LEGAL AFFAIRS AND SAFETY COMMITTEE

Members present:
Mr CG Whiting MP—Acting Chair
Mrs LJ Gerber MP
Mr SSJ Andrew MP (virtual)
Ms JM Bush MP
Mr JE Hunt MP (virtual)
Mr JM Krause MP (virtual)

Staff present:
Mrs K O'Sullivan—Committee Secretary
Mr B Smith—Assistant Committee Secretary

PUBLIC BRIEFING—INQUIRY INTO THE CRIMINAL LAW (COERCIVE CONTROL AND AFFIRMATIVE CONSENT) AND OTHER LEGISLATION AMENDMENT BILL 2023

TRANSCRIPT OF PROCEEDINGS

Friday, 10 November 2023

Brisbane

FRIDAY, 10 NOVEMBER 2023

The committee met at 2.14 pm.

CHAIR: Good afternoon. I declare open this public briefing for the committee's inquiry into the Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023. My name is Chris Whiting. I am the member for Bancroft and the acting chair of the committee. I would like to respectfully acknowledge the traditional custodians of the land on which we meet today and pay our respects to elders past and present. We are very fortunate to live in a country with two of the oldest continuing cultures in Aboriginal and Torres Strait Islander peoples, whose lands, winds and waters we all share. With me here today are: Laura Gerber MP, member for Currumbin and deputy chair; Stephen Andrew MP, member for Mirani, via videoconference; Jonty Bush MP, member for Cooper; Jason Hunt MP, member for Caloundra, via teleconference; and Jon Krause MP, member for Scenic Rim, via videoconference.

The purpose of today's briefing is to assist the committee with its inquiry. This briefing is a proceeding of the Queensland parliament and is subject to the parliament's standing rules and orders. Only the committee and invited witnesses may participate in the proceedings. Witnesses are not required to give evidence under oath, but I remind witnesses that intentionally misleading the committee is a serious offence. I remind committee members that departmental officers are here to provide factual or technical information. Any questions seeking an opinion about policy should be directed to the Attorney-General or left to debate on the floor of the House.

These proceedings are being recorded by Hansard and broadcast live on the parliament's website. Media may be present and are subject to the committee's media rules and my direction at all times. You may be filmed or photographed during the proceedings and images may also appear on the parliament's website or social media pages. I ask everyone to turn their mobile phones and devices off or to silent mode.

HISLOP, Ms Emma, Senior Legal Officer, Women's Safety and Justice Team, Department of Justice and Attorney-General

JONES, Ms Kellie, Principal Legal Officer, Women's Safety and Justice Team, Department of Justice and Attorney-General

McMAHON, Ms Kate, Acting Director, Women's Safety and Justice Team, Strategic Policy, Department of Justice and Attorney-General

McQUEENIE, Ms Bridie, Acting Principal Legal Officer, Women's Safety and Justice Team, Strategic Policy, Department of Justice and Attorney-General

REESBY, Ms Sonya, Executive Director, Program Management Office and Sector Reform, Department of Justice and Attorney-General

ROBERTSON, Mrs Leanne, Assistant Director-General, Strategic Policy, Department of Justice and Attorney-General

ACTING CHAIR: I now invite you to brief the committee. Then the committee members will have questions for you.

Mrs Robertson: Thank you chair, my name is Leanne Robertson, I am the Assistant Director-General of Strategic Policy and Legal Services in the Department of Justice and Attorney-General, I want to thank the chair and committee for the opportunity to brief you this afternoon on the Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023. I, too, would like to acknowledge the traditional owners of the land on which we gather this afternoon and pay my respects to elders past, present and emerging.

I won't repeat the invitation that you have done, chair in relation to the department officers and I note that the department has already provided some briefing material to the committee on the amendments in the bill. I thought I would start by briefly outlining the key features of the bill as such. The bill implements the government's response to recommendations 74 to 79 in chapter 3.9 of the Women's Safety and Justice Taskforce first report, *Hear her voice: report one—Addressing coercive control and domestic and family violence in Queensland,* including by introducing a criminal offence of coercive control. The bill also gives effect to the government's response to recommendations 7, 43 to 44, 56, 58 to 59, 76 to 77, 80 to 82, 86, 110 and 126 from the taskforce's second report, *Hear her voice: report two—Women and girls' experiences across the criminal justice system,* and that relates to domestic and family violence, sexual violence, publication restrictions, and women and girls as accused persons and offenders, including amendments to create an affirmative model of consent in Queensland.

The bill also separately progresses further amendments to abolish or reform particular jury directions, re-examining recommendations 65 and 66 of the *Criminal justice report* of the Royal Commission into Institutional Responses to Child Sexual Assault in light of taskforce report 2 and implements the government's response to recommendations 20 and 50 of the Commission of Inquiry into Queensland Police Service Responses to Domestic and Family Violence report, that report's entitled *A call for change*. The bill also allows the court to make an order to extend a police protection notice in exceptional circumstances.

As the committee is no doubt aware from the hearings this week, there are some very complex issues within the bill which require a careful balancing of different rights and interests. In particular, DJAG notes various submissions from stakeholders in relation to the drafting of the coercive control offence, the introduction of a new reasonable excuse to the failure-to-report offence, and inclusion of non-payment of a sex worker and false or fraudulent representation about serious disease as circumstances in which there is no consent. I am going to briefly discuss each of those issues.

Turning to the coercive control offence, much has been said about the drafting of this offence, with some submitters raising concerns about the potential for unjust outcomes. The taskforce intended that this offence will hold perpetrators of coercive control to account for the full spectrum of their abuse against their victims. The taskforce acknowledged the vast range of offending behaviour that could be captured under the offence. In light of this, it needs to be anticipated that the drafting of the offence itself would require some breadth.

The taskforce also acknowledged that in criminalising the range of coercive controlling behaviours that some risks will flow, and this includes the risk of misidentifying the person in need of protection by the legal system. So steps were taken in drafting the legislation to mitigate that risk, primarily through the introduction of an intent element and a reverse onus defence that can be raised where the accused's course of conduct was reasonable in the context of the relationship as a whole.

Importantly, these provisions commence on a date to be fixed by proclamation, and this will enable implementation work to occur to support the operation of the amendments, including community awareness and education activities, updates to court policies and procedures, training and instruction to court staff and police, and updating of bench books, prosecution guidelines and the Queensland Police Service's Operations Procedures Manual.

I now turn briefly to the reasonable excuses that exist under the failure-to-report offence in the code. The committee has also heard from stakeholders about amendments to the reasonable excuses that exist under the failure-to-report offence in the code. The amendments in this bill do not disturb other mandatory reporting schemes that exist outside the code, for example in the Child Protection Act, but respond to stakeholder concerns that this particular offence has had a chilling effect on vulnerable young people obtaining professional advice and support in response to sexual offending. The department has heard stakeholder feedback that the amendments do not go far enough and that the introduction of the concept of Gillick competence to the provisions could further promote victim autonomy. These amendments seek to balance the desirability of maintaining professional confidentiality and victim autonomy against the desirability of reporting abuse to police where the alleged offender presents an ongoing risk, noting that a perpetrator may offend against any number of children.

Turning now to those aspects of the bill dealing with non-payment of a sex worker and consent, on this issue the taskforce recommended that Queensland adopt section 61HJ of the New South Wales Crimes Act which provides a non-exhaustive list of circumstances where there is no consent. Section 61HJ(1)(k) provides there is no consent where there 'fraudulent inducement'. As set out in the

department's written brief to the committee—pages 26 and 27, if that helps—the taskforce considered whether non-payment of a sex worker should constitute a circumstance where there is no consent but noted that the Queensland Law Reform Commission was currently considering the issue and that, as such, it was not appropriate to make findings or recommendations about it.

In its 2023 report *A decriminalised sex-work industry for Queensland*, the QLRC noted that the taskforce looked at consent laws in report 2, and the QLRC do not recommend any changes to the code on this issue. The QLRC also said that making specific amendments to the consent provisions in the code outside the context of a wider review of sexual offences and consent laws could have unintended consequences. Circumstances of non-consent extending to non-payment is consistent with the concept of affirmative consent—that is, being a free, voluntary, informed agreement to engage in a sexual act.

The other aspect in relation to consent that has been raised, as we understand it, is in relation to false or fraudulent misrepresentation about serious disease. In relation to this, I refer the committee to the detailed department response in relation to this issue at page 23 of our response to submission No. 1. To briefly highlight some aspects of that, as set out in the explanatory notes to the bill, the provision requires actual transmission of the disease, and this is intended to limit the circumstances where the provision would apply. It recognises that the treatment of many such diseases has advanced to a point where the risk of transmission of disease is almost non-existent with effective management and treatment. The explanatory notes acknowledge that HIV and STI transmission are primarily a public health issue; however, fraudulent misrepresentations about serious sexually transmitted diseases strike at the heart of a person's right to make a free and informed decision about whether to participate in a sexual activity with another person.

The explanatory notes also provide that the provision does not mandate disclosure of disease status. Rather, the approach strikes an appropriate balance with the right to privacy. Where a person does not wish to disclose their status, they might decide not to participate in the act rather than make misrepresentations that could have a substantial influence on a person's decision to participate in sexual activity. This adequately balances the rights of both parties while promoting affirmative consent. The policy intention of the provision is not reduction of transmission of disease but in keeping with a model of affirmative consent is the promotion of honest communication and informed agreement between persons who agree to participate in sexual activity.

Chair, if you are comfortable, I was going to also talk to the foundational reforms necessary prior to commencement of the provisions in the bill.

ACTING CHAIR: Thank you.

Mrs Robertson: As the committee would be aware, the taskforce itself recommended a suite of foundational reforms that are necessary prior to the commencement of certain legislative amendments. The government has committed to implementing those foundational elements identified by the taskforce, including strengthening the service system, undertaking community awareness raising and education activities, and supporting the training of staff across the domestic violence and justice sector.

The government has invested $588 million to implement reforms from the two taskforce reports and has increased investment into the domestic, family and sexual violence specialist support sector. The implementation of these key initiatives is underway and will ensure the system is appropriately equipped to deal with these important changes. This includes development of a domestic, family and sexual violence system monitoring and evaluation framework which will monitor and evaluate the reforms at a system level and guide program and initiative-level evaluations; also a domestic and family violence training and change management framework for use across the domestic and family violence and justice systems; importantly, a co-designed whole-of-government and community strategy to address the over-representation of First Nations people in Queensland's criminal justice system and to meet Queensland's Closing the Gap justice targets; and, also importantly, a communication strategy to guide trauma informed and culturally informed communication activities to increase awareness and understanding of coercive control and domestic and family violence. Government agencies are working with stakeholders to ensure foundational elements are in place prior to commencement of the amendments, including updating judicial procedures and manuals to support the implementation of the amendments.

The department notes that the Queensland government is also committed to monitoring the demand and impact on services across the domestic, family and sexual violence system and the justice system which arise from the legislative amendments. This will include monitoring key indicators on demand for services across the system more broadly.

The government has established a number of governance and oversight mechanisms to ensure that these reforms are on track and appropriately implemented. This includes a steering committee with ministerial and directors-general representation, an independent implementation supervisor, and a program management office to monitor implementation. The Independent Implementation Supervisor, Ms Cathy Taylor, is responsible for overseeing and reporting biannually on the government's progress of the implementation of the taskforce recommendations.

Many of the submitters to the committee have also raised the critical importance of community education with respect to the bill. In this regard, I note there is funding to deliver comprehensive community education programs related to the bill in respect of coercive control, sexual consent and changes to the law in Queensland up to 2027.

Chair, I thank you again for the opportunity to provide information on the bill which, as you know, covers a wide variety of legislation across the justice portfolio. We are here to assist with questions the committee might have. Thank you.

Ms BUSH: Thank you, everybody, for coming in. Leanne, certainly it is not lost on me just how complex this bill was to draft and how many moving pieces, stakeholders and reports have led to this. I sincerely congratulate your team on getting us to where we are. A couple of areas have piqued my interest in the public hearings. The first was around the diversion scheme—eligibility and then potentially the capacity of the sector in Queensland around where programs exist and where they may not exist. Some of that might be legislative and some might be more programming, but do you have any comments around the appropriateness of the eligibility criteria and what work the department may be doing in looking into the capacity of the sector around DV perpetrator programs?

Ms McQueenie: The starting point for the modelling of the diversion scheme was the intervention order scheme that operates in the civil jurisdiction. That was the approach that the taskforce recommended. The eligibility criteria build on what is already provided for in that scheme but add some additional elements. There is a consequential amendment to the intervention order eligibility scheme to also align that with what is now under the bill, which could be considered to be more thorough than what was already provided.

In terms of the service availability, the starting point is that the bill provides that the diversion scheme applies only if there is an approved provider who can provide the program or counselling to the defendant under the scheme. This allows the scheme to be delivered in specific locations where programs are available and have been approved. Subject to passage, those providers and programs will be approved. There is delayed commencement, as you would know, with the provisions commencing by proclamation.

It is currently intended that the scheme would initially operate in one location—the rationale for that is that this would ensure any potential safety risks to victim-survivors arising from the new diversion model can be monitored closely and addressed early—with further enhancements to the model and future rollout to be considered following an evaluation. The availability of appropriate programs and the significant role of and the obligation of those providers under the scheme warrants a careful and considered approach to implementation.

I understand that some submitters have raised concerns about the current availability of programs under the intervention order scheme. It is anticipated that some of those programs may be suitable for the purposes of the diversion order scheme, but that is something that would need to be considered further during implementation prior to commencement.

Ms BUSH: I know that you have been listening to the submissions, but certainly the ones that struck me concerned the availability of programs within prisons and then availability of programs that have a cultural lens to them as well. You do not need to comment; I am just taking the opportunity to underline that that is what we heard. It may have been Caxton Legal Centre that thought perhaps the eligibility criteria around having a person accept all of the statement of facts might be too limiting. Someone may be willing to be better—they want to reconnect with their family, they want to reconnect with their relationships, all of those good signs are there—but they still do not agree with the whole presentation of the facts. Has that been the experience in the Magistrates Court or any of the other programs you have mentioned?

Ms McQueenie: It is slightly different because it is in the criminal context, but that requirement to accept responsibility is just one of the eligibility criteria under the scheme. If the court is satisfied that the defendant is eligible, they then must undergo a suitability assessment with an approved provider. That is against that range of considerations that are set out in the bill, which is what I was referring to earlier in relation to the assessment process.

The taskforce said that a defendant should be required to give a full, legally-binding admission to the breach of the domestic violence order to participate in the scheme. The approach in the bill provides that the defendant's acceptance is not taken to be a plea to the charge and is not admissible in evidence against the defendant. This approach was informed by stakeholder feedback. Some stakeholders supported not requiring a plea of guilty, including because that might incentivise and encourage participation in the scheme. The current approach is that the defendant must accept responsibility for the facts that are set out in the prosecution summary. Ordinarily, it is conceivable—the bill does not deal with this—that parties, in settling that summary of facts. might engage prior to appearing at court, where that acceptance of responsibility would need to occur.

Mrs GERBER: Can I say how wonderful it is to have six brilliant women with such a breadth of experience presenting to the committee on this bill from the department. Thank you very much for coming along today and sharing with us your expertise. I understand that you have not had the opportunity to give a response to the Law Society's submission because of the timing of the submission, so I want to focus my questions on that. I assume that you have had an opportunity to read it. One of the criticisms the Law Society has is around the consultation draft and the consultation process. How long was the consultation draft open for?

Ms McMahon: I will give you some information, broadly, about the consultation process that the department undertook. But at the outset the department recognises the importance of consultation with our community stakeholders, including the Law Society. Decisions around consultation timing for the development of legislation are ultimately a matter for the government, but the department endeavours to consult as much as possible as we can in a meaningful way. It should also be acknowledged that before the department undertook consultation the taskforce of course undertook a very broad, extensive consultation. Those recommendations then of course formed the foundation of the bill. To give a sense of just how extensive that taskforce consultation was—it was entirely public, so it was not restricted in terms of the stakeholders—for its first report the taskforce received over 700 submissions, with 500 people sharing lived experience, and it held over 125 individual meetings with stakeholders including the police, the legal profession, academics and service providers. For its second report it received 19 submissions from women who were offenders and 250 from victim-survivors of sexual assault. There is that foundational consultation that has already happened.

Mrs GERBER: I am probably specifically referring to recommendation 78 of the first report that says that the consultation draft should be open for three months. I just want to know how long the draft was open for.

Ms McMahon: In terms of departmental consultation, before we did the draft bill we did a preliminary consultation paper. We did that between December and February. That was targeted, but it included the Law Society. As I said, the department had not developed a draft bill at that stage, but we released that consultation paper to get feedback to assist us in drafting the draft consultation bill before we released it. Again, a broad range of stakeholders—legal, the domestic, family and sexual violence sector, and relevant government agencies including the Queensland Police Service—were involved in that process.

Mrs GERBER: And the draft bill was open for consultation for what period of time?

Ms McMahon: July and August 2023. The dates—if you want them, which I sense you do—were from 18 July to 4 August. Although I should say that a number of the submitters asked for extensions, and those were granted where that was possible. They are the formal released consultation dates for the draft bill.

Mrs GERBER: The bill has different aspects to the consultation paper. I guess that is where I am getting at. Now I will take you to some of the points from the Queensland Law Society to try to better understand from the department's perspective. Firstly, let's talk about affirmative consent. One of the issues was that—it was not just the Queensland Law Society; other submitters also submitted—perhaps, if it was to be modelled off New South Wales, 'serious' should have been included in the terminology. I am probably particularly talking about section 348AA(1)(f) when we are talking about harm—that it should have been 'serious harm' as opposed to just 'harm'. I note that this section has been modelled off New South Wales and Victoria but probably more closely Victoria. Did the department do any research into the outcomes as a result of the New South Wales section in terms of how many convictions resulted from that section that contained 'serious harm'?

Ms Jones: There has not been any particular research done in terms of the outcomes of that. Research into that area is quite difficult in this sense: the affirmative consent legislation in New South Wales was only passed in 2021 and took effect for offences happening mid-2022. We are about 15 or

16 months into it. Given the time that prosecutions take to get through to a trial stage and then potentially appeals arising from that, so you can thoroughly consider the issues, there is obviously not a lot.

Mrs GERBER: What about Victoria, then?

Ms Jones: Victoria have had their provisions for longer. When they amended their circumstances of non-consent they added a few more in their most recent amendments, but they have had it longer. Again, there was not a particular examination of appellant authorities or anything like that to see how it operates. In terms of the selection of 'harm' instead of 'serious harm', obviously New South Wales has the requirement for 'serious harm'; Victoria has the requirement for 'harm'. Our current provision provides that consent is not freely or voluntarily given where there is forced threat, intimidation, fear of bodily harm. When you look at the current provision in the Criminal Code, there is no reference to 'serious' or what threshold needs to be reached in order for harm to be considered sufficient to be vitiating or causing a person to not be able to freely and voluntarily agree to participate in a sexual activity.

Obviously, the focus of the non-exhaustive list of circumstances is to provide a comprehensive list that can be used for the community's education, assistance for juries and so on, but, really, the focus is on providing that more comprehensive list. That really just builds on what is in 348(1), which is: is the consent freely and voluntarily agreed to? In that context, the taskforce did not specifically examine the details of each of the components of 61HJ upon which the provision in the bill is built, but, on examination of the issue, we concluded that 'serious' is a hard concept to define and it would ultimately be a subjective question for a jury. The approach taken in the bill focuses on the jury's attention on whether there was a harm or fear of harm arising from the defendant's conduct such that it caused the complainant to participate as a result. One of the potential consequences of having that 'serious' threshold is potentially sending a message in that kind of community education context that, 'Well, some harm is okay but it has to be serious if it is going to interfere.' There is that very subjective line when you impose that in terms of to what extent do you need harm for it to affect a person's ability, which, regardless of whether or not 'serious' is there or not, should be the focus of the jury.

Mrs GERBER: Thank you for that. That leads me to my next question. I am still focused on consent, if that is okay, Chair? I do have questions in relation to coercive control, but I appreciate that others have questions. I would like to give the department an opportunity to respond to the case example that the Queensland Law Society put in its submission. It is essentially around long-term relationships and non-verbal cues in relation to affirmative consent. On page 2 of their written submission they state—

For example, a long term married couple may have spontaneous sexual intercourse without any prior explicit communication because their history enables them to understand each other's non-verbal behaviours. Strictly interpreted, however, the couple falls foul of s348(3).

They go on to talk about how that also might have an implication in relation to the criteria of 'harm' as opposed to 'serious harm'. I just want to give the department an opportunity to respond to that. What would you say to the Queensland Law Society's submission that the prescriptive approach in drafting that section will increase rather than decrease the focus on the complainant's evidence—and therefore reliability and credibility—and act contrary to the stated concerns in the Women's Safety and Justice Taskforce, specifically in relation to the relationship example that the Law Society has given?

Ms Jones: DJAG acknowledges concerns about how the law may criminalise otherwise lawful sexual conduct in the context of loving relationships but notes that the purpose of the law is not to interfere in those loving, consensual partnerships. Rather, the laws are designed to prevent sexual assault and prevent false allegations of sexual assault. That is achieved through the clarity provided in that non-exhaustive list as well as in the amendments to 348 itself. It is designed to have that clarity there.

Mrs GERBER: In that same circumstance, should that couple be divorced for five years, based on the drafting of the section—and this is the QLS's argument—person B, as in the accused, might be prevented from saying that he or she believed there was consent arising from the context of their previously loving, long-term relationship where the sex was often initiated on the basis of non-verbal cues and without physical resistance, whereas if the elements of section 23 in the code were made out they would have the reliance. What does the department say?

Ms Jones: I would say that the bill, as drafted, does not exclude non-verbal communication from being taken into account. What it does say is that a defendant who wants to rely on the mistake of fact in 348A has to point to the fact that they have said or done something to ascertain whether the complainant was consenting or, in the context of going back to consent as a state of mind that is communicated, the bill also clearly provides that that person not saying or doing something will be evidence of a lack of consent. It does not exclude consideration of those circumstances where, in a

loving relationship, people do not expressly ask each other, 'Are you consenting to this? Do you mind if I do that?' But it looks at things in terms of, for example, there could be responsive behaviour—undressing oneself and those kinds of circumstances—that demonstrate clearly and unequivocally that the person is a willing, enthusiastic participant in that sexual activity. Does that answer your question?

Mrs GERBER: That is the response. I have further questions, Chair.

ACTING CHAIR: We might come back to you, because I know that the member for Cooper has more questions. I will go first to the member for Mirani.

Mr ANDREW: The bill does not seem to contain many definitions of the key terms like 'coerce' and 'control'. We would like to think that the public has a right to be told clearly and simply what they can and cannot do. Do you have think the bill gives that clear definition because of the situation?

Ms McQueenie: It is correct that the new chapter 29A for the criminal offence of coercive control does not contain definitions for 'coerce' or 'control'. There is a definition of 'coerce' within the definition of 'domestic violence', and that is picked directly up from the equivalent provision under the Domestic and Family Violence Protection Act. Those words are intended to take on their ordinary meaning. That is consistent with the approach taken in New South Wales, where neither of those terms is defined. The New South Wales offence also contains an intent element where the intent is to coerce or control the other person through the course of conduct.

Mr ANDREW: That makes it very hard for people to understand, even for people going in or out of a relationship, where they fall foul of the bill. For instance, parents who are going to leave behind considerable estates or amounts of money can change their minds on the will. Is that considered to be coercive as well? I am trying to understand the boundaries of where this starts and stops. Could you enlighten me a little and maybe touch on some of that, please?

Ms McQueenie: I think whether a particular matter falls within scope for the offence will depend on the circumstances of the case. There are a number of elements that have to be made out, so an intent to coerce or control is just one of those. The bill includes definitions of 'domestic violence', and other definitions of terms are included within that. Those definitions also include examples of types of behaviour that might be captured. Part of the intent of including those examples, which have been informed by the feedback received during consultation, is educative—to give a sense of what sort of behaviour might be captured within that meaning of domestic violence for the offence.

Mr ANDREW: What about, for instance, financial matters? What would be considered to be too far either way in a financial situation? What laws or boundaries are there? Is it a percentage of money that is being used? Is it a percentage that is not held back? Is it just the actual way that it has been? Do you have any definitions around that?

Ms McQueenie: There is a definition of economic abuse in the bill that provides a bit more clarity and gives some examples of what might fall within that. It would also be the case that that abuse in those circumstances would have to meet the other elements of the offence, so it would also have to be reasonably likely to cause the person harm and there would have to be that intent.

Mr ANDREW: That is where I come back to that situation where mum and dad say, 'This son or daughter of mine is not doing the right thing so I'll write them out of the will.' That is what I am trying to say. Can you see where I am coming from?

Ms McQueenie: It was the intent—

Mr ANDREW: They have intent to coerce those children. It does not just go the other way; it goes both ways. Do you know what I mean?

ACTING CHAIR: That brings me to a question, member for Mirani, that relates to the education material. The member for Mirani has talked about how we communicate these definitions or what this is or what that is. Many submitters have raised the need for the development of education material and training, for law enforcement as well as the public. Can you talk a bit more about what training is planned for the judiciary, law enforcement and the public once this comes through?

Ms McMahon: I can answer that in respect of the community education that is planned. The training aspect of that my colleague Ms Reesby will probably answer. We can answer it in two parts for you, if that is okay.

In terms of the communication activities for the bill for the public, $19 million has been committed. That is across all of the amendments in the bill. There are quite a lot of different campaigns and community education activities planned. The main ones relate to coercive control, domestic and family violence, and affirmative consent. There is also a campaign planned around the failure-to-report amendments in the bill. Some of those communication activities are about to happen, very imminently.

There are some smaller campaigns—it is what the department calls a small-spend campaign—which relate to, firstly, coercive control and consent. That smaller campaign for consent is going to run from mid-November to mid-December this year and for coercive control from December this year until February next year. Those communication campaigns are run by another part of the department, but my understanding of it is that the thinking around the timing of those smaller campaigns is that this is a moment when there is a lot of public discussion and heightened discussion of these issues so it is a good time to run those smaller campaigns now.

A bigger piece of work around community education is planned as well, in respect of both the consent amendments and the coercive control part of the bill. For consent, the department is developing a communication strategy, and stakeholder consultation is key in developing that. Part of what that is about is understanding where the community is at now in terms of its understanding of consent. Once the strategy is developed, the department is going to develop an education campaign for consent. That is an approximately $2 million campaign. That includes consent, sexual violence and also the failure-to-report amendments that I talked about earlier. There is going to be specific, targeted messaging for that for young people as well.

With coercive control, again, there is a strategy that is being developed and then there will be a comprehensive education program arising out of it. It is going to cater for the general community, but there are a number of specific cohorts that the department will cater for: cultural and religious communities, First Nations communities, older people, and rural and remote Queenslanders. The communication will be informed by social and market research about those communities, but it will also involve consultation with representatives from those communities. Specifically with respect to the First Nations community, the department is planning on undertaking a community engagement and co-design process for that campaign. There is also a plan to evaluate that messaging as it rolls out on an ongoing basis so that the department can understand whether we are reaching who we need to with it and whether the approach needs to be adapted.

ACTING CHAIR: Thank you for the comprehensive answer. That is good. Ms Reesby, you wanted to touch on training?

Ms Reesby: The government has committed to developing an evidence-based and trauma informed domestic and family violence training framework. The framework will promote consistency in both the content and the delivery of training. Extensive consultation has been undertaken in developing the training and change management framework with both government agency partners and non-government stakeholders. Obviously, this is a critical foundational piece to support the reforms so it has been really important to take the time to get that right and work with stakeholders in the development of the training and change management framework. It is close to finalisation and planning for implementation is underway.

Mr KRAUSE: I want to ask a question about the addition to sentencing principles around sentencing for Aboriginal and Torres Strait Islander people, recognising I think the specific wording says 'systemic and generational disadvantage'. I was of the understanding that the Penalties and Sentences Act and various other laws were already probably broad enough to take into account individual circumstances of offenders when they are being sentenced. Could the department please give us some more information about why this is being specifically added, in light of the fact that there are already various provisions to deal with individual circumstances for offenders when they are being sentenced?

Ms Hislop: You are quite correct that, to a large extent, Queensland's criminal courts are already taking into account indicators of systemic disadvantage and intergenerational trauma. Sentencing courts routinely hear submissions about defendants who are diagnosed with foetal alcohol syndrome, who grow up with incarcerated caregivers or who are exposed at an early age to abuse, neglect or drug and alcohol abuse.

Ms McQueenie: While Emma is looking at some notes, I would add that those amendments were made in response to a recommendation made by the taskforce—recommendation 126 of report 2. The taskforce recommended that those factors should be made explicitly clear.

Ms Hislop: The government supported that recommendation and the bill reflects the taskforce recommendation in that regard.

Mr KRAUSE: The taskforce also recommended that the government look to the Scottish offence provision when it comes to coercive control. What practical implications do you think the addition of that provision in relation to Aboriginal and Torres Strait Islanders may have in relation to sentencing? What practical implications will there be that do not already exist?

Ms Hislop: I think the amendments will tend to draw the attention of judicial officers and practitioners to these very specific issues. It will ensure that their minds are turned to making submissions on those points.

Mr KRAUSE: I wanted to ask about the recommendation from the taskforce that the government look to the Scottish version of the coercive control offence. I note the evidence from the Queensland Law Society indicating that the coercive control offence is not based on the Scottish model. In fact, they refer to it as being unnecessarily complex, that it will do a disservice to the complainants and accused persons, and that it will be too difficult for juries to understand. They also gave quite strong submissions that the requirement for particulars of a course of conduct needing to be set out in a prosecution must be restored. They actually said that there is no other offence in the code where intent is part of an offence but the actual particulars of an offence do not need to be made out. How do you respond to that criticism, bearing in mind that they also said that there is no other jurisdiction they can think of where such a situation exists and it goes against the taskforce recommendation?

Ms McQueenie: The starting point is that the taskforce did recommend that the coercive control offence in Queensland should be modelled on the Scottish offence but with necessary adaptions for a Queensland context. I understand that the concerns raised by the Law Society are particularly in relation to the provision that deals with particularisation and jury unanimity in the context of an offence that has a specific intent element.

The provision in the bill states that the prosecution is not required to particularise an act of domestic violence that makes up the course of conduct to the extent that would be necessary if that were charged as a separate offence. The prosecution is still required to particularise the elements of the offence. The 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, which is another course-of-conduct offence.

The taskforce explicitly contemplated this kind of provision appearing in the coercive control offence. The taskforce said that a similar provision to that which appears in the repeated sexual conduct 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 be charged as a separate criminal offence. The taskforce also made findings about the significant impacts of coercive control on victims including the impact of trauma on memory, with victims saying that it can be hard to pinpoint particular stories because coercive control and intimidation can be so ongoing and relentless.

The Royal Commission into Institutional Responses to Child Sexual Abuse also discussed this type of provision in the context of child sexual abuse in its *Criminal justice report*. A provision like this, like the one that is included in the bill, overcomes an evidentiary challenge that arises where abuse may have occurred repeatedly and in similar circumstances. The intention is that the provision in the bill would operate in the same way as that existing provision in the Criminal Code for the repeated sexual conduct offence with a focus on the course of conduct rather than on the specific incidents. I understand in your question you referred to the fact that there is no other jurisdiction that has a provision like this. It is consistent—

Mr KRAUSE: We heard some evidence to that effect from the Law Society.

Ms McQueenie: There is a provision in the proposed New South Wales offence that has not yet commenced that is largely consistent with the provision that is included in the bill. The New South Wales provision does go a bit further and is explicit that the prosecution does have to allege the nature and description of the behaviours and the period of time over which the course of conduct took place. This approach is more explicit than what is included in the bill, but that more explicit approach is not consistent with the existing offence in the Criminal Code. The approach taken in the bill is consistent with what is already in that repeated sexual conduct provision.

I understand that last point in relation to the fact that that offence does not have an intent element, which makes this a unique offence. This would be a unique offence in the Queensland Criminal Code. As I understand it, part of the reason that existing offence might not have an intent element is that, regardless of your intent, an unlawful sexual relationship with a child is criminal behaviour.

Ms BUSH: You have already touched on the inclusion of the transmission of disease—I do not have the clauses in front of me around that—and some of the issues that submitters raised from a public health perspective. Recognising that it fulfils a grievous bodily harm charge potentially in the Criminal Code, what would be the impacts of simply removing that section from this bill?

Ms Jones: The provision has been included in circumstances where the recommendation was to adopt section 61HJ of the New South Wales Crimes Act. That provision provides for fraudulent inducement. The explanatory notes and the New South Wales Law Reform Commission report that informed that provides that that has a very broad ambit such that the New South Wales provision itself does not apply to representations about wealth, feelings or income because the ambit is so potentially broad when it comes to fraudulent inducement.

When we were consulting on the draft bill, we asked our stakeholders whether it would be better to have this very broad provision that could have a number of applications or whether it would be better to limit it to these particular circumstances that are most likely to arise that really fit within that nature of affirmative consent and the issues that it is designed to address. The conclusion was reached that having those very specific provisions provided for greater clarity and reduced the potential for unintended consequences in terms of conduct that was not supposed to be captured being captured because it was fraudulent inducement.

In that consultation, obviously there are competing stakeholder views on whether it should or should not be there, and that is ultimately a question of policy that I will not address. We did hear in our feedback process that, with modern treatments and those kinds of things, the actual transmission of disease is almost nil when people are receiving treatment.

I can refer to you those jurisdictions. The general fraud provisions in New South Wales, Tasmania and the ACT would all cover serious disease transmission. Queensland would not be alone in having provisions that cover that—arguably in Victoria as well, whilst it does not have a specific provision. The list contained in clause 348AA is non-exhaustive, as it is in every other state. The question always comes back to: was it a free and voluntary agreement? We have just sought to provide as much clarification as possible so that it is clear and can help with public education but also to make sure, given what we know about serious diseases and treatments, that it is limited to cases where the consequences for the victim who has been fraudulently or falsely deceived and induced by that misrepresentation to participate that it only applies in those circumstances where there is a serious consequence to them..

Ms BUSH: I understand what you are saying. To be frank, I was really taken with the testimony given by some of the submitters and really understand that public health need. What I am hearing is that obviously there was competing feedback and submissions, so that is a matter for government to consider now. I understand. I want to go to the carve-outs around mental disorder and cognitive disorder. There was some feedback around that which you would have heard.

Ms Jones: Yes. The safeguard has been adopted in New South Wales and Victoria when they passed their affirmative consent legislation. It is in very similar terms to ours in terms of the definitions of cognitive impairment and mental health impairment. Sections 348B and 348C have been modelled off those provisions and capture the same sorts of potential impairments that would be covered in those other states. They are also commensurate with the impairments that are already captured and are known to practitioners in Queensland because they cover the same sorts of things that disease of the mind for the purposes of the unsoundness test covers as well.

The taskforce recommendation explicitly said that the safeguard was critical. It needs to be made clear that the safeguard does not operate as a full defence. It is not like an unsoundness defence where, if you are found unsound because you have complete deprivation of capacity, you are found not guilty by virtue of that impairment and that deprivation of capacity. Instead, what the presence of the safeguard does is say that, for a person who has one of these relevant impairments, as per the definition, where that was a substantial cause of them not saying or doing anything, the test of mistake of fact is not this new one, where section 348A(3) says that you have to have said or done something; it is instead what we do at the moment. It just means that the mistake-of-fact test that is applied in all cases at the moment where it is raised will be what is considered by the jury. The jury may still have regard to whether the defendant said or did anything, but it is not a mandatory requirement that they have done it before it can be considered reasonable. Obviously it is for the jury to assess in all the surrounding circumstances of the case whether or not the defendant's actions were reasonable.

Ms BUSH: How does that interact with the Mental Health Court, then?

Ms Jones: In the Mental Health Court they are exclusively dealing with questions of fitness and questions of unsoundness. Unsoundness has to do with section 27 of the Criminal Code which refers to three relevant capacities. There has to be complete deprivation of that capacity. Where you see a slight variation of that is, for example, in diminished responsibility where, instead of providing a complete defence, if there is the presence of a relevant impairment and it has substantially affected the defendant, they are responsible for manslaughter instead of for murder. You can see that parallel there in terms of that idea of 'substantial'. As I was saying before, it does not operate as a defence.

What it does is inform what a jury is going to have to consider when assessing reasonableness. Do you want any more information about how the Mental Health Court works in its considerations of those things?

Ms BUSH: No. I understand that. I just was not sure around the interaction, but you are right: it does assess more fitness to plea and the defensibility.

Ms Jones: Yes. The feedback we received during our consultation, particularly with stakeholders experienced in this area, was that they operate quite differently. The people who are to be protected by the safeguard as articulated by the taskforce are people who would not otherwise be covered under the Mental Health Court provisions. The other thing is that to proceed by the Mental Health Court there has to be no contest of facts, which would remove nearly everybody in this case from being able to be referred.

Ms BUSH: I think the concern that we probably would all share is if somebody is assaulted and the defendant says, 'I'm depressed and that is what led to it,' when we all know that a lot of people suffer depression but do not go on to commit acts of rape.

Ms Jones: The inclusion of mood disorders and anxiety disorders are within the ambit of a mental disease at the moment. The way it is drafted is that it has to be significant. It has to materially impair it. Not only that, but this will be the subject of expert evidence—whether or not they were suffering that particular impairment to such a degree that it affected their ability to communicate. I would expect that the anxiety/depression example you are talking about there would be very few people whose anxiety and depression affected their ability to say, 'Are you happy to continue?' or whatever it might be in the particular circumstances of the case. That is why the expert evidence is so important and is mandated under the bill as being necessary to prove it, because those experts are very experienced in being able to obtain the necessary history and examine the medical conditions in order to determine whether or not this person was so affected by their impairment to not be able to meet that threshold.

Mrs GERBER: We have gone over time, but if the department is happy to stay for a few more minutes I want to cover coercive control. I want to point out from the start that, whilst I am talking about the QLS and Legal Aid Queensland, we want these provisions to succeed. The concern that both Legal Aid Queensland and QLS have is with the drafting of these provisions and, in relation to the principle of law, whether or not it is going to be particularised in a way that is going to impede the case. It will end up in courts of appeal and be dragged out for years because it has not been drafted in the way that it should be, so let me put the question to you.

Legal Aid Queensland and the Law Society raised concerns with it. In particular, I note there are probably two other provisions that talk about a course of conduct: trafficking offences and child sex offences—relationship with a child, as already mentioned. The Queensland Law Society pointed out that the reason particularisation is not necessary in the course of conduct for maintaining a relationship with a child is that it is with a child. They pointed out that translating that to an adult could carry some consequences for the justice system that might result in cases not being able to be effectively prosecuted under this legislation. We want this to succeed. I am going to read from Johnson v Miller, which states—

> ... without particulars the prosecution can be as unsure of the case being run as is the court and the defendant. 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.

What is the department's response to the fact that, where you have an offence of specific intent and you are not requiring it to be particularised, neither the prosecution nor the defence can know the extent of the case with sufficient particularity?

Ms McQueenie: The starting point is that the prosecution is still required to particularise the offence. The proposed provision being referred to is 334C(5), which states that the prosecution is not required to particularise an act of domestic violence that makes up the offence to the same extent that would be necessary if it were charged as a separate offence. So if the act that made up the course of conduct were charged as a separate offence, the particulars required might include date, time and place, but over the course of conduct each of those individual incidents do not need to be particularised to that extent.

Mrs GERBER: Was there consultation with the DPP or Crown Law? I note that maintaining a relationship with a child could fall within the jurisdiction of the Commonwealth DPP—that is, they might prosecute that when they are talking about carriage service offences—but also the state DPP. Was there consultation in relation to the prosecution of these?

Ms McMahon: There was consultation with the state DPP about it, yes.

Mrs GERBER: As part of a draft? Was it part of that two-week period?

Ms McMahon: To be honest, we have worked very closely with them throughout the entire development of the bill and specifically on that issue as well, yes.

Mrs GERBER: Legal Aid Queensland said—

If the prosecution is not required to allege the particulars of any act of domestic violence constituting an offence that would be necessary if the act were charged as a separate offence—

which I think does go to your point, Bridie—

a defendant is placed at a significant disadvantage in the preparation of their case by not being informed in detail as to the nature and reason for the charge.

Ms McMahon: Can I just talk a little bit about the sort of genesis of that provision with the repeated child offence that is in the code, because I think that is informative of what is the purpose of this type of provision that does not require particulars of the act. As Ms McQueenie said, the starting point is that you still do have to particularise the offence. I do not want the committee left with the impression that the prosecution does not have to provide any particulars.

Mrs GERBER: No, I understand that.

Ms McMahon: It is complex because it is a course of conduct made up of acts, so it is about what other particulars you need to provide for the act.

Mrs GERBER: For example, a joint bank account may be innocuous, but it may also form part of the coercive control particulars. If a defendant does not know that is what is being alleged as a particular then how are they to defend that?

Ms McMahon: In the context of coercive control we are talking about acts of domestic violence, so yes.

Mrs GERBER: Having a joint bank account might allow the defendant to control the victim-survivor's access to finances so it might be an element of the case. I am just throwing it out there. That is the example the Queensland Law Society gave us and it is an example in Legal Aid Queensland's submission, so that is the only reason I am using it.

Ms McMahon: Yes, I understand. So in terms of what is the thinking behind this provision which does not require particulars, I am trying to be careful not to call it the maintaining offence because it has been renamed the repeated child sexual contact offence. The rationale behind that kind of provision—and I acknowledge this applies to children, but I am going to link it back in a second—is about that the offending is of a type where it can be persistent, so it is an evidentiary difficulty for vulnerable victims to give specific dates and times of each of the acts that made up the course of conduct. It is also the type of offending that, because of the traumatic nature of it, can affect memory. The offending, by its nature, has the ability to undermine a victim's capacity to remember specific dates and times of the acts.

The royal commission into institutionalised child sex abuse considered the general provisions of that type in that context. That is the sort of rationale for the requirement not to provide particulars. It is about an evidential difficulty for victims being able to particularise dates and times of specific acts. The taskforce said we should consider picking up that idea from the repeated child sexual contact offence in the code because there are similar evidentiary difficulties with coercive control for victims. It is a persistent, ongoing pattern of abuse—I should not say it is persistent because the offence does not require that, but it can be a persistent and ongoing pattern of abuse of a person. The taskforce talked about many victims who told them how their memory was affected by delay and by the offending itself. I acknowledge that that is not the same vulnerability perhaps as a child victim might have, but that rationale and that reasoning still applies to these victims as well.

Mr ANDREW: Do you have a list of any of the public that we spoke to about the law and making laws or some of the actual stakeholders? When we have all these different groups and these different people, there are a lot of people with different education, different stature as far as they are not as strong, or they retaliate on phone calls, or they are weaker and they go back and say things that they may not mean, or they are trying to fight the whole fight. Could this capture the people we are trying to preserve who are standing up for themselves? Could we be capturing them as perpetrators in this law?

Ms McQueenie: I can respond from the perspective of the coercive control offence. I understand that the question might be about the misidentification of a person who is most in need of protection and is not actually the primary aggressor. It was something that the taskforce considered. One of the things they recommended in order to avoid that misidentification was the delayed commencement period to allow for that extensive training of police, law enforcement and the judiciary in order to help address

that misidentification. They acknowledged that it is currently a problem and that in the context of a criminal offence that can be exacerbated or perhaps heightened. From a drafting perspective, that is one of the rationales for including an intent element in the offence. We received feedback from stakeholders that intent to coerce or control would elevate the threshold of the offence and might prevent the offence applying to people who have engaged in retaliatory violence in one incident.

One final point I would make in relation to it being a course of conduct offence is: the taskforce noted that in jurisdictions where a coercive control offence has been implemented there has been very little misidentification of victims. They attributed that success in part to the training that is undertaken and the focus of that training being not on individual incidents but on a pattern of behaviour. Constructing an offence that is a course of conduct offence where the focus is on the pattern has helped in part to address that risk of misidentification.

Mrs GERBER: Will the department be providing a written response to the Law Society's submission? I have further questions in relation to other issues they have raised and I just did not have time to get to them.

Mrs Robertson: We are in your hands on that, Acting Chair and committee members. If you would like us to provide a formal response, we can.

Mrs GERBER: I would.

ACTING CHAIR: That would be good. You are after a formal response to the QLS?

Mrs GERBER: Yes, because I did not get a chance. We have done that with other submitters.

Mrs Robertson: When would you like that by?

ACTING CHAIR: That is a question on notice, so the committee would like an official response from QLS by 5 pm on Tuesday, 14 November.

Mrs Robertson: If the committee would indulge us, my colleague would like to clarify one little statement we made when we were talking about the court ordered perpetrator program.

Ms McQueenie: I just wanted to correct the record in response to the first question from the member for Cooper. The question was in relation to eligibility criteria. Part of the answer I gave was in relation to the suitability assessment criteria. That criteria has been modelled on the intervention order scheme and it has been built upon for the purpose of this scheme.

ACTING CHAIR: Thank you very much. We talked about the question on notice. We will communicate with you directly via email for that. This concludes the public briefing. Thank you for your attendance here today. Thank you to our secretariat and thank you to our Hansard reporters. A transcript of these proceedings will be available on the committee's webpage in due course. I declare this public briefing closed.

The committee adjourned at 3.27 pm.