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

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Committee Secretary
Community Support and Services Committee
Parliament House
George Street
Brisbane Qld 4000

By email: CSSC@parliament.qld.gov.au

Dear Committee Secretary

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

Thank you for the opportunity to comments in response to the Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Bill 2024.

This submission has been prepared with the assistance of members of the Queensland Law Society's Criminal Law Committee.

It is the Society's position that the insertion of new section 210A and amendment of s229B of the Criminal Code 1988 (Qld) is unnecessary and will have uninitended consequences. With respect to the proposed new offence, the Society queries whether it should seriously be thought that an offence of sexual acts with a child aged 16 or 17 under one's care, supervision or authority, that does not involve identifiable abuse or harm, ought to be criminalised and attract the proposed penalty of 10 years imprisonment.

With respect to the proposed legislative reforms to the Evidence Act regarding tendency and coincidence evidence, the Society considers that without a sufficient evidence base to draw on, we are not in a position to provide comprehensive evidence-based commentary on the operation of the proposed new provisions. In our view, consideration of codifying common law principles concerning tendency and coincidence evidence should not occur until comprehensive evidence is available following referral to the Queensland Law Reform Commission for review and reporting.

Part 4 Amendment of Criminal Code

Clause 8 Insertion of new s 210A 'Sexual acts with a child aged 16 or 17 under one's care, supervision or authority'

The Bill introduces a new standalone offence of sexual acts with a child aged 16 or 17 under one's care supervision or authority to Chapter 22 of the Criminal Code.

The Society strongly opposes the introduction of the new section 210A offence.

Plainly, the new offence will allow for the circumstance where two consenting individuals, both over the age of consent (which remains 16 years) and proximate in age, could be prosecuted and liable for penalties of between 10 and 14 years imprisonment; notwithstanding there being no evience of any identifiable abuse or harm.

The new section 210A offence omits consent as an element, in respect of a child of between 16 and 17 years old and a defendant who may be as young as 19 years old, on the basis that the defendant occupied a (classifactory or factual) relationship of care, supervision or authority with the child. There is no onus on the prosecution to prove that the defendant exercised nor abused their position of authority in the commission of the offence. If proceeded with, we suggest consideration be given to an amendment to ensure that these types of relationships are not inadvertently caught by the new provisions.

The new section 210A is to be inserted within Chapter 22 of the Criminal Code. The title of Chapter 22 is 'Offences against morality'. The intention and target of the offences contained in Chapter 22 is not sexual activity *per se* but, rather, sexual activity involving an element of abuse. In respect of child sex offences, the target mischief is the sexual abuse of children by adults who seek to prey on their vulnerability, rather than children being sexually active in and of itself. Of course, not every child under 18 years of age is equally vulnerable. Nor is every offender equally predatory. The object of the legislation is to protect children, not prosecute them.

The Bill provides that a defendant is liable to a maximum penalty of 14 years imprisonment for an offence under section 210A(1)). For an offence under section 210A(2), the defendant is liable for a maxium penalty of 10 years imprisonment. The QLS considers it appropriate for the maximum penalties to reflect those in NSW and the ACT:

- Between 4-8 years imprisonment, depending on the age of the child, for offences involving sexual intercourse or penetration (s 210A(1)); and
- Between 2-4 years imprisonment, depending on the age of the child, for offences involving sexual touching or indecent dealing/acts of indecency (s 210A(2)).

These maximum penalties reflect the generally less serious nature of the section 210A offence, together with rational assumptions that, as a child matures, the disparity in power between the defendant and the child is likely to decrease, along with an increased ability on the part of the child to resist the position of authority of the defendant.

Clause 9 Amendment of s 229B (Repeated sexual conduct with a child)

Clause 9 proposes an amendment to the extant offence of repeated sexual conduct with a child under section 229B. The QLS does not support this amendment which introduces a new section

229B(1A) imposing a maximum sentence of life imprisonment where that same sexual relationship is maintained.

To expose a defendant to a penalty of life imprisonment in respect of sexual contact with a 16-17 year old child, absent evidence of actual abuse or sexual exploitation of the child by the adult, is unwarranted. Actual abuse or sexual exploitation cannot be safely inferred in every case solely by virtue of the adult defendant occupying a care, supervision, or authority in respect of the child.

Accordingly, the Bill should not add an additional limb to the offence of "Repeated sexual conduct with a child" in section 229B so the offence may capture an adult who maintains an unlawful sexual relationship with a child over 16 years of age, who is under the adult's care, supervision, or authority, unless a statutory defence of an absence of abuse or sexual exploitation is contained in both the new section 210A offence and the section 229B offence.

Part 5 Amendment of Evidence Act 1977

Clause 18 Amendment of s 21A (Evidence of special witnesses)

Clause 18(4) of the Bill inserts a new section 21A(3) of the Evidence Act to provide that in the case of a relevant proceeding, the court must, on the application of a party to the proceedings, make or give an order or direction under subsection (2)(a)(ii), (c), (d) or (e) unless the court is satisfied it would not be in the interests of justice to do so or, subject to subsection (9), appropriate equipment and facilities are unavailable to accommodate an order or direction under those paragraphs. The Society opposes the automatic 'special witness' classification without justification, particularly given the already low threshold for such classification.

Furthermore, we consider the proposal to amend section 21A through the addition of new subsection 21A(2)(a), allowing the court to exclude the defendant or other parties from the courtroom when a special witness is required to testify or for any other purpose, to be extraordinary.

Clause 20 Insertion of new s 21AAB (Directions hearings)

Clause 20 of the Bill inserts new section 21AAB into the Evidence Act. This section allows a court to issue directions regarding the giving of evidence by a witness that the court considers appropriate for the fair and efficient conduct of the proceeding. The Society opposes new subsection (4), which specifies particular matters the court may give a direction about.

Section 21AAB has the potential to unreasonably constrain cross-examination by defence counsel without requiring any precondition (such as intellectual impairment, medical or psychiatric condition) to the making of a direction about the manner, duration or questioning of a special witness. The section also appears to give the court the power to 'allocate' points for cross-examination by each counsel where there are multiple defendants, which raises significant concern. Defence counsel should not be directed about questions that may or may not be put to the witness, provided such questions are permitted at law. Furthermore, it would

be almost impossible to rule on such matters without forcing the defence to show their hand prior to trial.

Clause 22 Insertion of new s 21AAC (Special witness evidence to be videorecorded)

Clause 22 introduces section 21AAC, which provides the court must direct that a videorecording of the evidence of a special witness be made if a special witness is giving evidence. The Society opposes this mandate to videorecord the evidence of a special witness. Evidence evolves over the course of multiple trials, and having to recall witnesses to repeatedly give videorecorded evidence is both disjointed and confusing for the jury.

Clause 33 Insertion of new pt 6B, div 4, sdiv 2

Subdivision 2 (Evidence about the nature of sexual offences and factors that might affect the behaviour of victims)

Clause 33 inserts new pt 6B, div 4, sdiv 2 into the Evidence Act. The scope of this new subdivision is extremely concerning. Specifically, under new section 103ZZGB, an expert (defined to include a person who can demonstrate specialised knowledge, gained by training, study or experience, of a matter that may constitute evidence about a sexual offence) may now give evidence about the nature of sexual offences generally. This includes the 'social, psychological and cultural factors that may affect the behaviour of a person who has been the victim, or who alleges that they have been the victim, of a sexual offence, including the reasons that may contribute to a delay on the part of the victim to report the offence'.

The admissibility of this evidence abrogates the credibility rule, the ultimate issue rule and the common knowledge rule. The Bill explicitly acknowledges this, abrogating these rules in proposed sections 103ZZGC and 103ZZGD. While the introduction of expert evidence on victim behaviour seems to follow similar models in other jurisidctions, the purpose of those schemes is to prevent juries from acting on common misconceptions or biases, rather than altering the standard of proof. This is typically complemented by specific and robust directions. For example, in New Zealand, section 126A(1) of the *Evidence Act 2006* (NZ) provides that "In a sexual case tried before a jury, the Judge must give the jury any direction the Judge considers necessary or desirable to address any relevant misconception relating to sexual cases." This requirement is not dispensed with even if expert evidence has been called about those matters. This serves to redress any imbalance that may have been caused by the Crown suggesting to a jury that the fact that expert evidence about the complainant acting in a particular way is directly indicative of guilt (or incapable of being relied upon as a path to acquittal).

The amendments to directions introduced in the Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2024 do not appear to go as far. If there are concerns about the improper use of expert evidence led by the Crown about victim behaviour, it may be necessary to revisit these directions, or establish proposed directions akin to those found in the Benchbook as soon as possible.

Moreover, section 103ZZGB will likely create a contest of experts. This could delay proceedings and increase costs, which would have a disproportionate impact on defendants relying on legal aid.

Clause 40 Insertion of new pt 7A (Admissibility of tendency evidence and coincidence evidence)

Clause 40 of the Bill amends laws concerning similar fact and propensity evidence, aiming to replicate Part 3.6 of the NSW Evidence Act in its effect. The QLS does not support the changes in Clauses 40 to 43. This aspect of the reforms is sufficiently significant to warrant referral to the Queensland Law Reform Commission. Nevertheless, if statutory reform of this area of evidence law is to be effected in Queensland, it is submitted that the reform should be limited to sexual offence proceedings. The Pfennig Test should continue to apply in all other criminal proceedings.

The rules governing the admissibility of propensity (tendency) and coincidence (similar fact) evidence are inherently complex. Each case turns on its own facts. In the Society's view, the proposition that uncharged, prior discreditable conduct evinces, in a relevant and admissible way on another or other occasions and/or has or had a particular state of mind on another or other occasions, is qualitatively different and less compelling in respect of charges of a non-sexual nature.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [redacted] or by phone on [redacted]

Yours faithfully

[redacted]

President