ANROWS

AUSTRALIA'S NATIONAL RESEARCH ORGANISATION FOR WOMEN'S SAFETY
to Reduce Violence against Women & their Children

Attention: Committee Secretary
Legal Affairs and Safety Committee
Parliament House
George Street, Brisbane QLD 4000
By email: LASC@parliament.qld.gov.au

Response to the Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Bill 2022

Dear Committee Secretary,

ANROWS thanks you for the opportunity to make a submission in response to the Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Bill 2022 (the Amendment Bill 2022).

ANROWS is an independent, not-for-profit company established as an initiative under Australia's first *National Plan to Reduce Violence against Women and their Children 2010–2022*. Our primary function is to provide an accessible evidence base for developments in policy and practice design for prevention and response to violence against women, nationally. Every aspect of our work is motivated by the right of women and children to live free from violence and in safe communities. We recognise, respect and respond to diversity among women and children, and we are committed to reconciliation with Aboriginal and Torres Strait Islander Australians. ANROWS continues to deliver and develop this function under the new *National Plan to End Violence against Women and Children 2022–2032*.

Primary funding for ANROWS is jointly provided by the Commonwealth and all state and territory governments of Australia. ANROWS is also, from time to time, directly commissioned to undertake work for an individual jurisdiction, and successfully tenders for research and evaluation work. ANROWS is registered as a harm prevention charity and deductible gift recipient, governed by the Australian Charities and Not-for-profit Commission (ACNC).

This submission draws on the submission ANROWS made to the Department of Justice and Attorney-General (Qld; ANROWS, 2022) as well as the ANROWS body of research.

Yours sincerely

Padma Raman PSM
Chief Executive Officer

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Australia's National Research Organisation for Women's Safety Limited
PO Box Q389, Queen Victoria Building, NSW, 1230
ABN 67 162 349 171
Phone *+61 2 8374 4000* ***anrows.org.au***

Overall feedback

ANROWS commends the efforts made to strengthen existing legislation in Queensland to address domestic and family violence (DFV). This is consistent with ANROWS's recommendations in our response to the Women's Safety and Justice Taskforce's (the Taskforce) first discussion paper (ANROWS, 2021b), and ANROWS's submission to the Department of Justice and Attorney-General (ANROWS, 2022). The second consultation draft of the *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Bill 2022* (the draft Bill) includes evidence-based amendments to existing legislation that will support the safety of victims and survivors when applied appropriately. ANROWS research supports broader systemic reform, including legislative and non-legislative reform to support victims and survivors of DFV. The second consultation draft is a good first step for this much-needed reform (ANROWS, 2021a).

ANROWS notes that this request for submissions calls for feedback on any elements of the draft Bill. ANROWS's submission focuses on the following key elements:

- the introduction of a definition of DFV that captures it as a "pattern of behaviour" rather than isolated incidents
- a focus on identifying and supporting the safety of the person most in need of protection in the case of cross-applications and cross-orders
- amendments to the *Evidence Act 1977* (Qld) that allow for victims and survivors to be treated as protected persons for the purposes of cross-examination, lift restrictions on the types of evidence on the history of domestic violence that are permitted in court, and allow for expert evidence and jury directions to address stereotypes and misconceptions around DFV.

Definition of domestic and family violence

ANROWS is pleased to note that the draft Bill includes amendments to the definitions of domestic violence, emotional or psychological abuse, and economic abuse in the *Domestic and Family Violence Protection Act 2012* (Qld) to include reference to a "pattern of behaviour". The draft Bill notes that this pattern of behaviour may occur over a period of time and may comprise a series of acts that are together considered to be threatening, abusive and coercive, or which cause fear. The draft Bill states that this behaviour or pattern of behaviours must be considered in the context of the relationship between the victim and survivor and the perpetrator as a whole.

This definition is consistent with ANROWS evidence that recognises DFV, specifically coercive control, as a pattern of behaviour within relationships that results in fear (Stark & Hester, 2018). Recent ANROWS research, *Accurately identifying the "person most in need of protection" in domestic and family violence law* (Nancarrow et al., 2020), identifies that police responses to DFV are often incident-based, and focus on responding to a single incident of DFV behaviour. This response to DFV risks missing circumstances of coercive control and/or misidentifying the victim and survivor of domestic violence as the perpetrator when they have engaged in self-defence (ANROWS, 2021a; Nancarrow et al., 2020). ANROWS emphasises that behaviours that constitute coercive control are tailored to the context of the relationship, situation, and the victim and survivor; that these behaviours evolve over time; that the behaviours respond to the actions of the victim and survivor; and that they may look innocuous to bystanders (Tarrant et al., 2019). The legislative definition of DFV as comprising behaviours or a pattern of behaviour

should, when combined with training and resourcing, help to address trends of incident-based policing.

ANROWS notes that the current *Domestic and Family Protection Act 2012* (Qld) defines a relevant relationship for the purposes of the Act as covering intimate, family and informal care relationships. ANROWS cautions that, in expanding the scope of the Act, care needs to be taken to ensure that young people are not inappropriately captured by the legal system to address issues that are more effectively addressed outside of the legal system (see ANROWS research on adolescent violence in the home: Campbell et al., 2020; Fitz-Gibbon, Meyer, Boxall et al., 2022; Fitz-Gibbon, Meyer, Maher et al., 2022).

Cross-applications and the person most in need of protection

The concept of the person most in need of protection was initially proposed in a joint report by the Australian Law Reform Commission and the New South Wales Law Reform Commission (2010, p. 410) to assist with distinguishing between the aggrieved and respondent in court cases. It has since been included in the provisions of the *Domestic and Family Violence Protection Act 2012* (Qld) and in the principles of the *Restraining Orders Act 1997* (WA) in 2016. Nancarrow et al. (2020) identified that the concept of the person most in need of protection has been introduced as a mechanism to help guide decisions around cross-applications and cross-orders for DFV protection orders.

ANROWS is pleased to note that the draft Bill addresses the issue of cross-applications and cross-orders against victims and survivors of DFV. Section 4 of the current *Domestic and Family Protection Act 2012* (Qld) outlines principles for administering the Act which state that, in cases of cross-applications and cross-orders, the person most in need of protection in the relationship should be identified. The draft Bill expands this principle to provide that only one domestic violence order should be in force, covering the person most in need of protection. This is reinforced by the proposed introduction of s 41G, which states that the court must decide who the person most in need of protection in the relationship is and must dismiss the cross-application or reduce the duration of any existing order so that it ends. The draft Bill also removes the ability for the court to hear cross-applications or cross-orders separately, requiring them to be heard together. Only in exceptional circumstances where both parties appear to be in need of protection and it is not possible to identify the person most in need of protection can the court consider granting more than one domestic violence order. ANROWS encourages the committee to ensure that victim and survivor safety is not diminished by the requirement to hear cross-orders simultaneously and enshrine a degree of flexibility to accommodate exceptional circumstances which may warrant separate hearings. Nancarrow et al. (2020, p. 96) identify that misidentification of victims and survivors as perpetrators of DFV can occur where women do not present as the stereotypical and “ideal victim”, especially if they don't appear to be "powerless" or "submissive". Nancarrow (2016, 2019) notes that women who engage in self-defence are more likely to use weapons in order to address their strength disadvantage and can sometimes therefore cause more visible injuries. When incident-based responses to DFV, which often prioritise physical violence, are used by police or courts, women using self-defence can be misidentified as perpetrators (Nancarrow et al., 2020). This can contribute to women’s imprisonment and disproportionately impacts Aboriginal and Torres Strait Islander women (Douglas & Fitzgerald, 2018; Nancarrow, 2016, 2019; Nancarrow et al., 2020). Misidentifying victims and survivors as perpetrators of DFV can also undermine their confidence in the legal system and deny them access to appropriate support (Nancarrow et al., 2020).

The misidentification of victims and survivors as perpetrators of DFV can also occur where a perpetrator engages in systems abuse through legal processes (Douglas & Chapple, 2019; Mansour, 2014; Reeves, 2019; Ulbrick & Jago, 2018). Systems abuse is defined as the "abuse or manipulation of legal systems and processes by perpetrators to exert power and control over the victim/survivor" (Douglas & Chapple, 2019 as cited in Nancarrow et al., 2020, p. 8). In the context of cross-applications and cross-orders, perpetrators can perpetrate systems abuse by making retaliatory applications for protection orders (Nancarrow et al., 2020). Cross-applications and cross-orders can be intended to intimidate the victim and survivor to withdraw their own application, or can be used to deplete the victim's and survivor's financial and emotional resources (Douglas & Chapple, 2019; Kaspiew et al., 2017; Miller & Smolter, 2011; Reeves, 2019; Wangmann et al., 2020).

The extent to which the concept of the person most in need of protection can be applied in police and legal processes and systems can be limited by other systemic factors. While training on legislative concepts for police and judicial officers is needed, this alone is not sufficient to ensure that understanding is translated into action (Nancarrow et al., 2020). Nancarrow et al. (2020) identified that, in Queensland and elsewhere, current organisational cultures and unclear guidelines can result in police reverting to incident-based responses to DFV that prioritise physical violence. Nancarrow et al. (2020) also identified that current systems for courts to identify when an application is a cross-application need improvement, and noted a lack of clarity for magistrates around the ability to dismiss, strike out, or revoke orders, and when this can be done. The requirement for cross-applications to be heard together that has been introduced in the draft Bill should help to address this issue. To ensure full effectiveness, ANROWS recommends that the draft Bill be supported by training and guidance for police and judicial officers, as well as resourcing to ensure that increased understanding can be translated into practice (see ANROWS, 2022).

Amendments to the Evidence Act

ANROWS is pleased to note amendments to the *Evidence Act 1977* (Qld) that are intended to improve the experiences of and outcomes for victims and survivors in courts. ANROWS research suggests that these proposed amendments will support legal actors to realistically assess the nature of the relationship between the victim and survivor and the perpetrator and therefore to decide the most appropriate legal course of action (ANROWS, 2022; Tarrant et al., 2019). As these changes are modelled on Western Australian provisions (ss 37–39) in the *Evidence Act 1906* (WA) and the Victorian *Crimes Act 1958* (ss 322J, 322K, 322M), there are opportunities to learn from operational advice from these jurisdictions (ANROWS, 2022).

Expanding cross-examination of protected witnesses

ANROWS is pleased to note that the draft Bill incorporates alleged victims and survivors of a DFV offence into the protected witness scheme through amendments to s 21M of the *Evidence Act 1977* (Qld). This amendment means that, when an accused perpetrator is unrepresented in court, they are not permitted to directly cross-examine the victim and survivor. While existing legislation, such as the *Family Law Amendment (Family Violence and Cross-Examination of Parties) Act 2018* (Cth), does provide protections to victims and survivors in some circumstances (Wangmann et al., 2020), Volume 3 of the Taskforce's report (2021) indicated that there was a lack of clarity on when broader legislation could be applied, leaving open the possibility for victims and survivors to be directly cross-examined by a perpetrator.

Improving protections for victims and survivors as witnesses is important as the legal system offers a potential realm for systems abuse by perpetrators. In an inquiry into the family law system conducted by the House of Representatives Standing Committee on Social Policy and Legal Affairs (HRSCSPLA; 2017), most participants strongly supported addressing the issue of direct cross-examination by perpetrators in family law matters. A number of submissions to the inquiry highlighted that cross-examination by perpetrators constitutes an abuse of process (HRSCSPLA, 2017). The experience of cross-examination can also cause significant distress. A study by Carson et al. (2018) indicated that direct cross-examination in court can cause one or both parties to demonstrate emotional, aggressive, or argumentative behaviour or responses. Furthermore, Carson et al. (2018) identified that direct cross-examination can have stressful and/or traumatising effects, which may call into question the quality of the evidence provided by witnesses. The safety and wellbeing of victims and survivors is at high risk during impending or actual separation from a perpetrator (Wangmann et al., 2020). In a study of intimate partner homicides (IPHs) in New South Wales between 2008 and 2016, actual or impending separation was a characteristic in 47 per cent of IPHs (NSW Domestic Violence Death Review Team, 2020, p. 154). It is therefore unsurprising that many women fear for their safety while in court, particularly where there is a history of public violence from the perpetrator (see Wangmann et al., 2020). As such, removing opportunities for systems abuse by perpetrators through direct cross-examination of victims and survivors is positive progress.

ANROWS suggests that specific lessons can be learned from other jurisdictions to inform the implementation of the amendment to expand the cross-examination of protected witnesses. The research report *"No straight lines": Self-represented litigants in family law proceedings involving allegations about family violence* (Wangmann et al., 2020) provides useful guidance and insights from the implementation of the NSW Family Violence and Cross-Examination Scheme that should be considered for the Queensland context. These insights included the following:

- There had been a substantial underestimation of the number of cases that would qualify under the Scheme, which resulted in delays and which could impact the scheme's ongoing viability.
- There was a potential for misuse of the Scheme by perpetrators as a method to gain access to free legal representation.
- There was a lack of clarity around the parameters of legal representation.
- There was a responsibility for raising the relevance of the Scheme, which could sometimes fall to self-represented litigants.

History of domestic and family violence

ANROWS commends the amendments which remove s 132B of the *Evidence Act 1977* (Qld), and the introduction of s 103CA which provides a non-exhaustive list of evidence that may indicate domestic violence. The amendment removes restrictions on the types of offences that can be provided as evidence and allows this evidence to be admissible regardless of whether it relates to the defendant, the victim and survivor, or another person related to the offence. This allows the amendment to operate effectively alongside the provision for expert evidence, which is discussed below. These changes reflect contemporary understandings of DFV and coercive control as constituting a "pattern of behaviour" (ANROWS, 2021a). In cases where coercive control is present, this may help to identify evidence of domestic violence that would otherwise be overlooked, such as seemingly innocuous behaviours that contribute to a relationship of control and coercion (Tarrant et al., 2019).

This amendment is also relevant in cases where a victim and survivor has used self-defence against a perpetrator causing physical injury or death. Nancarrow et al. (2020) identified that

victims and survivors who engage in self-defence against a perpetrator can be misidentified as perpetrators by police or in judicial proceedings. This contributes to women's imprisonment and has been identified as disproportionately impacting Aboriginal and Torres Strait Islander women (Douglas & Fitzgerald, 2018; Nancarrow, 2016, 2019; Nancarrow et al., 2020). This amendment addresses a need raised by Nancarrow et al. (2020) for magistrates and police to be supported by guidelines and processes to ensure that histories of domestic violence in relationships are considered in their decision-making in order to avoid misidentification.

ANROWS emphasises that judicial training in coercive control and a shift away from hierarchical understandings of violence that prioritise physical violence will support the implementation of this amendment. Ensuring that judicial officers have a nuanced understanding of coercive control and DFV will support those officers who are presented with a criminal and DFV history in court to be able to assess the context of the relationship between the victim and survivor and perpetrator as a whole (see ANROWS, 2022). For example, judicial officers may be better placed to identify instances of victims and survivors engaging in retaliatory violence as self-defence (see ANROWS, 2020, 2021a; Nancarrow et al., 2020), or to recognise that the criminal and DFV history provided to the court may only represent the officially recorded instances of abuse and not capture the whole story (ANROWS, 2022). This is particularly important for groups who have experienced barriers in the legal and judicial systems and/or who are at increased risk of being misidentified as perpetrators, such as Aboriginal and Torres Strait Islander women (ANROWS, 2022; Douglas & Fitzgerald, 2018; Nancarrow, 2016, 2019; Nancarrow et al., 2020).

Jury directions

ANROWS is pleased to note that the draft Bill inserts new sections into the *Evidence Act 1977* (Qld) that enable the judge to give directions to the jury that are intended to proactively address common stereotypes and misconceptions about DFV and provide the jury with factors that can impact victims and survivors. The inclusion of the directions set out in the draft Bill is positive, as findings from ANROWS's *National Community Attitudes towards Violence against Women Survey* (NCAS) suggest that community understandings of DFV and coercive control may not currently align with the aims of the reforms (Webster et al., 2018).

The 2017 NCAS indicated that, while most Australians recognise that violence against women comprises a continuum of behaviours, respondents were more likely to identify obvious physical violence or forced sex as DFV rather than non-physical forms of violence such as emotional, social, and financial abuse and control (Webster et al., 2018). This does not align with evidence-based understandings and definitions of DFV and coercive control that include both physical and non-physical behaviours. The hierarchy of violence that prioritises physical violence also does not align with existing evidence on IPH. A review conducted by the NSW Domestic Violence Death Review Team (2020, p. 68), which examined cases of IPH between 2000 and 2019 where female victims were killed by former intimate partners, found that "a number of its cases were not preceded by an evident history of physical abuse – instead homicides were preceded by histories of other forms of coercive and controlling behaviour". We also know that separation, or intent to separate, can be a risk factor for lethal violence (Boxall et al., 2022). As such, it is important that juries are aware of the breadth of physical and non-physical behaviours that can constitute DFV.

Findings from the 2017 NCAS also revealed victim-blaming attitudes present in the Australian community. The NCAS findings indicated that nearly one in three Australians (32%) believe that women are partially responsible for continued abuse when they do not leave a relationship, and one in six (16%) do not believe that it is hard for women to leave violent relationships (Webster et al., 2018, p. 81). Coercive control is characterised by entrapment, whereby a victim and

survivor is deprived of autonomy and agency and therefore faces significant barriers to leaving the relationship (ANROWS, 2021a). The inclusion of jury directions that reflect the realities of DFV, such as the fact that it is not uncommon for a victim and survivor to stay with an abusive partner, to return following separation, to not report to police, and to not seek assistance, is positive.

ANROWS notes that the amendment allows for the prosecution or defence to ask the judge to direct the jury at any time during the proceeding. As the request for jury directions is optional, there is a risk that juries may not receive relevant information to address commonly held stereotypes and misconceptions unless the prosecution and/or defence are aware of the amendment and choose to request these directions. ANROWS recommends further clarification or refinement of the amendment to ensure that the default is that juries are provided with the directions.

Expert evidence

ANROWS is supportive of the inclusion of s 103CC in the *Evidence Act 1977* (Qld) to permit expert evidence to be given about DFV in a criminal proceeding. The Taskforce's report (2021) identified that it can be challenging to demonstrate the emotional and psychological harm suffered by victims and survivors of DFV in a jury trial. This is particularly the case with coercive control, where behaviours can appear harmless to bystanders but can be consistent with a pattern of controlling behaviour (Tarrant et al., 2019). The Taskforce (2021) suggested that allowing for expert evidence on DFV in criminal proceedings could help support juries to understand the complexities of experiences of DFV. As identified previously, the 2017 NCAS findings reveal that community understandings of DFV, coercive control, and the difficulties that victims and survivors face while trying to leave can be limited (Webster et al., 2018). As such, expert evidence could be used to support juries to further understand DFV and coercive control and the experiences of victims and survivors when providing verdicts.

ANROWS cautions that care must be taken in the definition of an expert in criminal proceedings relating to DFV matters as this provision has the potential to be exploited in practice by perpetrators and their allies.

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