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

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25th October 2023

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

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

Dear Committee Secretary,

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

Thank you for the opportunity to provide comments in relation to the Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 (**Bill**) which proposes to amend, inter alia, the *Bail Act 1980* (**Bail Act**), Criminal Code, *Domestic and Family Violence Protection Act 2012* (**DFVP Act**) and Regulation, *Evidence Act 1977* (**Evidence Act**) and Regulation, *Penalties and Sentences Act 1992* (**PS Act**), the *Youth Justice Act 1992* (**YJ Act**) and which proposes to repeal the *Criminal Law (Sexual Offences) Act 1978* (**CLSO Act**). The legislative amendments proposed in the Bill include, notably, the implementation of an affirmative consent model in Chapter 32 of the Criminal Code and the creation of a criminal offence of coercive control. As we were consulted on the earlier draft of this Bill, our comments in this submission are confined to matters that we considered to be notable in the Bill as introduced which, in our view, required further comment.

Preliminary consideration: Our background to comment

The Aboriginal and Torres Strait Islander Legal Service (Qld) Limited (**ATSILS**), is a community-based public benevolent organisation, established to provide professional and culturally competent legal services for Aboriginal and Torres Strait Islander peoples across Queensland. The founding organisation was established in 1973. We

now have 25 offices strategically located across the State. Our Vision is to be the leader of innovative and professional legal services. Our Mission is to deliver quality legal assistance services, community legal education, and early intervention and prevention initiatives which uphold and advance the legal and human rights of Aboriginal and Torres Strait Islander peoples.

ATSILS provides legal services to Aboriginal and Torres Strait Islander peoples throughout Queensland. Whilst our primary role is to provide criminal, civil and family law representation, we are also funded by the Commonwealth to perform a State-wide role in the key areas of Community Legal Education, and Early Intervention and Prevention initiatives (which include related law reform activities and monitoring Indigenous Australian deaths in custody). Our submission is informed by over five decades of legal practise at the coalface of the justice arena and we, therefore, believe we are well placed to provide meaningful comment, not from a theoretical or purely academic perspective, but rather from a platform based upon actual experiences.

Preliminary comments

We acknowledge that the amendments proposed in this Bill have arisen from recommendations from the Women's Safety and Justice Taskforce (**Taskforce**) and the Independent Commission of Inquiry into Queensland Police Service Responses to Domestic and Family Violence (**QPS COI**) which the Queensland Government has supported, or supported in-principle.

Notwithstanding, we wish to take this opportunity to express that we continue to have concerns about the creation of a criminal offence of coercive control and the implementation of an affirmative consent model in Queensland on the basis that it will create uncertainty in the law and has the potential to create significant negative implications to Aboriginal and Torres Strait Islander individuals and communities.

We have previously expressed, in detail, our concerns regarding the criminalisation of coercive control in our submission to the Queensland Government consultation on the first tranche of coercive control amendments.

With respect to the implementation of an affirmative consent model in Queensland, we broadly oppose this reform for the following reasons:

(a) It will remove the presumption of innocence of an accused and shift the burden of proof regarding whether there was consent onto the accused. The presumption of innocence is a fundamental human right, as enshrined in section 32 of the

Human Rights Act 2016 (Qld) and is a keystone in the rule of law. It should not be dispensed with lightly and, in the context of these proposed reforms, we do not consider such removal to be reasonable or proportionate.

(b) As drafted, the provisions might be counterproductive and dangerous in the case of false allegations. Whilst we are fully in support for swift and appropriate legal redress for rape and sexual assault victims, these proposed laws will potentially open the door for persons to falsely accuse individuals of sexual assault or rape on the basis that they merely need to make the accusation. The accused would need to prove that consent was provided and was not withdrawn for the relevant period. If they are not able to prove this, even where the sexual activity was consensual, they are likely to be convicted as a rapist or perpetrator of sexual assault. This is an absurd outcome from a legal and moral standpoint.

We are concerned about how an affirmative consent model will be implemented in the context of the differing cultural context, norms and traditions in Aboriginal and Torres Strait Islander communities. In remote and regional communities, individuals might have very limited access to educational resources about these laws and what their obligations are with respect to consent. Language barriers will exacerbate these issues. The result might mean that more people are caught up in these provisions with the risk of incarceration heightened, especially when those individuals are unrepresented by a lawyer. In the context of Closing the Gap, we urge the Government to consider the potentially unintended consequences of these laws on Aboriginal and Torres Strait Islander persons.

In our view, affirmative consent is an excellent basis for community education (provided such is widely accessible including into remote and regional communities) with the potential to create impactful change in the community more broadly on the perceptions and understanding of sexual consent, however, we are not supportive of incorporating affirmative consent into a legal framework.

Response to consultation

We note that we have previously provided a detailed submission in relation to the earlier draft of the Bill. Accordingly, our comments in this submission are confined to matters that we considered to be notable in the Bill as introduced for which we considered further comment was required.

Clause 20, Insertion of new pt 5, ch 29A (Coercive control)

1. *S334A - Proposed definition of "economic abuse"*

   In proposed section 334A(a), the term "financial autonomy" does not appear to be defined in the existing Criminal Code or the Bill. This is a vague term and has the potential to create uncertainty in interpretation. We recommend that this term be defined.

2. *Proposed section 334B (What is domestic violence)*

   The proposed new subparagraphs (3)(i) to (n) contain language which will create plenty of scope for litigation. Some terms used in these subparagraphs are vague and imprecise, for example:
   (a) subparagraph (3)(m) refers to depriving a person of "freedom of action"; and
   (b) subparagraph (3)(n) refers to "punishing a person".

3. *Proposed section 334C (Coercive Control)*

   We are pleased to see that proposed section 334C (Coercive control) expressly states that the offence of coercive control applies to adults only; however, in our view, the maximum penalty for the coercive control offence of 14 years imprisonment is excessive when compared with other jurisdictions.

   Additionally, we noticed that proposed section 334C states that an adult commits an offence under this provision if, inter alia, "the course of conduct would, in all the circumstances, be reasonably likely to cause the other person harm". *Harm* is defined in the following manner: "harm, to a person, means any detrimental effect on the person's physical, emotional, financial, psychological or mental wellbeing, whether temporary or permanent." The earlier drafting of this proposed provision made reference to a narrower threshold of *serious harm* which was described as being intentionally so to reflect the seriousness of the maximum penalty for the offence, being 14 years. Whilst the proposed maximum penalty of 14 years has remained, the threshold for harm has been significantly broadened. We do not see this as being proportionate. Accordingly, we recommend that the maximum penalty for this offence be reduced or, alternatively, that the threshold of harm be narrowed.

   With respect to paragraphs (5)((b) and (c) and the related reforms in the Bill as a whole, we have concerns regarding how complex jury directions might need to be and the impact that might have on a trial and its outcome.

Clause 13 (Affirmative consent, mistake of fact and stealthing)

Proposed section 348AA (Circumstances in which there is no consent)

(a) In our view, proposed section 348AA(1)(f), which is one item in the list of circumstances in which a person is taken to have not consented to an act, is too broad, in particular, in its reference to a person participating in the act because of "fear of harm of any type" regardless of when the conduct giving rise to the fear occurs. In our view, this drafting needs to be narrowed.

(b) In proposed section 348AA(1)(i), we are unclear on the what the threshold is of being "overborne by the abuse of a relationship".

Proposed amendments to the DFVP Act

Clause 40, Insertion of new pt4A (Diversion orders scheme)

(a) We are broadly supportive of the diversion orders scheme; however, we would like to see that approved diversion programs are widely available and culturally nuanced. It would be disappointing if there is a lack of availability of such programs, in particular, for those who reside in remote and rural areas, and long wait times for participating in such programs (in our practice, this has been and continues to be an ongoing issue that has been identified with other court ordered programs).

(b) We also strongly recommend that the order scheme be made available to a wider cohort of offenders, given the prevalence of domestic violence generally.

(c) Additionally, proposed section 135F relates to the assessment of suitability of a defendant and provides that the suitability assessment will be undertaken by an "approved provider". As the assessment relates to character, personal history, language skills, cultural background including whether the defendant identifies as an Aboriginal or Torres Strait Islander person, relevant disabilities, alcohol or drug problems, etc., we strongly recommend that where the defendant identifies as an Aboriginal or Torres Strait Islander person, the assessment be undertaken by an Aboriginal and/or Torres Strait Islander service provider (preferably from the local community of the defendant).

Evidence Act 1977

Clause 59, Insertion of new pt 6B (Evidence related to sexual offences)

Proposed section 103ZZG(2) contains a broad-ranging list of material that a person who is engaged to give evidence about the defendant in a *relevant proceeding* can ask the prosecutor for including an indictment or bench charge sheets, summaries or particulars of allegations, witness statements, exhibits or photographs of exhibits, transcripts of proceedings, a record of interview or transcript of a record of interview, criminal history, educational and work records. However, the context of these provisions relates to the person providing *relevant evidence* which is defined as evidence relating to a person's *cognitive impairment* or *mental health impairment* (per the corresponding amendments to the Criminal Code in relation to the Mistake of Fact defence). In our view, it appears excessive and potentially prejudicial that such a person may be able to request all of this information. Given the definitions of *cognitive impairment* and *mental health impairment* under the proposed amendments to the Criminal Code, providing evidence as to the same should only require a psychological assessment of the defendant. Accordingly, we do not support these proposed amendments.

Penalties and Sentences Act 1992

Clause 83, Amendment of s9 (Sentencing Guidelines)

We strongly support the proposed amendments which, if enacted, will:

(a) insert subparagraph (oa) at section 9(2) which provides that where the person being sentenced is an Aboriginal and/or Torres Strait Islander person, the court is to have regard to any cultural considerations including the effect of systemic disadvantage and intergenerational trauma on the offender; and

(b) expressly state that for Aboriginal and/or Torres Strait Islander offenders, any submissions made by a representative of the community justice group in the offender's community in relation to *cultural considerations* pursuant to section 9(2)(p)(ii) can include submissions in relation to the effect of systemic disadvantage and intergenerational trauma on the offender.

We thank you for the opportunity to provide feedback on the Consultation.

Yours faithfully,

[redacted]

Shane Duffy
Chief Executive Officer