

**CRIMINAL LAW (COERCIVE CONTROL AND AFFIRMATIVE CONSENT) AND OTHER LEGISLATION
AMENDMENT BILL 2023**

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Submission on the Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023

I thank the Legal Affairs and Safety Committee for the opportunity to provide submissions on the Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023. Whilst I largely support the Bill under consideration, there are some provisions which, in my view, ought to be amended.

I. Criminal Code Act 1899: Proposed insertion of section 348AA(1)(n) – ‘Stealthingly’

The criminalisation of ‘stealthingly’ is a welcome addition to the law. However, I would suggest that the Committee consider broadening this subsection to include other forms of birth control, not merely condoms. This could encompass scenarios such as a person falsely claiming that they are sterilised or using contraceptive pills. Such an amendment would ensure that both ‘stealthingly’ and other forms of misrepresentation during sexual activity are covered by the criminal law.

II. Evidence Act 1977: Proposed insertion of section 103ZY – Direction on differences in complainant’s account

I would suggest that the Committee consider omitting or revising subsections (iii) and (iv) of subsection (2)(a). Informing jurors that ‘it is common for there to be differences in accounts of a sexual offence’ and ‘both truthful and untruthful accounts of a sexual offence may contain differences’ may tend to confuse jurors and lead them to disregard serious concerns about inconsistencies in witness testimony. Conflating truthful and untruthful accounts would affect the ability of jurors to distinguish between the two.

I would also suggest that the Committee include a provision within the section, in which it is emphasised that jurors must assess the complainant’s truthfulness and reliability on the whole of the evidence before them. This would ensure that jurors consider all of the circumstances in assessing a complainant’s reliability, given that this is often a critical inquiry in sexual assault matters.

III. Evidence Act 1977: Control of online publications in contravention of anonymity provisions

The widespread use of the internet carries with it the risk of anonymity breaches for complainants. This is particularly so with social media platforms and other informal means of publication, given that users of such sites may be unfamiliar with reporting restrictions.

I therefore propose that the Committee include provisions in the Bill addressing online content which breaches the anonymity restrictions of the proposed section 103ZZN. Whilst online publishing is included within the definition of ‘publish’, there is a lack of clarity as to the liability of websites operators and the like. The Committee may find it appropriate to

include a ‘notice and take down’ scheme, which imposes liability on website operators only where they were aware that the offending material was available and failed to expeditiously remove or disable access to it.

IV. Evidence Act 1977: Proposed insertion of section 103ZZS – Defence to prosecution for offence against s 103ZZN—child gives consent to defendant

Whilst complainants ought to be able to disclose their identity if they so choose, I would argue that a child lacks the capacity to properly understand the serious consequences of waiving their anonymity, even with the advice of a medical practitioner. A child may be unable to fully grasp these concepts and it is unlikely that consent to publication of the child’s identity could reasonably be withdrawn (given the permanent nature of online distribution for example).

In my view, it would be more appropriate to require the consent of both the child and the child’s parent or legal guardian, in order to ensure that the child’s interests are adequately protected.

V. Penalties and Sentences Act 1992: Proposed insertion of section 9(2) – Effect of ‘systemic disadvantage’

The inclusion of ‘systemic disadvantage’ as a sentencing consideration is not appropriate. An offender’s disadvantage and personal background is already a factor considered by the courts when passing sentence; the inclusion of ‘systemic disadvantage’ would encourage mitigation simply due to the disadvantage suffered by a group to which an offender belongs; the offender themselves may have suffered no disadvantage at all. Determining whether an offender has suffered disadvantage should be an inquiry specific to the offender.

I would again like to thank the Committee for inviting public submissions on this Bill. As a Bill which includes several wide-reaching amendments, it is important that public consultation is undertaken throughout all stages to ensure that these changes are appropriate and fit for purpose.