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

Submission No:	10
Submitted by:	North Queensland Women's Legal Service
Publication:	Making the submission and your name public
Attachments:	See attachment
Submitter Comments:	

Feedback by the North Queensland Women's Legal Service

on the

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

We thank the Community Safety and Legal Affairs Committee on the opportunity to provide responses to the Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Bill 2024.

Who we are:

We are the North Queensland Women's Legal Service - a community legal centre with offices in both Cairns and Townsville. We assist women from Mackay to the Cape and out to the NT boarder, primarily in the areas of family law, child protection, domestic violence and migration.

We are members of the Women's Legal Service Australia committee and are involved in law reform work at state and national levels. Additionally, we do significant work in communities, delivering community education programs and supervising legal students as volunteers and placement students.

We provide an array of face to face and telephone services, and duty lawyer services in the specialist domestic violence courts and family law courts. In the 2022/23 year we assisted around 2500 women and girls with 16,000 services. One in five of our clients identify as being Aboriginal or Torres Strait Islander and a further one in five identify as being from a CALD community. Almost all identified as being victims of domestic and family violence, very often including sexual violence.

Our feedback:

Whilst we do not practice in the criminal jurisdiction, we have significant experience in the civil specialist domestic violence courts and have daily contact with women who are victims of sexual assault offences. Our clients regularly tell us of laws, processes and systems they feel, fail in providing them a sense of safety to tell their experiences and achieve the justice they deserve.

Our submissions focus on the experiences of our clients, garnered largely through our assistance with their legal and non-legal issues, and from their stories and comments about their lived experiences of domestic/family/sexual violence, how they perceive the justice system, and what happens to them as victim-survivors in the system.

Amendment of the Attorney-General Act 1999

We agree with amendments of the *Attorney-General Act 1999* to include a mandatory review into the operation and effectiveness of the substantial changes to Queensland legislation made pursuant to the Women's Safety and Justice Taskforce recommendations.

We appreciate that the effects of amendments in the criminal justice system may take several years to become apparent. However, we are of the view that the review of the extensive amendments to the *Domestic and Family Violence Prevention Act* cannot and should not wait five years. We suggest a two-year period would be adequate to garner meaningful feedback and data and make any necessary adjustments to the DFVPA.

We also comment that the intended commencement of the statutory review process is not apparent from the wording of the proposed s 14 (3)(a) and should be made clearer. As it stands, it could be understood that the five years starts from the commencement of the individual amending instruments.

We trust that as part of the review, stakeholders will be provided ample opportunity to make submissions, including to relay feedback on the effects of the amendments from parties directly affected.

Amendment of the *Corrective Services Act 2006*

We agree with the insertion of the new ss 344AA and 344AB to allow prisoners held on remand to talk freely in eligible s266 programs and services without fear of any admissions or derivative evidence being admissible in criminal, civil or administrative proceedings (excluding parole considerations.) We note this extends only to the commission of offences they are being held on remand for.

Relevantly, section 266 provides that the chief executive must establish or facilitate programs or services:

(a) for the religious welfare of prisoners; and
(b) to support the health and wellbeing of prisoners; and
(c) to help prisoners reintegrate into the community after their release from custody, including by acquiring skills; and
(d) to initiate, keep and improve relationships between offenders and members of their families and the community; and
(e) to help rehabilitate offenders.

The explanatory notes for the proposed provisions evidences parliament's intention to address Taskforce findings that women in custody are reluctant to participate in programs if they fear an admission of guilt would detrimentally impact their defence.

We support the proposed provisions for these reasons however, we also believe there are potential benefits for *all* prisoners and their family members if eligible s 266 programs and courses (especially those programs delivered under s 266 (d) and (e)) can be meaningfully engaged in and participation is not just a tick and flick exercise.

It is our recommendation that much broader amendments be considered so as to provide the basis for genuine and meaningful engagement in these valuable programs. Our view is that the concept of inadmissibility of admissions made in s 266 programs should extend to <u>all</u>

prisoners - whether on remand or serving a sentence - and for all admissions made during engagement in such programs.

For a prisoner to engage meaningfully in an eligible s 266 program, they need to know they can openly and fully explore negative attitudes and aspects of past behaviour that are problematic. This may include discussing past behaviour that would constitute a criminal offence for which the prisoner is not charged. For instance, unless they know an admission cannot be used against them, prisoners will be reluctant to disclose behaviour that could constitute assaults, wilful damage, deprivation of liberty, stalking, contraventions of protection orders, use of carriage service to intimidate etc. We are also mindful of the commencement of the coercive control offence, which will no doubt lead to apprehension and confusion by many when it comes into effect. This may also have a chilling effect on the participation and overall effectiveness of s 266 programs and courses, unless a blanket immunity is extended to *all* admissions made by *all* participants.

We can also see benefits for women prisoners who are victims of domestic violence (including sexual violence and other coercively controlling behaviour) being able to speak freely about adverse experiences they suffer as a result of behaviour of their partners or other family members and which may constitute criminal conduct.

We know many victims choose to stay in violent relationships and do not want their partners charged for controlling/violent behaviour for various reasons, including because they fear retaliation, or they do not want the incarceration of partners they love or depend on. Our clients often tell us they are reluctant to be open and honest about their victimisation as they fear such disclosure could be used against their partners who are abusing them.

Again, we believe here is an excellent opportunity for proper engagement by victims in s 266 programs, which can provide vital support and counselling whilst these women are separated from violent partners or family members.

In summary, it is accepted knowledge that the success of behaviour change programs to any degree relies on the participant being honest about underlying attitudes and beliefs and how these manifest in patterns of behaviour. If only those prisoners held on remand are able to freely discuss the behaviour that constitutes the offence they are on remand for, the likelihood of meaningful engagement in eligible s 266 programs and courses is vastly reduced and a rare opportunity to engage perpetrators (and victims) before they re-enter society and return to families is missed.

Amendment of Criminal Code

We agree with the insertion of the new s 210A and the amendment to s 229B of the *Criminal Code* to criminalise sexual conduct toward children over 16 years by an adult who has the care, supervision or authority over the child.

We note that the proposed offences do not extend to situations where the child is no longer under the care, supervision or authority of the adult. We query whether section 24 of the Code is available for those listed in the proposed section 210B (3) to raise a defence that they honestly and reasonably believed the child was no longer under their care, supervision or authority?

Our view is that if parliament's intention is that a defence under s 24 is not available to the list of adults in section 210A(3) as to whether the child is in under their care, supervision or authority, then the categories listed in that section must be clear and definitive. For instance,

there is no definition of what is meant by 'health practitioner' in the proposed provision or section 1 of the Code, and this may lead to confusion.

Further, the proposed ss 210A(3)(f) and (g) need clarification and are too broad. Under these proposed provisions a person who provides a service such as mowing the lawn at a residential facility or works as a kitchenhand at a youth detention centre would be deemed to have a child 'under their care, supervision or authority' and have no recourse under s 24. If these are not the types of relationships with inherent power imbalances the legislation is designed to capture, then clarification is needed.

We also believe an anomaly is created with the defences for the existing s 229B (1) and the proposed s 229B(1A). If we are correct, offenders caught by the existing offence under (1) include offenders maintaining an unlawful sexual relationship with a child under the age of 16 years who are in their care, supervision or authority. A defence is available to those offenders, if the child is over 12 but under 16 years, to prove they believed on reasonable grounds that the child (under their care, supervision, or authority) was at least 16 years.

However, compare this to the defence available for an adult charged under (1A) with maintaining an unlawful sexual relationship with a child above the age of 16 years who is under their care, supervision or authority. They must satisfy the Court they believed on reasonable grounds that the child was at least 18 years, or the other circumstances of the proposed s229B (5A) are made out.

How can it be a defence to maintaining an unlawful sexual relationship with a child in your care, supervision or authority who is under 16 years, to argue that you reasonably believed that you were committing another offence (a s 229B(1A) offence) – and for which you cannot be prosecuted because the child is not over the age of 16 years?

We suggest amending the wording of the proposed s 229B(1A) to provide that:

> *Any adult who has a child under their care, supervision, or authority and maintains an unlawful sexual relationship with the child commits a crime.*

We also suggest amending the wording of s 229B(5) to provide that:

> *If the child was at least 12 years when the crime was alleged to have been committed, it is a defence to prove the adult believed on reasonable grounds the child was at least the age of 16 years, unless subsection (5A) applies.*

We note that under both s 229BB (failure to protect child from child sexual offences) and s 229BC (failure to report belief of child sexual offence committed in relation to child,) there is no requirement to protect a child over the age of 16 years unless they have an impairment of the mind), or report adults who offend under s229B(1A) unless the child has an impairment of the mind.

Amendment of *Evidence Act 1977*

We support the proposed amendments to the *Evidence Act 1977,* including the extension of who is, or can be, considered a special witness.

We comment that the new proposed s 21AAC Special witness evidence to be videorecorded provision should be clearer at (3)(c) as to the use of this evidence in civil proceedings containing the same allegations, to clarify this excludes civil proceedings under the *Domestic and Family Violence Protection Act.*

Even though the provisions of the DFVPA explicitly excludes the operation of the *Evidence Act* (save for part 2, division 2A,) at first blush s 21AAC(3)(c) could lead some to believe that the videorecorded evidence could be admissible in all civil proceedings that includes the same allegations.

We also comment here that we believe the videorecorded evidence should be available in proceedings under the *Domestic and Family Violence Protection Act* if the same allegations are part of those proceedings. This is especially important because the DFVPA does not mandate a ban on direct cross examination of aggrieveds by self-represented respondents. The DV court *may* ban direct cross examination if an application is made by a party, or on its own initiative, but this is discretional. Whilst s 42 of the DFVPA empowers a sentencing court to make or vary a protection order, there will be circumstances where this does not occur and proceedings in the domestic violence court are necessary to obtain protection. We believe amendments to the DFVPA should be made to allow the admission of the aggrieved's videorecorded evidence from relevant criminal proceedings into civil domestic violence proceedings.

We especially approve of the provisions regarding the admissibility of evidence in relevant proceedings of evidence about the nature of sexual offences and factors that might affect the behaviour of victims. In listening to many victims of sexual violence over the years, we understand there are myriad complex societal, cultural and personal factors that affect how different victims react to sexual violence and why they may delay in reporting such offences.

We fully support the inclusion of the admissibility of tendency evidence and the presumption of the probative value of sexual interest in children a defendant has or has had, whether acted upon or not. We acknowledge here, the challenges faced in obtaining evidence from younger child victims of sexual offences and the frustration and upset this causes many protective parents who are told there is not enough evidence to support charges. Any reliance that could be placed on tendency evidence will assist in addressing these issues.

Similarly, we also support the provisions concerning coincidence evidence as a manifestation of common sense. In relation to both these types of evidence, we support the provisions concerning the standard of proof for such evidence not being beyond reasonable doubt (except if adduced as proof of the element or essential fact.)

Amendment of the *Penalties and Sentences Act 1992*

We have no concerns about the proposal to increase the maximum duration of a non-contact order under s 43C of the *Penalties and Sentences Act* from two to five years, nor to increase the maximum penalty for a contravention of an order under s43F to 120 penalty units or three years imprisonment.

The explanatory notes clarify that it is intended that non-contact orders can be made against offenders convicted of sexual violence. We suggest mandating that a sentencing court sentencing offenders of sexual violence must consider imposing a non-contact order in these types of offences.

We believe parliament should also consider going further to explicitly state that a non-contact order must be considered against adults who are convicted of child sexual offences to protect their child victims, including those convicted under the new proposed s 210A and the amended s 229B.

It is our view that there is an opportunity to encourage the use of no-contact provisions to address a legal gap in the protection of children abused by a parent or family member.

Under the *DFVPA,* a child can only be named as an aggrieved (or respondent) if there is an intimate partner relationship or informal care relationship. Parent/child relationships and child/other family relationships are therefore excluded and are not considered a 'relevant relationship.' Consequently, this important protective jurisdiction cannot be used to protect a child under the age of 18 years (in their own right) from familial offenders.

The victimised child could be a named child on an aggrieved's protection order, but only as a collateral consideration: for the child to receive protection as a named child, there must be a relevant relationship between the aggrieved and respondent, domestic violence must have been perpetrated against the aggrieved, and the risk of future domestic violence toward the aggrieved must be sufficient to satisfy a court that it is necessary or desirable to make the order.

Whilst a protective parent could seek an injunction in similar terms as a non-contact order under the *Family Law Act 1975,* the issue is one of enforcement. The onus is on the victim (more specifically the protective parent of the victim) to seek enforcement of a family law injunction. This is done by filing a contravention application in the *Federal Circuit and Family Court of Australia,* after first complying with pre-action procedure requirements (including mediation with the other party.) It can be many weeks before a contravention application is listed, and many more before it is finalised.

Whilst sanctions can be made if a contravention is made out and there is no reasonable excuse, contravention proceedings are not intended to be punitive, and their purpose is to encourage future compliance with family law orders. In all, family law injunctions are wholly unsuitable for offering practical and safe protection of children.

In finishing, we believe no-contact orders are an avenue for proper protection to many victims, especially victims of sexual violence - and in particular child victims - and their use should be encouraged. One way to encourage the making of orders is to mandate all sentencing courts to consider making a non-contact order when sentencing offenders of sexual offences. Additionally, the legislation should clearly state the applicability of the non-contact provisions, to adult offenders of child sexual offences, inclusive of those with a familial relationship with the victim child.