Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Bill 2024

Submission No:	5
Submitted by:	Legal Aid Queensland
Publication:	Making the submission public but withholding your name
Attachments:	See attachment
Submitter Comments:	

Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Bill 2024

Submission by Legal Aid Queensland

4 July 2024

Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to make a submission in relation to the *Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Bill 2024.*

LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997*, LAQ is established for the purpose of *"giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way"* and is required to give this *"legal assistance at a reasonable cost to the community and on an equitable basis throughout the State"*. Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ's services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ's lawyers in the day-to-day application of the law in courts and tribunals. LAQ believes that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

This submission calls upon the experience of lawyers in LAQ's Criminal Law Services, which is the largest criminal law practice in Queensland providing legal representation across the full range of criminal offences and is informed by their knowledge and experience.

LAQ also acknowledges that the objective of this Bill is to implement the third major tranche of legislative reforms arising from recommendations made by the Women's Safety and Justice Taskforce (the Taskforce).

Submission

Statutory Review

Clauses 3 and 4

The amendments in Clauses 3 and 4 effectively introduce statutory review requirements that are intended to encompass all Taskforce-related legislative amendments.

LAQ supports the review examining the effects of these amendments on, and the outcomes for, First Nations peoples. LAQ also supports this review examining the effects of these

amendments on both victims and perpetrators of sexual violence, and domestic and family violence.

However, LAQ submits that the new s 14(3)(b)(ii) of the *Attorney-General Act 1999* (Qld) could be constructed in similar terms to s 14(b)(iii) – for example, *"the outcomes for, and the effects of the amendments on, victims and perpetrators of sexual violence and domestic and family violence"*.

In *Hear Her Voice – Report One: Addressing coercive control and domestic and family violence in Queensland,* the Taskforce noted that:

> *"This five year review of the operation of the legislative reforms in this chapter should consider the outcomes achieved for victims, including victim safety, and for perpetrators with a particular focus on impacts for Aboriginal and Torres Strait Islander peoples."* [1]

This alternative construction would make it abundantly clear that the review should consider not only the effects of the amendments on victims and perpetrators, but also the outcomes achieved for these two pivotal groups.

Inadmissibility of admissions made during programs while prisoners are remanded

Clauses 5 and 6

LAQ supports the ability for prisoners to take part in programs or services without concern that their participation may become admissible against them in legal proceedings. LAQ is concerned that the current proposed form leaves open uncertainty about what is and is not admissible, and in what proceedings.

The inadmissibility provision, in LAQ's submission, is too limited in its scope. LAQ notes:

- The term 'admission' has not been defined. It is unclear whether the inadmissibility provision will extend to partial admissions or statements against interest.
- The inadmissibility provision is proposed to apply in civil, criminal, or administrative proceedings *"for the facts constituting the alleged offence for which the prisoner is detained on remand"*.[2] The explanatory notes clarify that proceedings include prosecutions, sentencing, and appeals and proceedings related to the making of orders in civil or federal court proceedings, such as domestic and family violence

[1] *Women's Safety and Justice Taskforce*, Volume 3, p 782.
[2] *Corrective Services Act 2006*, new s 344AB(2).

orders or orders of the family law courts. However, the phrasing used in this section is ambiguous and is anticipated to still require interpretation in individual cases. The admissibility provisions also do not appear to apply to criminal law appeals, given the requirement for the prisoner to be detained 'on remand'.

- The construction of these sections suggests the inadmissibility provision will not apply to uncharged acts, or evidence directly or indirectly derived from an admission made in relation to an uncharged act.
- The proposed provisions will not apply to proceedings for an offence committed or allegedly committed by the prisoner while participating in an eligible program or service. It is also not intended to apply to general conversations between prisoners at a corrective service facility or in transit to programs or services.
- Where admissions are covered by the inadmissibility provision, if such records are accessible by the Crown or police there would remain potential for evidence to be indirectly derived from admissions, particularly if records lead to a line of enquiry. If this occurs, it may not always be obvious thereby effecting the capacity for legal representatives to object to admissibility on this basis.
- The inadmissibility provision does not extend to parole matters. This means that even where an admission, or evidence directly or indirectly obtained from that admission are inadmissible in specified proceedings, the admission or evidence obtained from the admission could still be used by the parole board when making decisions which would remain a discouraging factor for prisoners contemplating participation in a program.

The proposed amendments provide a head of power to prescribe in regulation which programs and services will be 'ineligible' and not covered by the inadmissibility provision. LAQ is concerned that:

- The ability to make a program ineligible at any time is likely to create uncertainty.
- While the proposed amendments require that a prisoner must be told whether a program or service is ineligible prior to any participation, there does not appear to be any remedy in the proposed amendments to account for human error or the possibility that a prisoner may not be told prior to their participation in an 'ineligible' program or service. LAQ is concerned there may be situations where a program or service that takes weeks or months to complete may become 'ineligible' after a prisoner has already commenced that program or service.
- Prisoners most in need of particular programs and services may not be protected by the inadmissibility provision. For example, in the experience of LAQ's Criminal Law Services, sexual offenders often fall outside of protected categories.

LAQ is concerned that the inadmissibility provision, in its current form, will not remedy the issues raised by the Taskforce. Further, this provision is inconsistent with many rights under the *Human Rights Act 2019* (Qld) (the HRA)), namely:

- The right to equality before the law (s 15), in particular because it interferes with subsection (2) in that prisoners will not be afforded the same ability to enjoy their human rights (such as the right to privacy) without being subject to discrimination (on the basis of being a prisoner)[3]. In addition, this provision is likely to have a disproportionate impact on prisoners with cognitive or psycho-social disabilities, people for whom English is not their first language, and First Nations peoples (who are over-represented in the criminal justice system).
- The right to freedom of expression under s 21.
- The right to privacy and reputation under s 25 and in particular, the right not to have their privacy and correspondence unlawfully or arbitrarily interfered with.
- The right to fair hearing under s 31.
- The right to the presumption of innocence under s 31(2)(a) and the right not to be compelled to testify against themselves or confess guilt under s 31(2)(k).

LAQ notes the drafting of provisions in the *Mental Health Act 2016* in Part 5, Division 2 which relate to the admissibility of expert reports and transcripts, and note these sections are very prescriptive about what material is admissible and in what situations. Such an approach may reduce ambiguity and improve participation, particularly if such a construction took into account the concerns raised above.

Position of Authority Offences

Clauses 7 to 11 (General Concerns)

LAQ supports legislation that can effectively protect vulnerable children from sexual exploitation from those seeking to misuse their authority or position of power. What is central to these amendments is that they seek to criminalise the sexual exploitation of children by those who exercise authority over them. The proposed complainants in this instance are those

[3] Noting that the definition of "discrimination" under s 15 of the HRA is not tied to the definition of "discrimination" in Queensland's anti-discrimination legislation but allows for a broader interpretation that captures other types of discrimination and should extend to other classes of people who are at risk of social exclusion and prejudice – such as prisoners. See further: Alice Taylor, 'Substantive Equality and the Possibilities of the Queensland Human Rights Act 2019' (2024) 43(1) UQLJ 41

who are vulnerable by virtue of the authority exercised over them, in combination with their age.

It is important to note that a person who attains the age of 18 and yet is still vulnerable by virtue of a power imbalance exercised against them is not protected (other than where consent obtained by exercise of authority is not considered voluntary – see s 348(d) of the *Criminal Code Act 1899* (Qld)). Similarly, a child of 16 or 17 years of age who is manipulated for sexual exploitation by somebody who is not in position of authority is not legislatively protected.

A question posed by this legislation is whether it is possible for sexual activity to occur between a 16 or 17-year-old child and somebody in a position of care, supervision, or authority over them, and for that activity to be non-exploitative or dependent upon the exercise of a power imbalance. If this is possible, then the question arises whether the defences provided for within the Bill allow for the protection of all the various manifestations of this non-exploitative sexual activity. If they do not, then LAQ is concerned that this Bill will criminalise conduct that is unworthy of denouncement.

LAQ is also concerned that these proposed amendments, in the circumstances contemplated above, could unduly limit the agency of children who are over the age of capacity, and who have already been deemed to have the cognitive ability to consent. This may be an unjustifiable limitation of a number of human rights, namely:

- The right to equality before the law under s 15 of the HRA and in particular, sub-section 15(2) which states that *"[e]very person has the right to enjoy the person's human rights without discrimination"* and sub-section (4) which states that *"[e]very person is equal before the law and is entitled to the equal protection of the law without discrimination"*, noting that removing agency of children who are capable of consenting may amount to discrimination on the basis of age.
- The rights of every child, without discrimination, to the protection that is in the child's best interests, because of being a child (s 26(2) HRA) – noting that in some cases, respecting the child's agency may be in the child's best interests.
- The right to privacy under s 25 of the HRA, in particular sub-section (a) which provides the right to not have the person's privacy arbitrarily interfered with.
- The right to liberty under s 29(1) HRA.

Clauses 7 to 11 (Specific Concerns)

Marriage

Lawful marriage is a defence to all aspects of criminal behaviour contained within new s 210A and the amendments to s 229B of the *Criminal Code Act 1899* (Qld). This is the case regardless of whether the person comes within the special category of people noted within subsection 3.

It can be inferred from this that there is some acknowledgement that non-exploitative sexual activity can occur in all of these positions of authority, regardless of age disparity, if there is a loving relationship. However, the proposed amendments do not recognise de facto relationships, regardless of whether the de facto relationship involves children. Similarly other loving relationships are without protection.

It is LAQ's position that lawful marriage is not the only mechanism available to demonstrate a loving non-exploitative sexual relationship, and it should be a defence to the charge to prove that a person is in a non-exploitative loving relationship. For example, the Bill in its current form would criminalise mild sexual fondling outside of clothes between fiancées the day before their wedding if the prescribed relationship existed. The next day they would be protected. It is LAQ's position that this distinction is arbitrary and could place unfair limitations on the agency of a child who has been deemed to have the cognitive capacity to consent.

Age Disparity

New s 210A(3) of the *Criminal Code Act 1899* (Qld) is an evidentiary provision to facilitate the prosecution of a certain category of persons who are deemed to have care, supervision, or authority. Although not impossible, it would be difficult to imagine prescribed sexual acts between a child and someone in this category of persons that was not subject to an unacceptable power imbalance. As such, it is understandable why the age disparity defence does not apply to those categories in subsection 3.

However, the position of persons outside of this category is less clear. The Bill recognises that there are circumstances where either due to a small age disparity, or because of the presence of a formally recognised loving relationship, that the activity is not exploitative.

It is LAQ's position that the three-year designated disparity is arbitrary and does not capture all the potential non-exploitative situations that will inevitably arise.

It is proposed that outside of the categories contained in subsection 3 it should be a defence to the charge if the act or omission did not in the circumstances constitute sexual exploitation of the child (i.e., remove subsection 210A(4)(b)(ii)).

Under s 216 of the Criminal Code (abuse of persons with an impairment of mind) the Queensland legislature provides a defence where sexual activity is not exploitative in all the circumstances. Age disparity was not considered necessary in that section, although it would be a relevant consideration for the tribunal of fact in deciding whether the behaviour was exploitative.

Likewise, if age disparity were removed in this instance, it would still remain a remarkably probative factor for the tribunal of fact in determining whether the sexual activity was exploitation in all the circumstances.

It is conceded that the age disparity provision will facilitate the prosecution of matters. However, it will facilitate prosecutions by running the risk of criminalising non-exploitative conduct. If the legislature concedes that there can be a non-exploitative relationship within an age disparity of less than 3 years, then it is hard to imagine that there could not be different non-exploitative relationships with an age disparity of 3 or 4 years.

It is LAQ's position that age disparity is just one of the factors to consider in determining whether or not sexual activity or a sexual relationship is sexually exploitative. It is submitted that of equal importance is the nature of the relationship that exists between the parties. It is the interplay of all the various circumstances that will determine whether or not the acts or omissions are exploitative, and the imposition of an arbitrary age differential only serves as an impediment to achieving justice in these circumstances.

For example, consider a 21-year-old guitar teacher that is in a de facto relationship with his de facto wife who is 16 years of age. Eight months into the relationship he finally capitulates and accepts her as a student. The next time they engage in sexual activity he is likely to be considered to be committing a child sexual offence.

In the alternative, it is submitted that an age disparity of 10 years should be preferred. It may more safely be considered that anything outside of this figure is inevitably exploitative. If there were an age disparity of 10 years, it is of course still necessary to prove that the relationship was non-exploitative to be able to benefit from the defence.

Supervision

It is LAQ's position that the term 'supervision' is too broad and runs the risk of capturing unintended relationships. New s 210A(3) of the *Criminal Code Act 1899* (Qld) provides examples which fall squarely within the definition of care or positions of authority. However, supervision is a nebulous term.

Within the proposed s 210A(2)(f) there are examples at line 22 of persons who might have a child under their care, supervision or authority. Within the example of an employer, it mentions also another person with the authority to determine significant aspects of the child's employment. It is open for this to be an example of a person who has authority over the child. If this person is a person of authority in the workplace, it may be considered that a supervisor within the workplace is also captured by the provision.

For example, in a restaurant setting, a manager may leave at a certain time of night and trust the locking up to a late-night supervisor whose duties include locking up the premises and supervising other staff members for the final period of the night. Although this person has quite limited authority, it is anticipated that they would easily be captured by the term "supervision". Despite their job description, there may be very little if any power imbalance between the parties.

A further example may involve a 21-year-old volunteer lifeguard at the Gold Coast. To what extent is he a "supervisor" of the 17-year-old girls at the beach? To what extent is he precluded from sexual activity if he meets a girl who he spoke to at the beach later that night at a social occasion? The lack of specificity in relation to this term provides uncertainty around the policing and enforcement of this provision.

It is the position of LAQ that the term 'supervision' should be removed.

Special Witnesses & Directions Hearings

Clauses 12 to 19

These clauses propose to amend the existing special witness measures under the *Evidence Act 1977* (Qld), to amend the current s 21A to introduce a presumption that, on application of a party in a relevant offence,[4] the Court must make one, or more, special witness measures. The court would not be required to make the order if it is considered not in the interests of

[4] A criminal proceeding relating wholly or partly to a sexual offence or a domestic violence offence.

justice. This amendment seeks to give effect to recommendation 53 of the *Hear her Voice – Report 2: Women and girls' experiences across the criminal justice system*.[5]

LAQ considers this amendment unnecessary and could lead to the unintended consequence of denying personal agency to the special witness giving evidence. The experience of LAQ's Criminal Law Services is that applications for the giving of remote evidence, or other special witness measures, are made in the majority of relevant cases on a reasonable basis. These applications are rarely contested by defence. Crown Prosecutors are by and large proactive in making such applications, and appropriate orders for special witness measures are routinely made in line with the current legislation. A requirement that a court 'must' make an order unless it is considered not in the interests of justice is a confinement of the discretion of the Magistrate or Judge, who is best placed to determine these applications on the whole of the evidence before them. LAQ is opposed to the constraining of discretion available to judicial officers and believes the proposed amendment unnecessary, where the required legislation is achieving its intended purpose.

In circumstances where the legislation was to be amended to introduce a presumption that special witness measures be imposed in relation to victims in relevant offences, LAQ advocates for the introduction of a clear exception to this presumption where the victim does not want to access these measures. Whilst it commonplace for special witness measures to be granted at trials involving sexual offences, LAQ's in-house practice and Public Defender Chambers have been involved in matters where the complainant has adamantly elected to give live evidence, without the defendant being obscured.

The recommendation contained in the Taskforce report specifically states that a *"special witness is entitled (but may choose not to) give evidence in a remote room or by alternative arrangements"*.[6] This amendment was recommended to give victims in sexual offence matters a choice about how they give their evidence and was based on the New South Wales (NSW) scheme, in which special witnesses are legally entitled (but may choose not to) give evidence in a remote room. The proposed amendments, as they currently stand, do not give complainants a clear right to refuse special witness measures and appear personally in court. Whilst an exception is proposed when considered 'in the interests of justice', this is vague and open to differing interpretations. It is conceivable that a situation may arise where an individual prosecutor may believe that special witness measures should be imposed, where a victim in a relevant offence does not agree. A removal of personal agency and paternalistic approach to giving evidence in these matters risks re-traumatising a victim in an alleged sexual assault or domestic violence matter, may result in discriminatory treatment (for example on the basis

[5] *Women's Safety and Justice Taskforce*, volume 2, p. 574.
[6] *Hear her Voice – Report 2, Women's Safety and Justice Taskforce*, volume 2, p. 19.

of cultural barriers), and also unjustifiably interferes with the victim's right to freedom of expression under s 21 HRA.

Clauses 20 to 22

LAQ considers these amendments unnecessary. The current s 21 of the *Evidence Act 1977* already covers a significant proportion of the proposed amendments, investing a discretion in the court to disallow an improper question, defined as a question that "*uses inappropriate language, or is misleading, confusing, annoying, harassing, intimidating, offensive, oppressive or repetitive*".

Barristers must comply with the professional conduct rules and standards that are outlined in the *Barristers Conduct Rules 2011*. In addition to rule 59 and 60, which prescribe general rules for cross-examination, rule 61 specifically addresses cross-examination in sexual offence proceedings. Rule 61 states:

"…in proceedings in which an allegation of sexual assault, indecent assault or the commission of an act of indecency is made and in which the alleged victim gives evidence:

> *(a) a barrister must not ask that witness a question or pursue a line of questioning of that witness which is intended:*
>
> > *(i) to mislead or confuse the witness; or*
> >
> > *(ii) to be unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; and*
>
> *(b) a barrister must take into account any particular vulnerability of the witness in the manner and tone of the questions that the barrister asks".*

Further, the Court has a discretion to place limitations on questioning in relation to special witnesses, with respect to time and the number of questions on particular issues. It is LAQ's experience that defence counsel are observant of their professional obligations and are conscious of the sensitivities in sexual offence trials.

Division 4C of the *Evidence Act 1977* (Qld) already exists in a similar form to these proposed amendments and applies to children or vulnerable witnesses giving evidence in child sexual offence proceedings. LAQ does not support additional limitations on the ability of counsel to cross-examine in criminal matters. The law already acts as a safeguard against inappropriate or unnecessary questioning and to protect vulnerable witnesses from being badgered.

The proposed amendments unfairly disadvantage and prejudice a defendant at trial. At a directions hearing, defence counsel could be required to explain what cross-examination they

want to undertake and for what purpose. It is almost inevitable that this would require the disclosing of trial strategy and forensic decisions to the Court and the prosecutor.

The allocation of questioning on topics to one defence counsel where there are multiple defendants does not recognise that each defendant will likely be represented by separate solicitors and barristers, who must act in the best interests of their individual client. Instances of counsel representing multiple co-accused are now rare. Allocating cross examination topics to one barrister would not work unless each defendant is on a completely level playing field with all providing identical instructions, case theory, and approach to the trial. In LAQ's experience this is rarely the case, and to arrange this would require the disclosure of trial strategy and forensic decision making to the co-accused's representatives. This is likely to not only breach a barrister and solicitor's obligation to act in the best interests of their client but would require a breach of confidentiality. The prejudice incurred to a defendant outweighs through these proposed amendments.

It is noted in the explanatory notes that the court's consideration of the fair and efficient conduct of the proceedings should extend beyond the accused perspective and should also include the protection of the witnesses and interests of the community. LAQ is concerned that this measure prioritises protections afforded to witnesses (which are arguably not necessary), resulting in significant and disproportionate limitations of an accused's human rights. In particular:

1. The right to equality before the law, specifically under s 15(2) the right to enjoy the person's human rights without discrimination and under s 15(3) the right to equal protection of the law without discrimination (in this case, discrimination on the basis of alleged criminal offending).
2. The right to privacy and in particular the protections against unlawful and/or arbitrary interferences with privacy and correspondence (s 25(a)) HRA.
3. The right to a fair hearing (s 31 HRA).
4. Rights in criminal proceedings (s 32 HRA), specifically the minimum guarantee under s 32(2)(g) to examine, or have examined, witnesses against the person and (h) to obtain the attendance and examination of witnesses on the person's behalf under the same conditions as witnesses for the prosecution.
5. In relation to child defendants, the rights of children in the criminal process (s 33 HRA).

LAQ agrees that, if such pre-trial hearings were to be conducted, they would be best conducted and facilitated by the Judge who will ultimately be hearing the trial.

Clauses 22 to 25

There already exists a framework for an application to be made by the prosecution that the evidence of a special witness be pre-recorded. The experience of LAQ's Criminal Law

Services is that special witness evidence is regularly pre-recorded. Given this, the proposed amendment is not necessary to achieve its intended purpose, and therefore is not proportionate when balanced against the nature and importance of the human rights that are potentially limited.[7]

However, should the proposed amendment be passed, the exception that a party to a subsequent proceeding is not prevented from applying to the Court for the special witness to give further evidence is appropriate and required to ensure a fair trial. Additionally, LAQ notes the concerns raised by the Taskforce and the Department of Justice and Attorney-General (DJAG) that an update to resources and technology are required before this can be implemented.

In *Hear Her Voice – Report One,* the Taskforce noted that more than half of Queensland Courthouses lacked remote-witness capability.[8] Should this proposed amendment be passed, technology in courtrooms would need to be urgently updated so that these measures can be accessed by all victims, in all areas, in all courtrooms. The courtrooms without these capabilities are overwhelmingly regional and remote, where both accused people and victims already face access to justice issues.

Under the HRA, every person is held to be equal before the law and is entitled to the equal protection of the law without discrimination. All laws and policies should be applied equally and not have a discriminatory effect. A failure to update technology in courtrooms, so that protections, legislation, and policies can be applied equally to all victims, limits the right to equality under s 15 of the HRA. This is likely to disproportionately affect people living in rural and remote areas, including First Nations peoples who are already over-represented in the criminal justice system.

Expert Evidence in Proceedings for Sexual Offences

Clauses 28 to 38 and Clauses 44 to 45

In the Attorney-General's Explanatory Speech, introducing the Bill to Parliament on 21 May 2024, she said:

> "*The expert evidence will not be able to be used to reason that it is more likely the victim-survivor is telling the truth or that the offence is more likely to have occurred; rather, the purpose of the evidence will be to assist the jury in reaching their decision*

[7] HRA, s 13.
[8] *Hear Her Voice – Report 1, Women's Safety and Justice Taskforce,* Volume 3, p 646.

in an informed way and dispelling myths, stereotypes or assumptions about victim-survivor behaviour."[9]

LAQ submits that the most effective mechanism for dispelling myths, stereotypes and assumptions is via judicial direction. Supreme and District Court Bench Book Direction 52a 'Directions about domestic relationships and domestic violence' provides a good model. It is noted that this Bench Book direction was inserted following the *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act* 2023 and was modelled on directions given in *R v Cotic* [2003] QCA 435.

The value of a judicial direction is that it ensures consistency. There is a risk that oral evidence of an expert witness can be unpredictable. Inappropriate questions or answers can, and do, give rise to grounds of appeal. An increase in the number of appeals may also necessitate an increase in funding for all stakeholder agencies involved.

Further, a judicial direction is likely to be more efficient. In the alternative, introducing a new body of expert evidence to a sexual offence trial is likely to add further complexity and time. Delay and complexity must be considered not just in the context of the trial itself, but in the likelihood of delay while expert evidence is gathered and disclosed. Further, the likelihood of pre-trial hearings to determine the admissibility and limits of expert evidence is likely to add significant complexity and time.

Expert evidence in sexual offence cases also creates the risk of a 'trial within a trial'. Prosecutors will be tasked with briefing the expert witness with relevant material to form an opinion. Delays could arise where defence legal representatives seek addendum reports from the witness following review of further relevant material.

Legislative amendment is not required to allow expert evidence in appropriate cases. There is no restriction on any party to a proceeding adducing expert evidence, providing that the relevance of the evidence is established, the opinion is not on a matter of common knowledge and the witness' expertise is sufficiently established.[10]

It is noted that recommendation 79 of the Taskforce was that amendments allowing for the admission of expert evidence about the nature and effects of domestic and family violence and sexual violence should not commence until the expert panel (recommendation 80) is established and appropriate and equitable funding has been provided to the Office of the Director of Public Prosecutions and Legal Aid Queensland to obtain expert reports.[11]

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[9] Record of Proceedings of the First Session of the 57th Parliament, 21 May 2024, p.1625.
[10] *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, Heydon JA at 743-744
[11] *Hear Her Voice – Report 2, Women's Safety and Justice Taskforce,* Volume 1, p 353.

LAQ has not received any additional funding to obtain expert reports, and the pilot expert evidence panel will not extend to all court locations across the state. This potentially conflicts with the right to recognition and equality before the law under s 15 of the HRA, as it is envisioned that this will result in disproportionate use of expert reports based on an accused's location (and may disadvantage accused persons from rural and remote areas, including having a disproportionate impact on First Nations communities).

Tendency and Coincidence Evidence

Clauses 39-43 (General Concerns)

LAQ does support reforms to the criminal justice system designed to better support victim-survivors of sexual offending. However, LAQ does not support any reform which has the effect of eroding or compromising the well-established protections embedded in the criminal justice system.

There is an inherent tension between the understandable concern to protect victims of sexual offending from further trauma and the important protections enshrined in the criminal justice system including the presumption of innocence, the onus and standard of proof, and the rationale underpinning the rules of evidence.

The Royal Commission into Institutional Responses to Child Sexual Abuse noted, "*Many survivors have told us that they feel that the criminal justice system is weighted in favour of the accused….*"[12] as a matter in support of reform. The reality is that the criminal justice system is weighted in favour of an accused by very deliberate design and for good reason.

LAQ considers any proposed reforms to propensity and similar fact evidence should be referred to the Queensland Law Reform Commission (QLRC) for detailed consideration. The QLRC has not considered propensity evidence since 2005.[13] And, at that time, it was in the limited context of judicial directions. Further, careful technical analysis by the QLRC will help avoid the unintended creation of unnecessary complexities and difficulties in the application of the proposed new provisions.

As regular advocates in the Court of Appeal, LAQ lawyers are not witnessing trends of defendant appeals being allowed because of rulings and directions that permitted, or were based on permitting, the admission of propensity and similar fact evidence. A review of appellate decisions and pre-trial rulings between 2020 and 2024 demonstrates tendency and

[12] Criminal Justice Executive Summary and Parts I – II, at p10.
[13] A Review of Jury Directions. Report, Report 96, Volume 2 (April 2009) – p.417-444.

coincidence evidence is routinely admitted and trials concerning multiple complainants are routinely joined.

LAQ highlights the following court decisions:

DECISION	EVIDENCE	OUTCOME
R v VO [2024] QCA 96	Multiple complainants	Evidence admitted Appeal dismissed
R v LBE [2024] QCA 53	Multiple complainants	Evidence admitted Appeal dismissed
R v BEE [2023] QCA 261	Sister complainants	Evidence admitted Appeal dismissed
R v YF [2023] QCA 111	Multiple complainants	Evidence admitted Appeal dismissed
R v Trott [2023] QCA 107	Sexual interest	Evidence admitted Appeal dismissed
R v CDA [2022] QCA 25; (2022) 13 QR 62	Multiple complainants Prior conviction	Evidence admitted Appeal dismissed
R v Thomson (2022) 296 A Crim R 510; [2022] QCA 36	Multiple complainants	Evidence admitted Appeal dismissed
R v SDP [2022] QCA 17; (2022) 8 QLR	Multiple complainants	Evidence admitted Appeal dismissed
R v Lawton [2021] QCA 36; (2021) 9 QR 622	Multiple complainants	Evidence admitted Appeal dismissed
R v ABF; R v MDK [2021] QCA 240	Sexual interest	Evidence admitted Appeal dismissed
R v Smith [2021] QCA 105	Prior sexual assault	Evidence admitted at trial New trial ordered on another ground
R v Harris [2021] QCA 96; (2021) 20 QLR	Multiple complainants	Evidence admitted Appeal dismissed

R v LAS [2021] QCA 221; (2021) 15 QLR	Multiple complainants	Evidence admitted Appeal allowed – inadequate directions as to use
R v Nathaniel [2021] QDCPR 77	Multiple complainants	Evidence excluded
R v Jonathan [2021] QDCPR 76	Two complainants Sexual interest	Separate trials ordered
R v Spreadborough [2020] QCA 291	Brother complainants Sexual interest	Evidence admitted Appeal dismissed
R v WBN [2020] QCA 203	Multiple complainants	Evidence admitted Appeal allowed on other grounds Fraser and McMurdo JJA
R v PWE [2020] QDCPR 132	Sexual activity	Evidence admitted
R v LDP [2020] QDCPR 81	40 counts alleging sexual offending by 18 complainants	One count to be heard separately – distinctly not involving the same predation.
R v BRN [2020] QDCPR 52	Multiple complainants	Application for separate trials dismissed

It should be noted that both *R v Nathaniel* and *R v Jonathan* are first instance decisions and factually atypical.

The matter of *R v Nathaniel*,[14] identified as an example of a matter in which similar fact evidence was ruled inadmissible, is atypical in that it involved a 15-year-old accused. The trial judge noted, *"However, caution must be exercised when looking at a situation where the offender himself is a child or a young adult. In situations where an offender and the victim are close in age, the feature of an unnatural interest in young people does not exist."*[15]

[14] [2021] QDCPR 77.
[15] [2021] QDCPR 77 at [8] (Richards DCJ).

Similarly, in *R v Jonathan*, separate trials were ordered on the basis that the accused and the two complainants were teenagers, close in age, and that the similar fact evidence involved only exploring sexual contact when lying next to a similarly aged female known to him.

The common law has evolved with improved community awareness of the dynamics of sexual offending and abuse. This is reflected in the weight of recent decisions favouring admissibility. Concerns expressed regarding the existing rules for the admission of similar fact and propensity evidence reflect an understanding of the law which is somewhat dated.

The relatively recent decision of *R v McNeish*[16] provides a comprehensive statement of the law in Queensland. A thorough consideration of the decision demonstrates Queensland courts are alive to the dynamics of sexual abuse and framing the law responsively. In summary, similar fact and propensity evidence is admitted:

1. As relationship evidence, the express purpose of which is to protect a complainant witness against a suggestion their evidence about an isolated incident or incidents is implausible. The court observed:

   > "*Such evidence is admitted because the interests of justice require that the jury be able to understand the Crown case by seeing the case in its true factual context and not within an unrealistically truncated form. If such evidence were to be excluded, the jury would be denied the real factual basis upon which to understand aspects of the case that the complainant's and the accused's actual history might explain, such as the existence in the appellant of peculiar sexual urges that are not shared by most of the population, the possible reasons for a complainant's particular reactions or lack of reactions, the explanation for a complainant's failure or delay in complaining or for an offender's apparent risk taking and brazenness in offending.*"[17]

2. To demonstrate a sexual attraction and motive. The court observed:

   > "*In cases involving sexual offences against children a more accurate term than "motive" might be "urge" or "desire". Many motives in circumstantial cases are really constituted by emotional urges rather than by well-considered reasons, whether the motive is greed or lust or something else of that kind. Sexual offending against children may be the product of an offender's lust for a particular child or it may be the result of a lust for children generally.*"[18]

[16] [2019] QCA 191 (see also *R v Thomson* [2022] QCA 36).
[17] *Ibid* at [33].
[18] *Ibid* at [34].

3. To demonstrate an accused was prepared to act on a sexual interest because *"he had committed similar offences against the complainant or others previously".*

4. To identify the offender.

5. The 'Pfennig test' reflects the test that applies to other circumstantial evidence.[19]

6. The 'Pfennig test' will almost invariably result in the admission of evidence of uncharged sexual offences against a single complainant. The reasoning is the same that applies in the Uniform Evidence Law jurisdictions.

7. In cases involving uncharged acts against other persons other than the complainant, "the logic of probability reasoning dictates that there must ordinarily be some feature that links the two sets of evidence together." That statement of principle was derived from the High Court in *R v Bauer*.[20] *Bauer* was an appeal concerning the *Evidence Act* in Victoria.

8. *"However, in sexual offence cases, it is not necessary that the particular acts that constitute the uncharged offences and the particular acts that constitute the charged offence be of the same kind. Evidence of uncharged sexual offences may be relevant and highly cogent even if the acts that constitute those offences are different from the charged offence."*[21]

9. A sexual interest in girls under 16 and a preparedness to act upon that interest may, in itself, provide a sufficient connection even though the physical acts of abuse are disparate in nature.[22]

10. "*...the real question that is posed is not whether probative value 'outweigh' prejudicial effect but whether the interests of justice require the evidence to be admitted despite the risk of its misuse. Whether it is called a weighing of probative value against the risk of prejudice to the accused or whether it is called a consideration of the interests of justice, the task remains the same.*"[23]

Those same principles were confirmed in the recent decision of *R v Thomson*.[24]

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[19] *Ibid* at [36].
[20] (2018) 266 CLR 56; [2018] HCA 40.
[21] [2019] QCA 191 at [40].
[22] *Ibid* at [41], citing *Hughes v The Queen* (2017) 263 CLR 338; [2017] HCA 20.
[23] *Ibid* at [56], citing *Pfennig v The Queen* (1995) 182 CLR 461 at 513, 515 (McHugh J).
[24] (2022) 296 A Crim R 510; [2022] QCA 36.

Further, introducing amendments that limit rights under the HRA should only occur where those limitations can be demonstrably justified in a free and democratic society based on human dignity, equality, and freedom (s 13(1)). This requires a consideration of the nature and importance of the proposed limitation, and the relationship between the limitation and its purpose - including whether it helps to achieve the purpose[25]. Throughout these submissions LAQ has highlighted examples where these amendments will not, in practice, achieve the intended purpose. They will, however, substantially interfere with important human rights that are fundamental to the functioning of the criminal justice system. It is LAQ's submission that the existing legislative framework already provides the "less restrictive and reasonably available" way of achieving that same purpose[26], which is more compatible with the human rights of both the accused and, in some cases, the victim.

LAQ submits that the case for reform is not apparent having regard to the current state of the law in Queensland.

Clauses 39-43 (Specific Concerns)

Nonetheless, if the Parliament determines that new rules regarding tendency and coincidence evidence should still be passed, LAQ raises the following issues with particular parts of the new provisions set out in the *Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Bill 2024* ('the Bill').

Clause 40 – Restrictions on the application of the tendency rule and coincidence rule, proposed Pt 7A

LAQ observes that the application of both the tendency rule and coincidence rule are restricted only to criminal proceedings: see proposed ss 129AB and 129AC.

The Bill does not propose enacting the restrictions contained in each of s 94 of the *Evidence Act 1995* (Cth) and *Evidence Act 2008* (Vic) and s 94(1)–(3) of the *Evidence Act 1995* (NSW). LAQ is concerned that the decision not to adopt these restrictions would:

a. mean tendency and coincidence rules apply much more widely than is intended or is the case interstate
b. create practical difficulties in the conduct of bail and sentence hearings
c. unfairly restrict the conduct of the prosecution case and defence case at trial.

[25] HRA s 13(2)(b), (c) and €.
[26] HRA s 13(2)(d).

Section 94 is the first section in Part 3.6 of each of the NSW, Victoria, and Commonwealth Acts, which is the part that concerns tendency and coincidence evidence. Subsection 94(1) – (3) in each Act provides:

> *(1) This Part does not apply to evidence that relates only to the credibility of a witness.*
>
> *(2) This Part does not apply so far as a proceeding relates to bail or sentencing.*
>
> *(3) This Part does not apply to evidence of — (a) the character, reputation or conduct of a person; or (b) a tendency that a person has or had— if that character, reputation, conduct or tendency is a fact in issue.*

LAQ recommends that a provision be inserted into the proposed Part 7A of the *Evidence Act* that replicates these interstate and Commonwealth subsections.

If subsection (1) is not enacted in Queensland, then standard lines of a cross-examination of a witness might be prevented. For example, a suggestion by a prosecutor or defence lawyer that a witness has a habit of being untruthful or less than forthcoming might be precluded without a tendency notice having been served. This effect cannot be the intent of the provisions.

LAQ acknowledges that the Uniform Evidence Acts (UEA) contain Part 3.7, which sets out rules relating to the credibility of a witness, but the absence of such legislation in Queensland is no reason not to enact the equivalent of s 94(1) in Queensland.

It is noted that protections already exist under s 4 of the *Criminal Law (Sexual Offences) Act 1978* (Qld) that prevent a complainant in a trial for an alleged sexual offence being cross-examined about a number of matters, either absolutely or without leave of the Court.

If subsection (2) is not enacted in Queensland, bail hearings and sentence hearings might be slowed down significantly.[27] For example, a suggestion by a prosecutor that a defendant has a tendency to commit offences of a certain type while on bail, or a suggestion by a defence lawyer that their client is otherwise of good character, would potentially be precluded without the provision of a tendency notice five weeks in advance of the hearing or an application for leave to dispense with that requirement. There is no reason these rules should apply to bail hearings or sentence hearings when such application does not exist in UEA jurisdictions.

Subsection (3) should also be enacted in Queensland for consistency with NSW and the other UEA jurisdictions.

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[27] Noting this would interfere with the right of the accused in criminal proceedings under s 29 of the HRA, sub-section (5) which provides that a person arrested or detained on a criminal charge (a) must be promptly brought before a court; and (b) has the right to be brought to trial without unreasonable delay.

Clause 40 – Tendency or coincidence evidence that is adduced to contradict tendency or coincidence evidence adduced by another party, ss 129AB(3), 129AD(3)

Proposed sub-sections 129AB(3) and 129AD(3) concern tendency or coincidence evidence that is adduced to contradict or explain tendency or coincidence called by another party. Those subsections dispense with the requirements that the evidence proposed to be called 'will have substantial probative value' and, if adduced by the prosecution about a defendant, that its probative value outweighs the danger of unfair prejudice. The calling of such evidence must still be subject to a requirement to produce a notice at least five weeks in advance of the start of trial under the proposed s 129AE.

LAQ is concerned that these provisions diverge from the approach of other UEA jurisdictions. In fact, the NSW, Victoria, and Commonwealth provisions are quite different from the proposed Queensland provision.

For tendency or coincidence evidence that is adduced to contradict or explain tendency or coincidence evidence called by another party, those three jurisdictions do not dispense with the requirement that such evidence will have significant probative value, and do dispense with the requirement to provide 'reasonable notice in writing' of such evidence and the requirement that, if the evidence is adduced by the prosecution, its probative value outweighs the danger of unfair prejudice to the defendant.[28]

LAQ notes the aim of the Bill is to replicate the approach of NSW and does not consider there is any justification for the divergent approach in this respect. The approach of NSW appears workable. The Bill in its current form permits the prosecution to be able to adduce tendency or coincidence evidence in response to tendency or coincidence evidence of the defendant even though the prosecution's evidence will not have significant probative value. There does not appear to be any reasonable justification for this approach, and it is not adopted in any other UEA jurisdiction. It also appears impractical to require that a notice still be served five weeks in advance of the intent to call such rebuttal evidence.

LAQ recommends sub-sections 129AB(3) and 129AD(3) be amended to replicate the approach of NSW, Victoria and the Commonwealth.

[28] *Evidence Act 1995* (NSW), ss 97(2)(b), 98(2)(b), 101(3)(4), and the identically numbered sections in the *Evidence Act 2008* (Vic) and *Evidence Act 1995* (Cth).

Clause 40 – Timing of the Provision of a Notice of Tendency or Coincidence Evidence, s 129AE(1)

The proposed s 129AE requires a party seeking to adduce tendency or coincidence evidence to give notice in writing to each other party of their intention to adduce the evidence no less than five weeks before the date fixed for the start of the trial.

LAQ supports a requirement that the prosecution advise in writing, a reasonable time in advance of a trial commencing, whether and what evidence it intends to adduce as tendency/propensity evidence or coincidence/similar fact evidence. Such notice should generally be made several weeks in advance of the trial. However, LAQ is concerned with legislating the exact time by which such a notice should be given by any party.

The requirement of five weeks' notice differs from the approach of NSW, Victoria, and the Commonwealth. The *Evidence Act* in each of those jurisdictions requires that 'reasonable notice' be given in writing, and that such notices are to be given in accordance with regulations or the rules of court about such matters.[29] Further rules and directions as to timing have then been given by, for example, the District Court in NSW. In NSW, a District Court Practice Note provides that usually the Crown must provide any such notice no later than six weeks prior to the Readiness Hearing, and the defendant must serve their notice three weeks prior to the Readiness Hearing.[30]

LAQ considers the approach of NSW, Victoria, and the Commonwealth in not legislating an exact time period is highly preferable to the currently proposed s 129AE and should be replicated. It has the advantage of permitting the courts and relevant stakeholders to devise appropriately tailored timelines, noting that different timeliness might be appropriate for regional circuit sittings compared to sittings in a major city. If a particular timeline adopted by way of practice direction or rules of the Court – such as five weeks – proves unworkable, it is much easier to amend the direction or rules of the Court than to amend the *Evidence Act* itself. This would also reduce the need for an excessive number of applications for leave to dispense with the requirements in s 129AE(1) if the five-week requirement is legislated and turns out to be unworkable. LAQ notes that often, for regional circuits, defence counsel are not briefed sufficiently in advance to comply with such a requirement.

LAQ recommends s 129AE be amended to remove the requirement that notice be provided by five weeks in advance, to instead simply require that the party intending to adduce tendency or coincidence evidence give reasonable notice of such and provide that regulations or rules of the court can be made about that requirement.

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[29] *Evidence Act 1995* (NSW), s 97(1)(a), 98(1)(a), 99, and the identically numbered sections in the *Evidence Act 2008* (Vic) and *Evidence Act 1995* (Cth).
[30] *NSW District Court Practice Note 18 – Criminal Trials* at [19].

Clause 40 – Content of Notice of Tendency or Coincidence Evidence,

S 129AE(2) stipulates the matters that must be set out in a notice of intent to adduce tendency and/or coincidence evidence.

This sub-section is substantially similar to ss 5 and 6 of the *Evidence Regulation 2020* (NSW), which stipulate the minimum content of tendency and coincidence notices in NSW. However, s 5(3) of that regulation also provides that "[o]n the application of a party in a criminal proceeding, the court may make an order directing a notifying party to disclose the address of any person named by that party in a notice of tendency evidence who saw, heard or otherwise perceived conduct or events referred to in the notice." An equivalent requirement exists in respect of coincidence evidence notices in s 6(3) of the *Evidence Regulation 2020*.

LAQ considers a similar provision should be included in the proposed s 129AE. LAQ considers circumstances could arise where the prosecution identifies witnesses who were witnesses to events alleged to give rise to a tendency, but in which the Crown declines to obtain evidence from that person. Such evidence may be exculpatory. It is appropriate that a defendant, at least through their legal representatives, be able to approach that person and consider whether to call that person as a witness. Concerns about the privacy or vulnerability of such potential witnesses can be ventilated by the prosecution at the hearing of such an application. Contact details, like an email address or phone number, may be more appropriate to provide than a physical address. LAQ would recommend a subsection in the following terms be inserted into the proposed s 129AE:

> *'On the application of a party, the court may make an order directing a notifying party to disclose the address or contact details of any person named by that party in a notice of tendency evidence and/or coincidence evidence who saw, heard or otherwise perceived conduct or events referred to in the notice.'*

Clauses 40 and 43 – Definition of 'child sexual offence', s 129AC and amendment to schedule 3 (Dictionary)

Proposed s 129AC, by its terms, applies to a proceeding in which the commission of a 'child sexual offence' is a fact in issue. Clause 43 of the Bill inserts a definition of 'child sexual offence' into schedule 3 (Dictionary) of the *Evidence Act 1977*.

LAQ is concerned that the proposed definition of 'child sexual offence' is unduly broad and would apply to Queensland offences that are not typically recognised or conceived of as child sexual offences. It makes more sense, and is more consistent, for that term to be defined in a way that reflects the definition of 'child' in the proposed s 129AC(5). The definition currently

proposed would permit the application of s 129AC in a case where, for example, a 16 year old defendant is charged with one count of rape against a complainant who is also 16 years old and is not under the defendant's care, supervision or authority, and would deem as having 'significant probative value' any alleged sexual interest that the 16 year old has in teenagers aged 14 or 15. That situation does not appear to replicate the intent of the provision.

To further the intent of the provision and achieve internal consistency, LAQ recommends the definition of 'child sexual offence' be replaced and instead be defined as:

> *'child sexual offence means*
>
> *(a) an offence against the law of the Commonwealth that is of a sexual nature and is committed in relation to a 'child', as 'child' is defined under the law of the Commonwealth; and*
>
> *(b) an offence against the law of Queensland that is of a sexual nature and is committed in relation to a child under 16, or a child aged 16 or 17 who is under the care, supervision or authority of the defendant.'*

Non-Contact Orders

Clauses 46 and 47

These clauses effectively extend the maximum duration of non-contact orders made under s 43B(1) of the *Penalties and Sentences Act 1992 (Qld)* from two years to five years.

A non-contact order may only be intended to restrict contact with one person. However, for the person against whom the order is made, it may have the unintended impact of limiting access to a whole community. This may be a justifiable restriction of the offender's freedom of movement under s 19 of the HRA, but in some cases may amount to an arbitrary interference with a person's family or home life (in breach of the right to privacy under s 25(a) HRA, and the recognition of families as the fundamental group unit of society under s 26(1) of the HRA).

This may also disproportionately affect people from rural and remote communities, infringing upon their right to equality before the law under s 15 of the HRA.

LAQ is particularly concerned about the impacts this could have on First Nations peoples from remote communities. This is because orders of this duration have the potential to significantly infringe upon the cultural rights set out in s 28 of the HRA. For example, the terms of a non-contact order may mean that a First Nations person is effectively prohibited from returning to their remote community, which may be necessary for example to participate in cultural practices under traditional lore or participate in 'sorry business'. This may also limit the

person's ability to interact with family members who live in that community, including their own children or people with whom they share kinship ties.[31]

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[31] See, for example, recent publication by Prisoners Legal Service that describes similar issues in relation to parole and probation orders: Fitzgerald et al., (2023) *Parole suspensions in Queensland: An examination of Prisoners' Legal Service case files, 2018-20* (The University of Queensland) at 4.3.1 'Cultural protocols and practices'.