THE LAW SOCIETY
OF NEW SOUTH WALES

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By email: Sallie.McLean@justice.nsw.gov.au

Dear Ms McLean,

Exposure draft Crimes Legislation Amendment (Coercive Control) Bill 2022

Thank you for the opportunity to comment on the exposure draft Crimes Legislation Amendment (Coercive Control) Bill 2022 (the draft Bill).

We have a number of concerns with the draft Bill, relating to its complexity, the potential breadth of the offence and the procedural fairness consequences for an accused as a result of the lack of a requirement for particularisation. The offence, which carries a maximum term of seven years imprisonment, should capture a calculated, persistent, and manipulative course of conduct that is necessarily intended to cause coercive control of a person. Specific intent is an essential safeguard - recklessness is too low a threshold.

In our view, the offence, as presently formulated, will be difficult for accused, complainants and juries to understand. At the outset, we suggest the offence itself expressly incorporate the terminology of coercive control.

In order to be effective, the offence should be narrowly prescribed. The current broad brush offence in the draft Bill risks criminalising dynamics and behaviour within intimate relationships that do not warrant moral, let alone criminal, sanction.

As we submitted to the Parliamentary Inquiry, we consider the essential elements of any new offence to be as follows:

1. A person intentionally engages in a pattern of persistent coercive and controlling behaviour (the behaviour).
2. The person intends by the behaviour to cause fear of serious harm to an intimate partner or former partner.
3. The behaviour causes the victim to fear serious harm.
4. The behaviour is not reasonable in the circumstances.

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Amendments to the *Crimes Act 1900*

Course of conduct

"Course of conduct" is defined as "engaging in behaviour repeatedly or continuously" (s54G(1)), and does not specify a minimum number of incidents.

We consider the concept of persistence is vital, (as used in the Irish model) to properly capture the nature of coercive controlling behaviour. In our view, the new offence should require a minimum number of three acts of abusive behaviour that take place as part of a pattern of behaviour. Each incident that is alleged to be abusive behaviour should be particularised on the indictment (see further below).

We note that the existing persistent sexual abuse of a child offence in s66EA of the *Crimes Act 1900* requires at least two acts. Given the conduct being targeted under the new offence may be otherwise lawful conduct (e.g. withholding of finances) we consider that a requirement of at least three instances of coercive/controlling behaviour would be appropriate.

Meaning of "abusive behaviour"

We consider the current definition is too broad and should be limited to behaviour that consists of, or involves, coercion or control of the person against whom the behaviour is directed. The conduct specified in s54F(1)(a) i.e. behaviour involving violence or threats against, or intimidation of, a person is already captured by existing offences and should be deleted.

We do not support inclusion of conduct involving "repeated derogatory taunts" in s54(2)(d). Such behaviour is typical in many households. As presently drafted, police could charge (and bail refuse) an individual who is heard swearing at their partner multiple times during the course of one incident. We do not consider training will be sufficient to prevent this, and the appropriate safeguard to prevent over-policing should be in the offence itself. We consider that prescribing such behaviour will lead to further over-policing of Aboriginal communities, who are already disproportionately policed for offensive language.

Specific intent

Section 54D(1)(c) provides that the person must intend to cause, or be reckless as to causing, physical or mental harm to the other person by engaging in the course of conduct.

As stated above, the offence should capture a calculated, persistent, manipulative course of conduct that is necessarily intended to cause coercive control of a person, similar to the Irish model. Specific intent is a very important safeguard. In our view, recklessness is too low a threshold and we submit that s54D(1)(c)(ii) should be deleted.

As an alternative approach, we would support the NSW Bar Association's suggestion that the appropriate mens rea would be an intention to unreasonably coerce or control the victim.

Proof of fear of violence or adverse impact

Section 54D(1)(d) does not require proof of a fear of violence or adverse impact – "*whether or not the fear or impact is in fact caused*".

There is good reason for including proof of actual fear, in contrast to the existing stalk/intimidate offence which does not require proof that the person alleged to have been

stalked or intimidated actually feared physical or mental harm. This is because, as we understood the original intent of a 'coercive control' offence, the gravamen of the offence is deliberate behaviour that causes fear – the nature of the physical act is not as relevant as the conduct itself.

It is difficult to understand the rationale for the offence if the requirement for a fear of violence or adverse impact is removed. If the conduct is not causing a fear of violence or an adverse impact, we query whether it is accurately described as coercive control, particularly when the individual incidents are not required to be criminal offences, and the bar has been lowered to include recklessness.

We submit that the phrase "*whether or not the fear or impact is in fact caused"* should be deleted.

Particularisation

The draft Bill specifies that the prosecution is not required to allege particulars, and the trier of fact is not required to be satisfied of particulars of any incident that would be necessary if the incident was charged as a standalone offence (subsections 54H(1), 54H(2)).

The accused and the court need to know what the particulars are, and the nature and quality of the alleged pattern of behaviour, in order for the accused to know the case against them, and for the court to make proper rulings about the scope of context and relationship evidence. Without identifying with fair precision the case against the accused, it creates unfairness and may result in protracted proceedings where significant relationship and context evidence become unnecessarily disputed issues.

It is necessary for the offence to be properly defined both at law, and in each particular case, for the criminal law to be effective at identifying behaviour to both the community and offender that constitutes a criminal wrong in order for it to have a deterrent effect. Clarity is especially important if the criminal law is to achieve general deterrence and denunciation.

We also note that a lack of particularisation could cause significant difficulties for sentencing, as the sentencing court may have limited guidance regarding the number and severity of the incidents that amount to the coercive conduct, and therefore determine the objective seriousness of the offence in question. The Court of Criminal Appeal decision of *R v B* [2022] NSWCCA 142, highlights the dangers of a vague offence (in the context of s66EA *Crimes Act 1900*). The Court referred to the offence inviting "a lax approach to police questioning of the complainant" where "further questions may have elicited sufficient particulars to have enabled substantive charges to be submitted to the jury" (at [73]-[74]), and requiring the judge to undertake a fact-finding exercise on sentence (at [66] – [76]).

<u>Section 54H(1)</u>

The apparent aim of this particularisation limitation is to enable a prosecution to succeed even if not all incidents are made out, or the prosecutor cannot prove each particular in the way that it would be proven if it were a standalone charge.

The narrow drafting in s54H(1)(b) is problematic as this drafting suggests the prosecution should only have to disclose the nature of the behaviours and the period of conduct.

An alternative, and in our view, more desirable, approach to s54H(1) would be to delete current s54H(1)(a), and for the provision to be to the following effect:

(1) In proceedings for an offence under section 54D(1), the prosecution is required to allege –

(i) the nature and description of the abusive behaviours that amount to the course of conduct, and

(ii) the particulars of the period of time over which the course of conduct took place, and

(iii) any specific incident relied upon.

Section 54H(2)

In our view, the drafting in s54H(2)(b) is too wide, and will have the effect of allowing a prosecutor to not prove underlying conduct that is still relied upon.

We suggest consideration of the following alternative drafting:

(a) the trier of fact must be satisfied beyond reasonable doubt that the evidence establishes a course of conduct that is abusive behaviour, particularly:

(i) any specific incident relied upon,
(ii) any course of conduct relied upon,
however,

(b) the trier of fact is not required to be satisfied of the elements of an uncharged offence that may be made out by any incident or course of conduct relied upon.

(c) nothing in this Part affects the operation of the Evidence Act 1995.

This is consistent with the prosecution obligation of particularisation, the burden and standard of proof required of matters central to the prosecution case. It also provides clarity for the parties in respect of which issues of fact are determined, which makes clear the boundaries of double jeopardy, and ensures that the evidence led will not derogate from the law of evidence.

Children

We are pleased that children as defendants have been excluded from the offence. Children are emotionally immature, and the type of conduct that the offence is trying to capture involves a certain level of manipulation and sophistication. We note that the Apprehended Domestic Violence Order (ADVO) regime is available to children, and the current grounds for an ADVO are very broad.

Amendments to the civil ADVO scheme

We understand that the new expansive definition of "abusive behaviour" in s6A of the *Crimes (Domestic and Personal Violence) Act 2007*, is largely for educative purposes, and does not expand the s16 grounds for an ADVO, except indirectly where the person in need of protection fears the commission of the offence of abusive behaviour.

We welcome confirmation that the intent of this aspect of the Bill will be included in police, prosecution, and judicial training, to avoid significant broadening of the civil ADVO scheme.

Training and reviews

We are concerned that there may not be the specialist training for police to deal with the offence, which is likely to be quite complex. This could result in the offence being applied very broadly and unfairly. We note the recent report by the NSW Bureau of Crime Statistics and Research found that domestic violence-related stalking and intimidation incidents recorded by NSW police more than doubled over the past 10 years to 2021. Aboriginal people were most impacted by the increase, with legal proceedings against Aboriginal people increasing by 274% (compared to 134% among the general population),[1] and Aboriginal adults accounting for 52% of custodial penalties for stalking/intimidation offences in 2021.[2]

We therefore suggest that the initial review of the operation of the legislation take place 18 months after the commencement of the legislation, and provision be made for subsequent and ongoing reviews.

It is essential that there is ongoing and comprehensive training on the offence for police, prosecutors, legal practitioners, and judicial officers. We suggest that a report detailing the education and training undertaken on the new offence should be tabled six months before the commencement of the legislation. We also support the creation of an independent legislative implementation and monitoring body consisting of representatives from all relevant key stakeholders.

The Law Society contact for this matter is Rachel Geare, Senior Policy Lawyer, who can be reached on (02) 9926 0310 or at rachel.geare@lawsociety.com.au.

Yours sincerely,

Joanne van der Plaat
President

[1] NSW Bureau of Crime Statistics and Research, *Trends in domestic violence-related stalking and intimidation offences in the criminal justice system: 2012 to 2021*, June 2022, p9.
[2] Ibid., p1.