

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

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25 October 2023

Committee Secretary
Legal Affairs and Safety Committee
Parliament House
George Street
Brisbane QLD 4000

Via email: LASC@parliament.qld.gov.au

Dear Committee Secretary

Re: Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023

Thank you for the opportunity to comment on the Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 (the Bill).

As you would be aware, as the Public Advocate for Queensland, I undertake systemic advocacy to promote and protect the rights and interests of Queensland adults with impaired decision-making ability.¹ There are several conditions that may affect a person's decision-making ability, including intellectual disability, acquired brain injury, mental illness, neurological disorders (such as dementia) or alcohol and drug misuse.

Amendments to the Criminal Code and the Evidence Act 1977 – Affirmative consent and mistake of fact, expert evidence panel on sexual offence proceedings.

The Bill introduces into the *Criminal Code* an affirmative consent model in relation to sexual offending, and changes to the 'mistake of fact' provision regarding consent, as recommended by the Women's Safety and Justice Taskforce.

In relation to mistake of fact, the Bill provides that 'A belief by the person that another person consented to an act is not reasonable if the person did not, immediately before or at the time of the act, say or do anything to ascertain whether the other person consented to the act.' It also includes a 'safeguard provision' so that if a person has a cognitive or mental health impairment, and this was found to be the substantial cause of the person not saying or doing anything to ascertain whether the other person consented, the requirement to say or do something to ascertain consent will not apply.

The use of an expert panel in relation to this defence appears to have only been briefly considered in the Taskforce report² and the 'safeguard provision' itself is based upon NSW law.

I have a number of questions and concerns as to how this will apply, its impacts on people with impaired decision-making ability, and whether this has been evaluated in the Queensland context.

It is unclear how widely this defence will be used, considering that Queensland has a *Mental Health Act* under which people with mental illness and/or cognitive disability can be found not to be legally responsible for their actions. The Mental Health Court is generally responsible for determining whether a person was 'of unsound mind' at the time of committing an offence, with experts advising the court in relation to a person's condition.

¹ *Guardianship and Administration Act 2000* (Qld) s 209.

² Women's Safety and Justice Taskforce, *Hear her voice*, Report two, volume 1, 215.

Considering the existence of Queensland's *Mental Health Act* and the jurisdiction of the Mental Health Court, the 'safeguard provision' included in the proposed draft bill would presumably apply only to an extremely limited number of people. This would include, specifically, a person with a mental illness or cognitive impairment that affects their ability to comply with the affirmative consent requirement but that is not sufficient for them to be considered of 'unsound mind' at the relevant time.

Looking at the Taskforce report, it does not appear that the Taskforce consulted broadly regarding this 'safeguard provision' both in terms of how it will apply in the Queensland legal context, as well as its impacts on people with mental illness and disability.

Further, there is a possibility that this provision may affect victims with disability disproportionately. This may be particularly relevant in situations where a person with a mental illness or cognitive impairment offends against another person with a similar condition. This may occur in locations such as mental health facilities and group homes, with the 'safeguard provision' possibly applying to such offenders. The potential impacts on such victims should be explored more thoroughly before the implementation of this part of the Bill.

In considering alternatives, other options that could potentially be explored include specifically taking into consideration a person's mental illness or cognitive impairment at the time of sentencing (rather than during a trial).

Finally, the 'safeguard provision' may also be seen to be broadly discriminatory, potentially leading to a perception that the legislation assumes that a person with a mental illness or cognitive impairment cannot understand the concept of consent.

Similar concepts surrounding the sexual rights of people with impaired decision-making ability can be seen in other parts of the *Criminal Code*, such as section 216, which prohibits a person with an 'impairment of the mind' from participating in consensual sexual activity (a defence exists where the circumstances are not exploitative). This was the subject of my report, *A discussion of section 216 of the Queensland Criminal Code*,³ which was released in 2022.

In the report, I called for a review of the criminalisation of sexual relationships involving people with an 'impairment of the mind'.

Conclusion

Thank you again for the opportunity to comment on the Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023.

Should you wish to discuss any of the matters I have raised in this submission further, please do not hesitate to contact my office via email public.advocate@justice.qld.gov.au or phone 07 3738 9513.

Yours sincerely

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John Chesterman (Dr)
Public Advocate

³ Public Advocate, *A discussion of section 216 of the Queensland Criminal Code* (January 2022).