

Legal Affairs and Safety Committee

Inquiry into the Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023

Department of Justice and Attorney General (DJAG) response to the submission of the Queensland Law Society (QLS)

Issue	Submission of QLS	Department response
Adequacy of consultation	Disappointed that the drafting was not open for at least 3 months prior to introduction as set out in Recommendation 78 of the Hear Her Voice report.	<p>DJAG notes the feedback.</p> <p>DJAG recognises the importance of consultation with community stakeholders. Noting that decisions around consultation and timing for the development of legislation are ultimately a matter for Government, the department endeavours to consult as much as possible in a meaningful way.</p> <p>Between December 2022 and February 2023, DJAG undertook targeted preliminary consultation. That preliminary consultation included a broad range of stakeholders from the legal, domestic and family violence, sexual violence sector and some Aboriginal and Torres Strait Islander stakeholders. That consultation included approximately 125 stakeholders. It also included relevant government departments and the Queensland Police Service. Feedback arising from this consultation process informed the development of a consultation draft copy of the Bill (consultation draft Bill).</p> <p>DJAG consulted on the consultation draft bill from 18 July 2023 to 4 August 2023. The stakeholders consulted on the</p>

		<p>consultation draft Bill were largely consistent with the stakeholders consulted during the preliminary consultation process, including relevant government departments and the Queensland Police Service. That consultation process included all of the 125 stakeholders from the preliminary consultation round and some new stakeholders that were identified to DJAG in the course of the consultation and were then included as soon as DJAG became aware of them. DJAG sent the consultation draft bill to 146 stakeholders and received 39 written submissions. Feedback received during this consultation process was taken into account in finalising the Bill for the purposes of introduction.</p> <p>QLS was consulted in both stages of the DJAG consultation process.</p> <p>Taken together, the overall DJAG consultation process was approximately 12 weeks or 3 months.</p> <p>Whilst the above departmental consultation process did not align with the Taskforce recommendation (3 months consultation on a draft bill), it allowed DJAG to receive much earlier feedback to inform the drafting.</p>
<p>Drafting of the coercive control offence</p>	<p>QLS have real concerns that its terms are unnecessarily complex, too wide and breach fundamental human rights norms. The offence is a disservice to both complainants and accused persons and the wider community. It is too difficult for juries to understand and will produce unjust outcomes.</p>	<p>DJAG notes the submitter's feedback in relation to the breadth of the offence and concerns about impacts on a fair trial.</p> <p>Consistent with the recommendation of the Taskforce, the offence of coercive control captures a course of conduct consisting of two or more acts of domestic violence as outlined in the definition in section 8 of the <i>Domestic and Family Violence Protection Act</i> (the DFVP Act). The</p>

		<p>Taskforce acknowledged that there is a wide spectrum of offending behaviour that could be captured under the offence. DJAG notes that coercive control is complex behaviour, which may be employed using a wide range of domestic violence behaviours¹, and that these factors, as well as the Taskforce’s recommendations as to the construction of the offence² necessarily require a complex legislative response capable of responding to a diverse and broad range of domestic violence behaviours, so as to ensure that the coercive control offence sufficiently holds perpetrators of coercive control accountable for the full range of their physical and non-physical violence.</p> <p>The Statement of Compatibility tabled with the Bill outlines the position that the purpose of the amendments, and the importance of the promotion of the human rights of victims and their children, outweighs any identified limitations, including in relation to rights in criminal proceedings.</p>
<p>Affirmative consent: general</p>	<p>Section 348(1)(2) and (4) are otiose. There is already the law in Queensland and there is no purpose served in re-writing the provisions.</p>	<p>DJAG notes this feedback.</p> <p>The Taskforce recommended amending section 348(1) of the Criminal Code so that consent is agreed, rather than given. The Bill implements this recommendation and better aligns Queensland with the approach DJAG understands is taken in all other jurisdictions (beside Western Australia who are currently finalising a review).</p> <p>The Taskforce noted that, in practice, the ‘giving’ of consent suggests that women and girls are sexual ‘gate keepers’. The</p>

¹ Australian Government, National Principles to Address Coercive Control, pp1-2.

² Report One, pp 739-751.

		<p>Taskforce noted that this makes them liable to be pressured by others to 'give' or perhaps 'give up' their consent.</p> <p>The Taskforce accepted the contentions of the many women who made submissions to the Taskforce, and those who work with and support them, that the term 'agreed' was more reflective of modern community standards, which value equality and mutual respect in sexual relationships, and better promotes and upholds those contemporary standards.</p> <p>The inclusion of additional provisions in section 348 is consistent with the current approach (though noting the provisions in the Bill go further to better align with an affirmative consent model), as well as the approach taken in other jurisdictions who have introduced affirmative consent.</p> <p>The provision will assist with education of the community and legal practitioners, providing that consent needs to be free and voluntary, can be withdrawn at any time, and that consent must be obtained for each sexual act.</p>
<p>Affirmative consent: requirement to say or do something to ascertain consent</p>	<p>QLS does not support the new section 348(3) "a person who does not offer physical or verbal resistance to an act is not, by reason only of that fact, to be taken to consent to the act". The QLS states it artificially limits the circumstances in which consent is, in fact, given and is not good law.</p> <p>Queensland law already recognises that silence or lack of resistance does not equal consent as per <i>R v Shaw</i> [1986] 1 Qd R 641.</p>	<p>DJAG notes the submitter's concerns about section 348(3). DJAG notes the approach in the Bill is consistent with that taken in other jurisdictions.</p> <p>New section 348(3) provides that the absence of physical or verbal resistance (that is, a failure to do or say something) is not, by reason only of that fact, to be taken to be consent to the act. The provision addresses the rape myth / narrative that 'real rape' involves force or resistance by a complainant, and also recognises the 'freeze' response.</p>

	<p>The common law also recognises that depending on the context, silence may also not constitute consent.</p> <p>One of the justifications for section 348(3) appears to be to limit the mistake of fact excuse, by preventing a person from saying that they honestly, reasonably but mistakenly believed that their partner's lack of resistance meant they were consenting to sex.</p>	<p>Combined with section 348AA(1)(a), which provides that there is no consent where a complainant does not say or do anything to communicate consent, this makes clear that there will be no consent in such circumstances.</p> <p>The provision is also consistent with existing section 348(3).</p> <p>Section 348 is primarily concerned with consent as to the complainant's state of mind, and something that is communicated. However, it is also educational, making it clear that consent should not be assumed where there is an absence of physical or verbal resistance.</p> <p>Under the proposed provisions, a jury may consider the absence of physical or verbal resistance by the complainant, and whether in the circumstances that contributed to the defendant's mistaken belief that there was consent. However, DJAG notes new section 103ZX of the <i>Evidence Act 1977</i>, which allows a direction to be given, where a circumstance in 348AA(1) is present, and where the defendant knew that to be the case, that this will be sufficient to demonstrate that any mistaken belief was not reasonable. Under the approach in the Bill, what will be pertinent is whether in the absence of physical or verbal resistance, the defendant said or did something to ascertain whether the complainant was consenting; where they did not, such a belief will not be reasonable.</p>
<p>Affirmative consent: example of a married couple</p>	<p>The affirmative consent amendments will produce unjust outcomes. For example in the case of a long term married couple who may have spontaneous intercourse with any prior</p>	<p>DJAG notes that the QLS made submissions to the Women's Safety and Justice Taskforce. QLS did not support reviewing the law on consent and mistake of fact and suggested that community support for a change to the law might be based</p>

	<p>explicit communication because their history enables them to understand each other's non-verbal behaviours.</p> <p>It is an inappropriate extension of the criminal law to criminalise those behaviours.</p> <p>By way of further example the QLS says that the same couple might later get divorced and Person A alleges that the 'spontaneous sexual intercourse' was rape. In that case the QLS asks why Person B should be prevented from saying that their belief there was consent arising from the context of their previous long-term loving relationship where sex was often initiated on the basis of non-verbal cues and without physical resistance. In that case whether the elements of section 23 of the Code (mistake of fact) were made out would be a matter for the jury.</p>	<p>on 'significant misconceptions' within the 'lay community' about the operation of law.³ The Taskforce still recommended this change to the law.</p> <p>When considering stakeholder feedback, the Taskforce noted that 'different stakeholders viewed the issue from very different perspectives', and that those who opposed the changes 'examined this issue from the perspective of an accused person and protecting an accused person's fundamental right to a fair hearing in the criminal trial process'⁴.</p> <p>The Taskforce noted they discussed the inclusion of a requirement to say or do something at length and carefully weighed the competing views. The Taskforce carefully considered the additional limits on human rights, and whether these could be justified, given the purpose of the proposed amendments was to see Queensland laws better reflect community expectations, including those of women.⁵</p> <p>The Taskforce concluded, by majority, that the concerns regarding the limitation on human rights were justified, that an affirmative consent model had the capacity to drive lasting change in the community and in legal processes, and noted the desirability of the laws across Australia being broadly consistent.⁶</p>
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³ Report Two, pp 204.

⁴ Report Two, pp 207.

⁵ Report Two, pp 214.

⁶ Report Two, pp 215.

		<p>The model of affirmative consent in the Bill does not prohibit consideration of the nature of the relationship existing between the parties, nor does it prevent consideration of ‘non-verbal cues’ that may exist in the context of a loving, long-term relationship.</p> <p>Rather, it requires there to be clear and unequivocal agreement from both parties. Body language (‘doing something’) may be sufficient to show consent; for example, removing an item of clothing or providing a physical gesture indicating a willingness to continue.</p> <p>DJAG notes there will be a comprehensive community education campaign regarding affirmative consent. The transitional provisions provide the ‘new standard’ will not apply to sexual activities that occurred prior to commencement of the new laws.</p>
<p>Affirmative consent: criterion of harm</p>	<p>The QLS does not support section 348AA(f) (which DJAG’s takes as a reference to section 348AA(1)(f)) and says that the criterion of harm is inappropriately broad. As a legal proposition, a person may, for many reasons, freely agree to do something that they would prefer not to do or later regret doing. Neither circumstance equates to an absence of consent at the time of the act. The question of whether the consent was freely and voluntarily given does not mean a complete absence of conflicting or negative thoughts or consequences. To require otherwise is a fallacious standard and an inappropriate</p>	<p>DJAG notes the submitter’s concerns about the breadth of section 348AA(1)(f).</p> <p>DJAG agree with QLS’s submission that a person may ‘freely agree’ to do something they may prefer not to or which they later regret. The provision does not criminalise such situations provided there was free and voluntary agreement at the time the person participated in the act. Instead, the provision recognises that force, fear of force, harm or fear or harm, may interfere with a person’s ability to freely and voluntarily agree to participate. What is relevant is the complainant’s state of mind. There is a requirement that the person participates in the act because of the fear of force or harm so there must be some connection between</p>

	<p>incursion of the criminal law. QLS recommends that section 348(f) be removed entirely.</p>	<p>the fear or force of harm and their participation in the sexual act.</p> <p>The defendant's state of mind can be considered as part of the mistake of fact defence if the defendant honestly and reasonably believed that the complainant was consenting. The surrounding circumstances, including what the defendant said or did at the time of the sexual act to ascertain consent, can be taken into account when assessing whether that belief was reasonable.</p> <p>The provision has been included in the Bill because of the Taskforce's recommendation to adopt section 61HJ of the <i>Crimes Act 1900 (NSW)</i>. The New South Wales equivalent provision requires 'force, fear of force or fear of serious harm'.</p> <p>The Taskforce did not directly address the issue of whether the harm ought to be serious. The Taskforce did however, recognise that many different types of harm, or fear of harm, can be used to create a power imbalance and undermine free and voluntary agreement to participate in a sexual activity. The Taskforce considered power imbalance, and how it contributes to domestic, family and sexual violence, in the context of both affirmative consent and more generally in the context of domestic and family violence.</p> <p>The existing provision in the Criminal Code – section 348(2) – provides consent is not free or voluntary where there is force, threat or intimidation or fear of bodily harm. The existing provision does not require an assessment of whether any of these things are 'serious'.</p>
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Affirmative consent: criterion of harm	<p>The proscriptive approach in the drafting of section 348AA will increase, not decrease, the focus of the alleged complainant’s evidence and therefore the reliability and credibility. This is contrary to some of the stated concerns in the Women’s Justice and Safety Taskforce report.</p>	<p>The Taskforce recommended inclusion of a non-exhaustive list of circumstances where there is no consent, modelled on section 61HJ of the <i>Crimes Act 1900</i> (NSW). This recommendation was supported by the Government.</p> <p>The Taskforce heard that under the existing law, complainants are subjected to brutal and often irrelevant cross-examination.⁷ There is no evidence that introduction of section 348AA will increase the duration of cross-examination. Rather, the proposed provisions provide for circumstances where there is no consent, and together with other measures proposed by the Taskforce, such as amendments to improper questions, may assist in reducing the traumatising nature of cross-examination.</p>
Coercive control: General	<p>Both the QLS Domestic Violence and Criminal Law Committees are concerned that the new coercive control offence as currently drafted,</p>	<p>DJAG notes the Taskforce’s recommendation that the justice system must be supported to identify and address patterns of violence over time, moving the justice system from a</p>

⁷ Report Two, pp 263.

	<p>will lead to members of the Queensland community being wrongfully charged, convicted and criminally punished. This will bring the justice system into disrepute, and negatively impact on the rule of law, including for victims of domestic violence.</p> <p>The proposed offence needs to be re-drafted with proper regard to the conventions of drafting, fundamental evidentiary tenets, the need for certainty and core human rights principles.</p>	<p>“violence model” that views domestic violence as single incidents to one that recognises the patterned nature of abuse over time and the insidious nature of coercive control.⁸</p> <p>The Statement of Compatibility outlines the position that the purpose of the amendments, and the importance of the promotion of the human rights of victims and their children, outweighs any identified limitations, including in relation to rights in criminal proceedings.</p>
Coercive control: intent	<p>The QLS endorses the need for the offence of coercive control to include an element of specific intent, noting the offence’s intent element. The QLS submits this inclusion of an intent element is a manifestation of the base safeguard that a person should only be criminally liable for conduct which they intended.</p>	<p>DJAG notes the submitter’s response, which is supportive of the intent element in the coercive control offence: the person intends the course of conduct to coerce or control the other person (subsection 334C(1)(c)).</p>
Coercive control: specific intent, particularity and jury unanimity	<p>QLS expresses a profound concern that in the context of a crime of specific intent, the element of proof of a course of conduct, as defined, combined with the removal of the common law requirements for particularity and jury unanimity, will result in convictions that are unsafe and occasion a miscarriage of justice.</p>	<p>DJAG notes the concerns of the QLS regarding the approach in the Bill to particulars, jury unanimity and the intent element.</p> <p>Particulars</p> <p>The Bill provides that the prosecution is not required to particularise an act of domestic violence that makes up the</p>

⁸ Report One, pp 479.

	<p>QLS submits the provision must be redrafted to restore the common law requirement that the Crown particularise the alleged course of conduct in every case, and to restore the requirement that the jury unanimously find the particularised, alleged course of conduct accompanied by the requisite intention in order to return a conviction, submitting that to do otherwise renders the requisite element of specific intent meaningless.</p> <p>QLS submits that particularisation is a precondition for a fair trial for the accused.</p> <p>QLS cites the judgement of Heydon J in Patel v R, which refers to and applies Johnson v Miller, the highlighted portion of which states: <i>A person charged with an offence is entitled to know with precision what the prosecution allege they have done. This is an elemental principle of law and human rights.</i> <i>QLS notes that the degree of particularisation to satisfy that requirement will depend on the nature and circumstances of the offence.</i></p> <p>The QLS submits that allowing conviction of a defendant for the indictable crime of coercive control, liable to a maximum penalty of 14</p>	<p>offence to the same extent that would be necessary if it were charged as a separate offence. The prosecution is still required to particularise the elements of the offence.</p> <p>This provision in the offence mirrors the approach in an existing provision in the Criminal Code for the offence of Repeated sexual conduct with a child (section 229B(4)(a)), which is also a course of conduct offence.</p> <p>The Taskforce said that a similar provision should be considered for the coercive control offence because a victim might describe acts of coercive control that are not able to be sufficiently particularised to the extent necessary if they were to be charged as separate criminal offences.</p> <p>The Taskforce also made findings about the significant impacts of coercive control on victims, including the impact of trauma on memory, with victims telling the Taskforce that it is hard to pinpoint particular dates and times because the coercive control and intimidation was ongoing and relentless.</p> <p>The Royal Commission into Institutional Responses to Child Sexual Abuse discussed this type of provision in the context of child sex abuse in its Criminal Justice Report. A provision of this nature overcomes an evidentiary challenge that arises where abuse may have occurred repeatedly and in similar circumstances.</p> <p>The intention is that this provision in the Bill would operate in the same way as the existing provision in the Criminal Code for the 'Repeated sexual conduct' offence, with a focus on</p>
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	<p>years imprisonment, on the basis 12 jurors find to exist a “course of conduct” consisting of undefined and likely different combinations of unparticularised evidence of multiple acts of domestic violence, with each juror’s findings as to the content and boundaries of the course of conduct unknown and inscrutable cannot co-exist with the need to find the existence of a specific intent at the time of the course of conduct.</p>	<p>the course of conduct rather than the individual acts.</p> <p>The approach in the Bill is similar to the approach that has been taken in the New South Wales coercive control offence, which has the same intent element.</p> <p>In New South Wales, there is a provision which is similar to, although more explicit than the approach in the Bill. That more explicit approach is not consistent with the approach in (section 229B(4)(a) of the Criminal Code, so the existing approach in the Criminal Code has been preferred in the Bill.</p> <p><i>Jury unanimity</i></p> <p>The jury must unanimously find that the defendant intended a course of conduct consisting of domestic violence to coerce and control the complainant.</p> <p>The Taskforce said that consideration should be given to including a provision similar to that which operates in respect of the offence of Repeated sexual contact with a child (section 229B(4)(b)) which provides that all the members of the jury are not required to be satisfied about the same unlawful sexual acts. The approach in the Bill adopts that existing approach in the Criminal Code.</p> <p><i>Intent</i></p> <p>The approach in the Bill of attaching the intent to the course of conduct, rather than the individual acts, is consistent with an understanding of coercive control as a pattern of behaviour.</p>
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Coercive control: specific intent	<p>QLS submits that it knows of no other crime of specific intent within the Criminal Code that involves a continuous course of conduct, where the content of the course of conduct must not be particularised by the Crown nor unanimously found to exist by the Jury.</p>	<p>DJAG acknowledges that the offence of coercive control is unique in terms of the elements of the offence requiring proof of a course of conduct and a specific intent element in combination with the relaxation of some requirements for particularisation and jury unanimity.</p> <p>The Taskforce found that there is no one criminal offence in Queensland that sufficiently holds perpetrators of coercive control accountable for the full range of physical and non-physical violence and that a stand-alone offence of coercive control should be introduced in Queensland. The drafting of the coercive control offence therefore requires a unique approach.</p> <p>As outlined above, the features of the offence that have been adopted based on the existing offence of Repeated sexual conduct with a child in section 229B of the Criminal Code are designed to overcome similar evidential difficulties experienced by vulnerable victims.</p>
Coercive control: definition of	<p>The QLS submits that the term “course of conduct” is defined only to the extent that</p>	<p>The Taskforce noted that a course of conduct offence will appropriately reflect the nature of the conduct, comprising acts that demonstrate persistent domestic and family violence</p>

course of conduct	there must be proof of an act of domestic violence on more than one occasion.	committed by the perpetrator, encouraging a change in the understanding about the nature of domestic and family violence offending. ⁹
Coercive control: <i>Mens rea</i>	QLS submits that in a crime of specific intent it is axiomatic that the requisite <i>mens rea</i> be proved to coincide with the commission of the charged act or omission. Applying this principle to the proposed section 334C underlines the problem.	DJAG notes that the coercive control offence requires proof that the person intends the course of conduct to coerce or control the other person (section 334C(1)(d)) such that the intention attaches to the charged act or omission, being the course of conduct, rather than an act of domestic violence.
Coercive control: Jury directions	There is no precedent for how a trial Judge can or may properly direct the Jury on the issue of when the requisite intent must be found to exist in circumstances where the course of conduct it must attend is unparticularised. This will lead to an elongation of trials, imprecision in directions and irremediable difficulties on appeal.	As set out in the DJAG written brief to the Committee of 27 October 2023, the offence of coercive control will commence by proclamation. Commencement by proclamation will enable implementation work to occur to support the operationalisation of the amendments which includes community awareness and education activities, updates to court policies and procedures, training and instruction to court staff and police, and updating of benchbooks, prosecution guidelines and the Queensland Police Service Operations Procedure manual.
Coercive control: Relationship to Scottish offence	QLS submit that the Women's Safety and Justice Taskforce recommended that the new coercive control offence be modelled on the offence in Scotland. QLS submits the Bill does not reflect this recommendation. None of the evidentiary truncations imposed by the proposed subsection (5) are mirrored in the Scottish provision.	DJAG notes that the offence of coercive control in the Bill shares a number of features with the Scottish offence, including: <ul style="list-style-type: none"> • focusing the <i>mens rea</i> on the actions of the perpetrator

⁹ Report One, p 744.

		<ul style="list-style-type: none"> • the criminalisation of a course of conduct consisting of behaviour which is abusive, on at least two occasions • providing that proof of the offence is not dependent on proof of actual harm to the complainant • providing an element of specific intent relating to the course of conduct/behaviour • providing an element incorporating a reasonable likelihood that the course of conduct/ behaviour will cause the other person harm • providing a bespoke defence that the course of conduct/behaviour was reasonable in the context of the relationship as a whole/ in the particular circumstances • allowing evidence of actual harm to be led despite proof not being required; and • providing an alternative offence. <p>DJAG notes that the Scottish criminal justice system has fundamentally different concepts of proof than those which apply in Queensland.</p> <p>As noted above, the Taskforce said that consideration should be given to adopting the relaxation of requirements for particularisation and jury unanimity, in keeping with the approach to the offence of Repeated sexual conduct with a child in section 229B of the Criminal Code.</p>
Prohibitions and restrictions in relation to	QLS's Criminal Law Committee members do not support the proposed amendments to the <i>Evidence Act 1977</i> (Evidence Act) which	The Taskforce recommended progressing amendments to reflect that 'leave should not be granted unless the court is satisfied that the probative value of any evidence about a

<p>particular questions and evidence</p>	<p>provide that leave should not be granted unless the court is satisfied that the probative value of any evidence about a complainant's sexual activities outweighs any distress, humiliation, embarrassment that the complainant may suffer as a result of its admission.</p> <p>QLS submits that an amendment of this type leaves it open for a court to refuse an application for cross-examination across substantially probative and proper matters, going to the credit of the complainant, which are necessary to be put before the jury to ensure a fair trial, because of an inherently subjective assessment that there will be some adverse effect on the complainant.</p> <p>Put another way, the QLS submits that it requires a judge to balance two incommensurables. First, the need for all relevant evidence to be placed before the tribunal of a fact to ensure a fair trial and, on the other hand, the unrelated and imponderable question of whether a fair trial will harm a complainant.</p> <p>QLS submits that the Bill and accompanying material do not explain how a Judge should</p>	<p>complainant's sexual activities outweighs any distress, humiliation, embarrassment or other prejudice that the complainant may suffer as a result of its admission.' However the Bill does not require that leave be refused in these circumstances, but rather, provides that the court is to have regard to this consideration.</p> <p>As provided in the Statement of Compatibility (page 42), the court will retain an overriding discretion to admit the evidence or allow cross-examination where the evidence is of substantial relevance to a fact in issue or a proper matter for cross-examination, and it is in the interests of justice. The court is also required to balance the interests of the complainant with the right of the accused to fully answer and defend the charge.</p> <p>The approach in the Bill more closely aligns with the recommendation made by the Australian Law Reform Commission¹⁰ (ALRC) and the approach taken in Victoria. The Taskforce referred to the ALRC recommendation in its report and stated that in making these recommendations, the ALRC noted that the formulation intends to 'adequately safeguard complainants against irrelevant and harassing cross-examination, but also upholds the defendant's right to a fair trial.'</p> <p>In relation to the QLS's submission that the provision requires a judge to balance two incommensurables, it is noted that comparable provisions in New South Wales, Victoria, Tasmania and Western Australia all require a judge</p>
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¹⁰ Recommendation 27-3, *Family Violence – A National Legal Response* (2010), ALRC Report 114.

	<p>determine whether a complainant will be harmed.</p> <p>QLS submits that the right to a fair trial is the paramount consideration and ought not to be compromised under any circumstances.</p>	<p>to consider whether the probative value of the evidence outweighs any distress, humiliation or embarrassment that the complainant might suffer as a result of its admission.¹¹</p>
<p>Jury Directions related to sexual offences</p>	<p>QLS submits that the jury direction provisions should be facilitative and not directive, and remain subject to a trial judge's overall discretion to ensure a fair trial.</p> <p>QLS further submits that it is important that directions are linked to the matters in issue in the proceedings, otherwise there is a risk of irrelevant directions being provided to the jury. For example, subsection 103ZQ(1)(a) could be redrafted to read: 'The judge may give any 1 or more of the directions set out in subdivision 3 in the criminal proceeding, if the requested direction is relevant and it is in the interests of justice to do so'. The use of the phrase 'in the interests of justice' is consistent with drafting in other sections about jury directions.</p>	<p>The approach in the Bill imposes a mandatory requirement on the judge to give directions in relation to consent and mistake of fact, subject to the judge exercising their discretion regarding whether there are 'good reasons' to give, or not give, the direction.</p> <p>For example, if a party requests a direction which the judge determines is irrelevant, the judge may consider that there is a good reason not to give the direction. This reduces the risk of directions being given which are not relevant to the evidence in a particular case.</p> <p>In relation to the other directions, the mandatory language is comparable to provisions in Victoria. These directions primarily relate to cross-examination techniques that might be employed by defence counsel to undermine the complainant's credibility. While the defence may be entitled to do this, the proposed directions are intended to be corrective directions to ensure that the jury considers the evidence on an informed basis.</p>

¹¹ See for example section 294CB of the *Criminal Procedure Act 1986* (NSW), section 349 of the *Criminal Procedure Act 1009* (Vic), section 194M(2) of the *Evidence Act 2001* (Tas) and section 36BC(2) of the *Evidence Act 1906* (WA).

		<p>The jury directions in the Bill are based on those in Victoria and New South Wales and are drafted in general terms.</p> <p>However, proposed section 103ZQ(5) of the <i>Evidence Act 1977</i> provides that the judge is not required to use a particular form of words in giving a direction. This will allow a judge to tailor the directions to fit the facts of the particular case.</p> <p>The judge may also provide or repeat the directions in the judge's summing up, during which the judge may relate the issues in the case to the relevant directions.</p>
<p>Admissibility of preliminary complaint evidence for domestic violence offences</p>	<p>The QLS raises concerns about making preliminary complaint evidence admissible for domestic violence offences.</p> <p>QLS notes the rationale for admission (from the discussion paper and Explanatory Notes to the Bill) that domestic violence often happens behind closed doors, and that such evidence may help contextualise the complainant's evidence, which is important when considering the whole relationship over time.</p> <p>QLS submits that preliminary complaint evidence is an exception to the rule against hearsay and admission should therefore be limited. QLS notes that preliminary complaint may only be used to assess credibility, and that this limitation on use is supported. QLS</p>	<p>The QLS (and others) made similar objections to the Taskforce which were considered (see page 335-336, report two).</p> <p>The Taskforce unanimously recommended the extension of preliminary complaint evidence to all domestic and family violence-related offences, and considered this would emphasise that the law and the community do not regard this type of behaviour as a private matter of little consequence.</p> <p>Further, the Taskforce considered this would send a message to the community that disclosures made to others about the actions of perpetrators of domestic and family violence are important to recognise and respond to (page 336 to 337, Report 2).</p>

	<p>also support the preservation of judicial discretion to exclude evidence when admission would be unfair to the defendant.</p> <p>QLS note the risk that admission of preliminary complaint evidence may lengthen the duration of a trial and increase the risk of miscarriage of justice should a jury misuse the evidence. QLS submit the risks outweigh any benefit.</p> <p>QLS note body worn camera (BWC) footage may be used as preliminary complaint evidence, and that this can be highly prejudicial to both defendant and complainant, and contain inadmissible and irrelevant statements. QLS note this could be subject to objection and pre-trial ruling (or voir dire) which could also increase the length of proceedings.</p>	
<p>Domestic Violence Order Applications – transcripts for media</p>	<p>QLS are concerned that the views of the parties or named persons, who may be identifiable from the de-identified transcript are not accounted for in clause 35. The concern extends to the possibility that children who are subject to family law proceedings may be identifiable (noting confidentiality provisions that apply under the Family Law Act).</p>	<p>DJAG notes this feedback.</p> <p>The Bill does not include a specific requirement to serve an application under new section 161A of the DFVP Act on a party to the original proceeding, nor notify a party about the making of an order.</p> <p>The decision to not require service or grant a right of appearance was made in light of feedback received during consultation that service could be a potentially triggering event for victims, or instigate further domestic violence by the</p>

	<p>QLS submit the aggrieved and respondent should be given the opportunity, on a voluntary basis, to have their objections heard by a judicial officer.</p>	<p>respondent. Additionally, to effect service, personal information would need to be provided to media (the applicant under section 161A).</p> <p>Given the requirement for de-identified reporting, including the comprehensive definition of identifying matter (which requires consideration of the location of the court, which may be particularly pertinent in rural or remote communities) the original parties, witness or a child should not be able to be identified from any subsequent reporting. The prohibition in section 159 of DFVP Act is supported by the amendment to the DFVP Regulation which provides that a child can never be identified (including information which may lead to identification of a child).</p>
<p>Extension of police protection notices in exceptional circumstances</p>	<p>QLS notes that clause 30 proposes to amend section 113 of the DFVP Act to provide that police protection notices (PPNs) can be extended beyond the first court date in exceptional circumstances for up to five business days.</p> <p>While QLS appreciates that exceptional circumstances is defined narrowly, they are of the view that PPNs should not continue after the first court date as they are made by police through a less robust process than orders made by a court and this increases the risk of misidentification and the wrong person being subject to the PPN.</p>	<p>DJAG notes the feedback.</p> <p>As provided in the Explanatory Notes (page 14), the purpose of the provision is to ensure the protection provided by a PPN does not lapse where exceptional circumstances significantly reduce a court's operational capacity, such that there is no capacity to print and serve a Temporary Protection Order. The need for this provision has been identified in the context of recent events, including the COVID-19 emergency and the 2022 southern Queensland floods.</p> <p>In such circumstances the protections provided by the PPN would otherwise lapse, and the consequences for the safety of a victim may be significant.</p>

		<p>The period of adjournment anticipated by the provisions is intended to be as short as practicable to minimise the potential adverse consequences to parties, also noting that a PPN may only be extended only under the section.</p>
<p>Clause 46 - Facilitation offence - Insertion of news 179A</p>	<p>QLS is concerned that the drafting of proposed section 179A(1)(b) is not sufficiently clear. QLS submits the drafting requires that the domestic violence behaviour engaged in by the person (set out in proposed s 179A(1)(a)) is engaged in with the intent of aiding the respondent to the order, notice or conditions.</p> <p>QLS submits there is no specificity regarding what the person is aiding the respondent to do — does it relate only to aiding the respondent to commit further domestic violence or to aiding them in legal proceedings or otherwise. QLS submits the broad wording may criminalise conduct that is not intended to be captured.</p> <p>QLS submits, for example, a person who is an occupier of premises may provide CCTV footage of an incident between the respondent and aggrieved to the respondent for the purpose of defending proceedings against them, where the respondent is themselves prohibited from recording the aggrieved. QLS suggest that paragraph (b) should be clarified as follows: <i>the domestic</i></p>	<p>DJAG notes the QLS's concerns about the potential for unintended consequences, including the offence extending to circumstances such as the example provided.</p> <p>DJAG notes that the drafting of the offence is largely consistent with the Taskforce recommendation (see pages 734 – 739, Report One).</p> <p>The three elements of the offence in section 179A are:</p> <ul style="list-style-type: none"> • That the person engages in domestic violence behaviour against another person who is the aggrieved or a named person in a domestic violence order, police protection notice or release conditions; • The domestic violence behaviour is engaged in with the intent of aiding the respondent to the order, notice or conditions; and • The person knew or ought to have reasonably known, the other person was the aggrieved or the named person in the order, notice or conditions. <p>The second element requires proof not just of an intention to aid a respondent, but that the domestic violence behaviour was engaged in with the intention of aiding the respondent.</p> <p>The example provided by the QLS of recording an aggrieved and later providing such footage to aid in a respondent's</p>

	<p><i>violence behaviour is engaged in with the intent of aiding the respondent to the order, notice or conditions <u>to commit or continue to commit domestic violence against the aggrieved or named person</u></i></p>	<p>defence, would not be domestic violence behaviour engaged in with the intention of aiding the respondent to the order. The behaviour would have been engaged in and then at a later time, there is an intention to aid the respondent. It might also not satisfy the third element of the offence, that the person knew or ought to have reasonably known the other person was an aggrieved or the named person in the order, notice or conditions.</p>
<p>Amendment of s 60 DFVP Act</p>	<p>QLS noted that drafting is consistent with current section 60 of the DFVP Act however, QLS is concerned that “<i>another person</i>” is too broad and may extend to friends or relatives of the respondent contacting or locating an aggrieved (under the guise of trying to arrange mediation, for example) where this is not intended.</p> <p>QLS recommends that consideration be given to specifically listing the category of a person a respondent may ask to contact an aggrieved or named person by adding categories of persons as part of an inclusive list that gives clearer indication of the categories of person contemplated. QLS submits that proposed s60(1A)(b) could read: <i>Another person, including a lawyer, <u>counsellor, mediator, family dispute resolution practitioner or parenting coordinator, to contact or locate the aggrieved or a named person for a purpose authorised under an act.</u></i></p>	<p>DJAG notes the feedback. The approach taken in the Bill is consistent with the approach taken in existing section 60 of the DFVP Act. The requirement that the purpose for contacting an aggrieved person must be ‘authorised under an Act’ ensures any contact with the aggrieved, for or on behalf of a respondent, is limited. DJAG notes QLS’s suggestion that in addition to lawyer, the provision establish a more extensive non-exhaustive list of persons who may contact the complainant.</p> <p>The approach in the Bill balances the need to limit contact for or on behalf of a defendant, with the need to provide appropriate protection for contact that is not intended to perpetuate domestic violence where such contact is ‘authorised under an act.’ Adding to this list may unintentionally broaden the scope of this section.</p>

<p>Amendment of DFVP Act – court-based perpetrator diversion scheme: general</p>	<p>QLS submits that they are generally supportive of a diversion scheme for accused persons charged with contravening a domestic violence order or police protection notice, noting that early intervention and education is key in curbing the continuation of domestic violence, and that the scheme has potential to prevent further breaches, particularly where a defendant argues they did not understand the terms of the order.</p>	<p>DJAG notes the feedback, which is broadly supportive of the perpetrator diversion scheme.</p>
<p>Amendment of DFVP Act – court-based perpetrator diversion scheme: eligibility – s135C(1)(f)</p>	<p>QLS expresses concern that some of the eligibility criteria proposed in s135C(1) are too restrictive, submitting the scheme should tend to expand rather than limit availability if the aim is to intervene at an early stage and enhance community safety.</p> <p>The QLS acknowledges that s135C(1)(f) was a recommendation of the Taskforce, but submits it is too restrictive and should be removed; the court would still have the discretion to decide a defendant is ineligible under s135(4), based on the domestic violence history.</p> <p>The QLS submits that accused persons who have been the subject of an order that they have complied with should not be deemed ineligible for the scheme; non-compliance with earlier orders is a different matter and is appropriately dealt with in (g) and (h).</p>	<p>DJAG notes this feedback.</p> <p>Regarding section 135(1)(f), DJAG notes that the Taskforce recommended that the scheme should only apply to perpetrators who have been named as a respondent on one Domestic Violence Order against one aggrieved person (page 731 of Report One).</p> <p>DJAG notes that the scheme gives effect to the Taskforce’s recommendations in this regard.</p>

<p>Amendment of DFVP Act – court-based perpetrator diversion scheme: eligibility – s135C(1)(b)</p>	<p>QLS submits that there may be scope to further relax the eligibility criteria in section 135C(1)(b) through broadening the court’s discretion in s135C(2), recommending that the drafting of (2) be reconsidered. Notes that often older contraventions upon which respondents have not been challenged or sanctioned are reported at the same time as recent contraventions, such that the temporal connection between separate offences may not be strong but the defendant may still be an appropriate candidate for early intervention.</p>	<p>DJAG notes the feedback relating to eligibility limitations of the scheme.</p> <p>DJAG notes that a defendant may be eligible for the scheme if they have been charged with more than one offence of contravening a DVO or PPN provided that the charges are for offences of a similar character or committed in prosecution of a single purpose and there is a strong factual and temporal connection between or among the offences (subsections 135C(2)(a) and (b)).</p> <p>DJAG further notes that the Taskforce recommended that the diversion scheme be limited to defendants facing a single charge of contravention of a protection order, who have only ever been named as a respondent on one DVO and have never breached that DVO before (page 731 of Report One).</p> <p>The scheme as drafted allows a court greater discretion than recommended by the Taskforce, in response to feedback which observed that differing charging practices between individual police officers may result in similar conduct by different defendants being charged as either one or multiple charges of contravention. DJAG considers that this is an appropriate limited departure, having regard to the intent of the Taskforce recommendation.</p>
<p>Amendment of DFVP Act – court-based perpetrator diversion scheme:</p>	<p>QLS notes that it is not clear whether accused persons, who are in custody for another offence will be eligible for the scheme or whether the types of program contemplated by the scheme (about which there is no detail) would be suitable for offenders in custody. Notes that s135C(1)(e) requires the defendant</p>	<p>DJAG notes that at present it is not anticipated the diversion scheme will be available to defendants in custody. DJAG notes that a defendant is not eligible for the diversion scheme unless they have been granted bail in relation to the eligible offence (subsection 135C(1)(e)).</p>

<p>eligibility – s135C(1)(e)</p>	<p>has been granted bail for the alleged contravention offence, but ignores the cohort of defendants alleged to have contravened domestic violence orders from custody. Note that unable to comment on whether prisoners should be eligible for diversion without understanding what types of programs are contemplated.</p>	<p>Whilst it is possible that a defendant who has been remanded in custody for a contravention of a domestic violence order offence, or another offence and who is subsequently granted bail may become eligible for the scheme, it is not anticipated that approved service providers will deliver diversion programs in custodial settings under the scheme.</p>
<p>Amendment of DFVP Act – court-based perpetrator diversion scheme: types of programs and resourcing and delay</p>	<p>QLS supports the current drafting of clause 40 insofar as it does not require the accused to enter a plea of guilty, but notes that this may result in a protracted diversion process that will require close monitoring and may require further refinement.</p> <p>QLS submits that early intervention and education should occur as close in time to the offending as possible, noting that relatively quick finalisation of matters also makes participation in the scheme more attractive to defendants. Submits that as drafted, where the court is satisfied at the first court date that the defendant meets the eligibility criteria set out in s135C, the scheme provides for the court to make an order and grant an adjournment of at least 14 days for suitability assessment (s135E(3), after which the approved provider reports back within 14 days or a longer period approved by the court (s135G(2)), i.e. at least one month before suitability is determined. Once suitability is determined the court may</p>	<p>DJAG notes that to give effect to the intention that approved diversion programs be suitable for needs of individual participants, the suitability assessment criteria include consideration of whether there is an appropriate diversion program or counselling available and suitable, including culturally appropriate, for the defendant (subsection 135F(g)).</p> <p>Subject to passage, providers and programs for the diversion scheme will be approved by the chief executive (DJAG) (section 135T of the DFVP Act). The Bill provides that the scheme applies only if there is an approved provider who can provide an approved diversion program or counselling for the defendant under the scheme, which allows the scheme to be delivered in specific locations where programs are available and providers have been approved.</p> <p>As noted in the departmental written briefing, consideration is currently being given to the establishment of the scheme in one location initially to enable policies, procedures and resource impacts to be tested before any further consideration of broader roll out.</p> <p>In response to the Taskforce’s Report One (Recommendations 25-28), the Queensland Government</p>

	<p>make an order for the diversion program to be completed within a period of no more than a year (s135I(5)) and the order may also be extended (s135L). Notes that the order ends when a notice of completion is delivered to the registrar of the court, though it is unclear whether a further mention is required at this stage (S135N).</p> <p>QLS notes that the timeframe of the scheme is likely to be unattractive to defendants, resulting in fewer defendants receiving necessary intervention and education; compared with the drug diversion scheme, where suitability is assessed before, or on the morning of the first mention, a plea of guilty is entered and the defendant placed on a good behaviour bond conditioned on a recognisance and completion of an approved program within a certain time period, and the matter returns to court only for resentencing following failure to complete or breach of the bond.</p> <p>QLS submits that it is difficult to comprehensively comment on the diversion scheme (including the duration of the process) without additional information about the types of programs that are contemplated. If the intention is to approve existing men's behaviour change programs, sufficient attention must be given to the level of resourcing required to ensure that such programs are available, particularly in rural, regional and remote areas. Notes that such</p>	<p>committed to establishing a state-wide network of perpetrator intervention programs. The network will</p> <ul style="list-style-type: none"> • address increased demand on existing Queensland Government funded perpetrator interventions (primarily men's behaviour change programs); • make available a diversity of perpetrator intervention programs across the continuum of risk and need, including primary prevention, secondary intervention, tertiary intervention and post-tertiary intervention support; • include an intersectional approach with programs that meet the needs of Aboriginal and Torres Strait Islander peoples, people with a disability, young people, people from culturally and linguistically diverse backgrounds and people who identify as LGBTIQ+ in urban, rural, regional and remote locations. <p>Additional funding of almost \$3 million per year has been allocated to help mainstream perpetrator intervention services meet increased demand and better support victim-survivors</p>
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	<p>programs are long (27 weeks) and generally only have defined intake points, meaning that it can take several months before a program can be commenced.</p>	
<p>Amendment of DFVP Act – court-based perpetrator diversion scheme: need for review</p>	<p>QLS submits that if the scheme is enacted in its current form they recommend that the scheme be reviewed after an initial period of operation of 12 or 24 months.</p>	<p>As noted above and in the departmental written briefing, consideration is currently being given to the establishment of the scheme in one location initially to enable policies, procedures and resource impacts to be tested before any further consideration of broader roll out.</p>