any new offence, with a long lead in time, supported by a cross-sector taskforce, to oversee implementing systemic reforms around education and training, alongside the new offence. Such a taskforce could report to the NSW Government on an appropriate time for the new offence to commence after sufficient training and education has been rolled out. Legal Aid NSW would welcome the opportunity to contribute to any such implementation taskforce.

4. Offence of coercive control

4.1 Engaging in a course of conduct

In our view, the proposed offence of coercive control should be drafted narrowly. We consider the current draft is too broad. As presently drafted, this offence risks disproportionately impacting on vulnerable communities, including Aboriginal and Torres Strait Islander people, and people from culturally and linguistically diverse backgrounds. We are particularly concerned about the impact on Aboriginal and Torres Strait Islander people who are already over-policed and who experience layers of intergenerational disadvantage and trauma, and will run counter to the NSW Government's efforts under the Close the Gap commitments.

As per our submission to the Joint Select Committee Inquiry, we submit that the proposed offence of coercive control should require a minimum number of incidents to be specified, so that a defendant can know the charge against them, and meaningfully respond to it. This reflects fundamental principles of natural justice and procedural fairness to an accused in criminal proceedings.

Regardless of whether this approach is supported the prosecution should be required to allege the particulars of the specific incidents of abusive behaviour that are alleged to form part of the course of conduct, and should be required to establish beyond reasonable doubt that such incidents occurred.

The proposed actus reus of a 'course of conduct' in sections 54D(2) and 54G of the draft Bill and additional procedural provisions in section 54H, which do not require particulars of individual incidents to be given, are too vague to be fairly prosecuted or defended. We note that these events may take place over a longer period of time. Victims may not immediately recognise 'coercive control', therefore complaints may come years later. If a general allegation of a 'course of conduct' need only be made, we query how a defendant - years after the fact - can properly and fairly mount a defence to such a broad allegation.

Section 54H(1) of the draft Bill would only require the prosecution to allege the nature of the behaviours that amount to the course of conduct and the time period over which the course of conduct took place. The prosecution would not be required to allege the particulars of specific incidents of abusive behaviour that are alleged to form part of the course of conduct.

For example, as currently drafted, it appears that the prosecution could allege that the course of conduct involved repeated derogatory taunts over a certain period of time to establish the actus reus, without providing any particulars of the nature of the derogatory taunts. We are concerned that this is not sufficient for an offence that carries a seven-year gaol sentence and can form the basis of a police issued Apprehended Domestic Violence Order.

As noted above, we remain concerned that this approach does not sufficiently allow a defendant to know and respond to the charge. If the Court Attendance Notice (**CAN**) or indictment does not have sufficient particulars, then there is a risk that hearings could blow out and significant context evidence could become relevant.

There may also be impacts on the principle of double jeopardy. While a note under proposed section 54H of the draft Bill states "This Division does not affect the common law in relation to double jeopardy", without sufficient particulars on the CAN or indictment, it would be difficult to determine if behaviour for which a person has already been convicted forms part of a charge of abusive behaviour, if it occurred during the same period as the alleged course of conduct. Conversely, without sufficient particulars on the CAN or indictment, it would be very difficult to determine if a subsequent charge related to behaviour that formed part of a prior conviction or acquittal of abusive behaviour, if it occurred during the same time period as the course of conduct. Rather than reviewing a criminal record to determine this issue, it may be necessary for parties to review hearing transcripts, facts found on sentence or fact sheets,

We are also concerned about the new concept of proof in a criminal proceeding of satisfaction as to the "nature of behaviours that amount to a course of conduct". Such an amorphous and broad concept is a fundamental watering down of procedural fairness safeguards, and risks criminalisation of behaviour that, while morally reprehensible, does not justify criminal sanction.

To address these concerns, we suggest that section 54H(1)(b) of the draft Bill be amended as follows:

The prosecution is required to allege –

(i) The nature and description of the behaviour that amounts to the course of conduct

The effect of adding the words 'and description' will require sufficient detail in the indictment about the incidents that are alleged. It will also avoid a situation where the 'nature' of the behaviour is not particularised in a generic way.

We also suggest the inclusion of the word "persistent" in the title and/or as an element of the offence. This term is used in the Irish offence, which refers to a person "knowingly and persistently engaging in behaviour that is controlling or coercive."[19]

[19] *Domestic Violence Act 2018* (Ireland), s 39.

4.2 Course of conduct must consider abusive behaviour

Definition of abusive behaviour

We are concerned that the inclusion of 'repeated derogatory taunts' in the non-exhaustive list of the examples of what includes domestic abuse (section 6A(2)(c) of the draft Bill) may unintentionally disproportionately impact on Aboriginal and Torres Strait Islander communities. The disproportionate impact of justice procedure offences, including offensive language, on Aboriginal and Torres Strait Islander communities has been thoroughly considered by the Australian Law Reform Commission's Report, Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, which recommended either abolishing or narrowing such provisions in state and territory criminal laws.[20] Legal Aid NSW has similarly advocated for offensive language offences to be removed from the *Summary Offences Act 1988* (NSW).

While we acknowledge that the inclusion of this example of abusive behaviour is necessary, to capture the broad scope of coercive and controlling behaviour, the Department should carefully consider the impact this may have on Aboriginal and Torres Strait Islander incarceration rates, and over-policing in these communities.

Behaviour directed at, or making use of, a child

Section 54F(2)(a) (Schedule 1[1]) the draft Bill provides that abusive behaviour includes engaging in, or threatening to engage in "behaviour directed at, or making use of, a child of a person to threaten the person".

We are concerned that this provision could be used by primary perpetrators to argue that the primary victim is perpetrating coercive control by not allowing the perpetrator contact with a child due to genuine safety concerns. Coupled with the *mens rea* which includes recklessness, this provision could be used to further perpetuate systems abuse, and could force the genuine victim to allow contact with the perpetrator in situations which could put the victim and child at risk. In our view, this would be inconsistent with the purpose of the proposed legislation and may in fact allow the perpetrator to further use coercive control. We consider this risk would be mitigated if the offence did not include recklessness.

[20] Australian Law Reform Commission Report 133, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (December 2017) 425.

Threatening a person's visa or immigration status

Legal Aid NSW frequently assists clients whose intimate partners threaten their visa or immigration status as a way to control and coerce them. We suggest that this behaviour should be included in the examples of paragraph 54F(2)(g).

4.3 Behaviour by an adult directed to a current / former partner

Legal Aid NSW supports this element. While we acknowledge that coercive control appears in family violence situations such as elder abuse, as stated in our submission to the NSW parliamentary inquiry into coercive control, we consider that the risks of capturing non-criminal behaviour and a broader range of relationships outweigh the benefits of potential criminalisation of coercive control in a broader range of exploitative relationships, and the offence should therefore be confined to intimate partner/ex-partner relationships only.

However, we suggest that the draft Bill be amended to make clear that the offence is limited to behaviour in respect of the same parties (as opposed to different complainants).

4.4 Intention or recklessness to cause physical or mental harm

We do not support the proposed offence applying to reckless conduct. As per our submission to the Joint Select Committee Inquiry, we submit that any proposed offence of coercive control should apply to knowing and persistent behaviour, and not apply to reckless conduct. While we acknowledge that the inclusion of reckless conduct may capture a wider net of perpetrators of coercive control, we hold serious concerns about the use of this provision by perpetrators to further perpetuate systems abuse on a victim.

This would be consistent with the existing stalk/intimidate offence in the *Crimes (Domestic and Personal Violence) Act 2007*, which does not apply to reckless conduct. The current stalk/intimidate offence is broad and already captures a wide range of behaviours. We again reference the recent BOCSAR findings regarding the trends in domestic violence-related stalking and intimidation offences over the period 2012 to 2021, which highlighted the significant increases in both stalking/intimidation incidents recorded by NSW Police, the increased police legal proceedings for domestic violence-related stalking/intimidation incidents, and the pronounced effect on Aboriginal and Torres Strait Islander people.

Since our submission to the Joint Select Committee Inquiry, having had the benefit of the Inquiry report, consideration of the current draft Bill and consultation with our colleagues in the legal sector, we consider that a different approach is necessary, to narrow the scope of the proposed offence to address any potential overreach and unintended impacts on vulnerable communities. Specifically, we consider that section

54D of the draft Bill should be redrafted to better capture the nature of coercive and controlling behaviour and instead focus on behaviour where the person intends the course of conduct to coerce or control the other person. That is, the fault element of the offence is an intention to control an intimate partner in some way.

Legal Aid NSW supports the alternative drafting proposed by the NSW Bar Association, to replace section 54D(1)(c) with the following formulation:

(c) the person intends the course of conduct to coerce or control the other person.

4.5 Reasonable person would consider behaviour likely to cause fear of violence or serious impact on day to day actions

We submit that the objective test is an important safeguard, particularly where the proposed offence does not require particulars of individual incidents or offences to be proven. We note that consideration 'in all the circumstances" gives appropriate discretion to the fact finder to assess the features of both the victim and the defendant. For example, this would enable the court to take into consideration the particular characteristics of the defendant, such as whether they have:

- a cognitive impairment or mental health condition, or
- less power in the relationship than the victim.

4.6 Defence – conduct reasonable in all the circumstances

We support this element. We also note that given that these prosecutions may take place after a passage of time, the duty on the accused to raise a defence, even if only on balance, may be hindered by an inability to locate and find evidence to support such a claim. It will be further complicated if the prosecution is not required to provide particulars. We note that it is markedly different to defending, for example, an affray charge, where a reasonable excuse can be raised, or a self-defence charge, where the reasonable excuse is raised on balance, and must be rebutted by the prosecution once raised. In those situations, the accused knows exactly the time, place and particulars of the accusation against them.

Therefore, we are concerned that this safeguard in the proposed legislation may not adequately protect against the risk of miscarriage of justice in the absence of the offence elements requiring greater particularisation.

4.7 Penalty

We note that the proposed offence carries a higher maximum penalty than assault and intimidation offences. If there is a combination of assault, intimidation and coercive control charges, as coercive control carries the higher penalty, officers in charge will consider it to be the primary charge and are unlikely to withdraw it on a plea

negotiation. We are concerned that a lack of a requirement of particulars may lead to many defendants entering inappropriate pleas of guilty.

We recommend that the penalty for the proposed offence of coercive control match the penalty for intimidation, destroy/damage property or actual bodily harm (i.e. five years).

4.8 Indictable offence dealt with summarily

The proposed new offence in section 54D of the draft Bill should be a Table 1 offence, for the purpose of Chapter 5 of the *Criminal Procedure Act 1986* (NSW), rather than a Table 2 offence, as currently set out in Schedule 4 of the draft Bill.

4.9 Capturing past behaviour

The accompanying factsheet to the draft Bill states that the proposed laws will only apply to behaviour that happens once the laws are passed by Parliament and then commence. The factsheet then states that violent or threatening behaviour that occurred before the new laws pass may nonetheless be criminal under other, existing offences. However, under the current draft Bill, there does not appear to be any barrier to the prosecution relying on behaviour which occurred well before the introduction of the legislation to establish the "course of conduct" and "abusive behaviour" elements of the new offence.

To support the intent of this principle, we suggest an amendment in the draft Bill to confirm that the new offence will only apply to conduct or abusive behaviour which occurred following the commencement of the legislation.

4.10 Three-year statutory review

Legal Aid NSW strongly supports this element. However, in our view, it would be preferable to await and consider the evaluations of the coercive control offences in other jurisdictions, such as Ireland and Scotland, before introducing any proposed offence of coercive control in NSW.

We would also support regular and ongoing reviews of the new offence, to monitor its implementation and to support the early identification of any unintended consequences. The regular review periods should be legislated, and the outcome of these reviews should be tabled in Parliament within a specified time period, modelled on the legislated requirements to monitor the recently introduced communicative consent reforms.[21]

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

5. Definition of domestic abuse

We welcome the introduction of a definition of domestic abuse in the *Crimes (Domestic and Personal Violence) Act 2007,* as set out in section 6A of the draft Bill [Schedule 2[2]], as recommended by the Joint Select Committee Inquiry. However, we are concerned that inserting a definition into the *Crimes (Domestic and Personal Violence) Act 2007* risks this definition being used to cover the field. Therefore, it is important that the definition accurately and appropriately captures all forms of abuse. Reference should be made to the *Family Law Act 1975* (Cth) in this regard.

We submit that the definition of 'domestic abuse' should also explicitly capture psychological abuse (contrasted with emotional abuse), isolation, and should also capture reproductive coercion.[22]

We welcome the recognition that domestic abuse includes circumstances where a perpetrator exposes a child to domestic abuse. However, we seek clarification as to whether this provision could be used to prosecute primary victims who do not leave or do not adequately protect their child, and the child is subsequently exposed to violence perpetrated on the primary victim.

As outlined above, Legal Aid NSW frequently assists clients whose intimate partners threaten their visa or immigration status as a way to control and coerce them. We suggest that this behaviour should be included in list of examples of domestic abuse in section 6A(2).

[22] Joint Select Committee on Coercive Control Report 1/57, *Inquiry into coercive control in domestic relationships* (June 2021), 14, 40.