

31 August 2022

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Department of Communities and Justice
New South Wales Government
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Submitted via email: policy@justice.nsw.gov.au

Dear Sir/Madam

RE: Crimes Legislation Amendment (Coercive Control) Bill 2022

The Australian Psychological Society (APS) is Australia's largest psychological association with more than 28,000 members. We welcome the NSW Government's commitment to respond to the recommendations of the Parliamentary Joint Select Committee on coercive control with the exposure draft of the Crimes Legislation Amendment (Coercive Control) Bill 2022. We are pleased to have this opportunity to provide feedback on whether this draft Bill will meet its purpose to criminalise coercive control.

Likewise, the APS commends the NSW Government's intention to approach any legislative reform with care and consideration for those who are victims and survivors of coercive control to ensure that they are assisted by this legislation rather than put at further risk.

As with all our work at the APS, we consider this current consultation in light of the Sustainable Development Goals (SDGs)¹. Of particular relevance is SDG 3: Good health and wellbeing; SDG 5: Gender equality; SDG 10: Reduced inequalities¹; and SDG 16 which aims to "provide justice for all, and build effective, accountable and inclusive institutions at all levels"².

Our feedback on the draft exposure bill focuses on two aspects of the proposed legislation: allowing evidence of actual harm and ensuring that the 'course of conduct' considers the effect of the perpetrator's behaviour over time.

Evidence of harm

Recommendation 1: Allow, but do not require, evidence of actual harm to meet the criteria for the offence in proposed section 54D.

- The APS recognises that the 'reasonable person' test in proposed section 54D(1)(d) is intended to place the focus of the offence on the perpetrator's behaviour. This objective construction stands in contrast with other legislative models which require evidence of actual harm to the victim-survivor.
- We also acknowledge the psychological impact of victim-survivors participating in a coercive control prosecution.

In particular, we recognise the potential retraumatisation and distress of victim-survivors being required to provide evidence of actual harm caused by the perpetrator's behaviour, if the legislation were to impose this evidentiary burden.

- However, we are concerned that the objective 'reasonable person' test in proposed section 54D closes the possibility for any evidence of fear or impact to be adduced at trial. Such evidence of actual harm may be important, if not critical to, a prosecution in circumstances where the coercive conduct is not amenable to the 'reasonable person' standard.
- Coercive control emerges within the intersubjectivity of an intimate relationship. That is, the meaning of behaviour – including its coercive effect – emerges within the particularities, history and context of a given relationship. While in most cases we might expect that a 'reasonable person' will be able to identify a link between a perpetrator's behaviour and the likely fear of violence or adverse impact that it would cause, this is not always the case. Behaviours can be coercive in the nuanced context of a relationship in ways which may not, on the surface, appear to be so to an objective 'reasonable person'.
- For example, as we pointed out in our response to questions taken on notice to the Joint Select Committee on Coercive Control Public Hearing on 23 February 2021, the giving of flowers by a perpetrator may be coercive if this is a reward for the victim-survivor cancelling social activities in a way that perpetuates their social isolation. Without considering the totality of behaviour in context, focusing on isolated snapshots of behaviour in this instance may distract from underlying coercive actions as experienced by the victim-survivor.
- The 'reasonable person' test also potentially constrains the range of behaviour that is considered coercive in ways that are not sensitive to culture, sexualities and other personal and interpersonal dimensions of the relationship.
- The required objectivity of the 'reasonable person' test in proposed section 54D may operate not only to erase or delegitimise the lived experience of victim-survivors, but also to deny victim-survivors a voice to be able to demonstrate the effect of the perpetrator's actions. The adverse psychological impacts of such injustice are contrary to the purpose of the Bill.
- This gap may be remedied by amending proposed section 54D to allow, *but not to require*, the offence to be established where there is actual harm to the victim-survivor. That is, we propose that the (objective) reasonable person test be retained but be supplemented with an alternative criterion of (subjective) actual harm in the form of fear of violence or serious adverse impact. We would also suggest the inclusion of a legislative safeguard to protect against any adverse inference being drawn if evidence of actual harm is not adduced.
- Coercive control is a form of abuse which is grounded in the psychological realities of the victim-survivor, the perpetrator and the relationship. We believe that psychologists have an important role in ensuring that victim-survivors are heard and that coercive behaviour is appropriately prosecuted. Evidence from psychological assessments of the victim-survivor, if they choose to provide such evidence, would be highly probative to show the very real, significant and lasting effects of a perpetrator's actions within the context of the relationship. The legislation should reflect this position.

Course of Conduct

Recommendation 2: Revise the definition of 'course of conduct' to include the temporal effect of the coercive behaviour

- The definition of 'course of conduct' in proposed section 54G operates to limit coercive conduct to behaviour that is repeated or continuous. The APS is concerned about the ambiguity introduced by this provision: how many instances of coercive behaviour constitutes repeated behaviour, and how long must the behaviour persist to be continuous? Is there, therefore, a level of coercive behaviour which is implicitly acceptable because of its brevity or infrequency? We strongly suggest that there is not.

- We suggest revising proposed section 54G to consider not only the temporal dimensions of the perpetrator's behaviour, but also to consider the temporal effect of the behaviour on the victim-survivor. The legislation should recognise that a perpetrator may engage in a brief or unrepeatable instance of coercive behaviour, but that this can have a long-lasting, if not permanent, impact.
- For example, a perpetrator may engage in a single instance of manipulation or deception about the victim-survivor's family which fundamentally alters those relationships in a destructive way, leading to isolation and reduced autonomy. There is arguably no 'continuous' or 'repeated' behaviour here for the purposes of proposed section 54G, but the effect on the victim-survivor is one of continuous and repeated adverse impact.
- Again, we believe that evidence from psychological assessment with the victim-survivor, voluntarily provided, would be able to identify the temporal impact of even limited instances of coercive behaviour. Allowing such evidence to be adduced, supplementing objective temporal considerations of the perpetrator's behaviour, would enhance the effectiveness of the Bill in facilitating the prosecution and elimination of coercive control in NSW.

Thank you again for the opportunity to provide our feedback on the exposure draft Crimes Legislation Amendment (Coercive Control) Bill 2022. If any further information is required from the APS, I would be happy to be contacted through my office on (03) 8662 3300 or by email at z.burgess@psychology.org.au

Kind regards,

Dr Zena Burgess, FAPS FAICD
Chief Executive Officer

References

¹ United Nations Department of Economic and Social Affairs. (2022). *Sustainable Development*. <https://sdgs.un.org/>

² United Nations Department of Economic and Social Affairs. (2022). *Goal 16—Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels*. <https://sdgs.un.org/goals/goal16>