

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

Submission No: 10
Submitted by: Queensland Human Rights Commission
Publication: Making the submission and name public
Attachments: See attachment
Submitter Comments:



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

Submission to Legal Affairs and Safety Committee

26 October 2023

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Introduction

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

About the QHRC

2. The Queensland Human Rights Commission (QHRC) is a statutory body established under the *Anti-Discrimination Act 1991* (Qld) and deals with complaints made under that Act and the *Human Rights Act 2019* (Qld) (HR Act). The Commission also has functions to promote an understanding and public discussion of human rights in Queensland, and to provide information and education about human rights.

Summary of submission

3. The Bill implements major reforms arising from recommendations of the Women's Safety and Justice Taskforce (the Taskforce) in their *Hear her voice* reports one and two, and the Commission of Inquiry into Queensland Police Service Responses to Domestic and Family Violence (the Commission of Inquiry) in their report, *A Call for Change*.
4. A guiding principle contained in the terms of reference for the Taskforce on coercive control and women's experience in the criminal justice system was the need to protect and promote human rights, including the rights protected under the HR Act.¹ The Commission of Inquiry was also required to conduct its inquiry in a way that protects and promotes the rights in the HR Act.²
5. Under the HR Act, a decision or action is compatible with human rights if the action or decision either:
 - a. does not limit a human right, or
 - b. limits a human right only to the extent that is reasonably and demonstrably justifiable in accordance with section 13 of the HR Act.³
6. A human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.⁴

¹ Taskforce on Coercive Control and Women's Experience in the Criminal Justice System, 'Terms of Reference' (1 April 2021) 2.

² *Commissions of Inquiry Order (No. 2) 2022* (Qld) ord 10.

³ *Human Rights Act 2019* (Qld) s 8.

⁴ *Human Rights Act 2019* (Qld) s 13(1).

7. A 'pressing and substantial' public or social concern is more likely to be capable of justifying a limit placed on human rights. The more important the right, and the greater the incursion, the more important the purpose will need to be.⁵
8. The QHRC supports the Bill in seeking to promote human rights and improve the lives of Queensland women and girls, and their families, in alignment with the goals and recommendations of the Taskforce and the Commission of Inquiry.
9. As well as emphasising provisions of the Bill that the QHRC considers enhances human rights protections in Queensland, this submission focuses on aspects of the Bill identified as raising human rights compatibility issues.

Recommendations

10. The Commission recommends that the Committee:
 - suggests an amendment to the Bill to incorporate a 5-year statutory review of the coercive control offence, and that law enforcement agencies have mandatory data collection and reporting requirements
 - seeks an explanation from government as to why non-payment of sex work is being addressed through the expansion of circumstances of non-consent in s 348AA of the Criminal Code, rather than in a standalone 'coercion' offence as recommended by the Queensland Law Reform Commission
 - narrows the scope of fraudulent inducement in relation to the circumstances of non-consent to representations made about 'serious disease' to only include sexually transmitted diseases.

Application of the HR Act to the Bill

Key human rights

11. Several human rights protected under the HR Act are relevant to provisions of the Bill concerning accused persons, including rights in criminal proceedings,⁶ right to equality,⁷ and right to liberty.⁸
12. The rights of victims of crime should also be considered alongside those of accused persons when introducing new offences or amending existing legislation. Article 2 of the *International Covenant on Civil and Political Rights* (ICCPR) obliges State parties to respect the rights of all individuals, and where not already provided for by existing legislation, take steps to amend laws to recognise rights.

⁵ Explanatory Notes, Human Rights Bill 2018, 16–18.

⁶ *Human Rights Act 2019* (Qld) s 32.

⁷ *Human Rights Act 2019* (Qld) s 15.

⁸ *Human Rights Act 2019* (Qld) s 29.

13. The United Nations Human Rights Committee has commented that this obligation includes ensuring individuals are protected not only against violations by the State, but against violations of their rights by private persons. This includes taking appropriate measures or exercising due diligence to prevent, punish, investigate, or redress the harm caused by such acts by private persons or entities.⁹
14. Relevant rights that must be considered by the state in relation to complainants under the Bill include the right to privacy,¹⁰ liberty and security of person,¹¹ the right to life,¹² and the right to equality, as most victims of sexual offences and domestic violence are women.¹³

Fair hearings for accused persons, victims, and the community

15. The Statement of Compatibility in relation to this Bill states that:

The right to a fair hearing of the HR Act affirms the right of **all individuals** to procedural fairness when coming before a court or tribunal... in the context of a criminal proceeding, will involve a triangulation of the interests of the victim, the accused and the community.¹⁴

16. The QHRC embraces the 'triangulation of interests' approach to the trial process and notes that Australian courts have acknowledged the right to a fair trial extends beyond the rights of the accused to include the interests of the community and the protection of witnesses.¹⁵
17. However, we consider that the existing right to a fair hearing in s 31(1) of the HR Act is currently too narrow for this approach to be applicable to the Bill. As a priority for future legal reform, the Commission suggests replacing the phrase 'a person charged with a criminal offence' in s 31(1) with 'all persons,' and we urge the government to prioritise this issue in the forthcoming review of the HR Act.¹⁶
18. Consistent with the QHRC's position, in *Hear her voice* report 2, the Taskforce acknowledged that without diminishing the rights of an accused person to a fair

⁹ United Nations Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add. 1326 (May 2004) 8.

¹⁰ *Human Rights Act 2019* s 25.

¹¹ *Human Rights Act 2019* s 29.

¹² *Human Rights Act 2019* s 16.

¹³ *Human Rights Act 2019* s 15.

¹⁴ Statement of Compatibility, Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023, 38 (emphasis added).

¹⁵ Women's Safety and Justice Taskforce, *Hear Her Voice Report One: Addressing Coercive Control and Domestic and Family Violence in Queensland* (Volume 3, 2021) 677.

¹⁶ We note that the *Human Rights Act 2004* (ACT) s 21 includes a broader fair trial right that contains the words 'Everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.'

trial, there is merit in reviewing the rights in the HR Act, and recommended that that the review of the HR Act should incorporate a specific focus on victims' rights.¹⁷

Comments on the Bill

Coercive control

19. The first Taskforce report identified that coercive control is a serious violation of the right to life, the right to be protected from torture and cruel, inhuman and degrading treatment, the right to equality, and the right to privacy.¹⁸
20. The right to life is particularly pertinent when considering the close link between coercive control and a heightened risk of fatality for people subjected to this form of violence.¹⁹
21. As acknowledged in the Statement of Compatibility accompanying this Bill,²⁰ Queensland has a positive obligation to take reasonable steps to protect the lives of individuals. Taking steps to address coercive control is a key part of discharging that obligation.
22. As noted by the Taskforce, while most legal stakeholders and victims supported the criminalisation of coercive control, some opposed it on the basis that it may have unintended consequences, including the potential for a detrimental impact on First Nations peoples in the criminal justice system.²¹ This concern is also reflected in the government's consideration of the human rights compatibility of the new offence in the Statement of Compatibility.²²
23. Any law that creates a new criminal offence should be carefully scrutinised in light of Queensland's commitment to 'Closing the Gap' as the consequences may include an increased overrepresentation of First Nations people in the criminal

¹⁷ Women's Safety and Justice Taskforce, *Hear Her Voice Report 2: Women and Girls' Experiences of the Criminal Justice System* (Volume 1, 2022) 139-140.

¹⁸ Women's Safety and Justice Taskforce, *Hear Her Voice Report One: Addressing Coercive Control and Domestic and Family Violence in Queensland* (Volume 2, 2021) 368-373.

¹⁹ Women's Safety and Justice Taskforce, *Hear Her Voice Report One: Addressing Coercive Control and Domestic and Family Violence in Queensland* (Volume 2, 2021) 368.

²⁰ Statement of Compatibility, Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023, 16.

²¹ Women's Safety and Justice Taskforce, *Hear Her Voice Report One: Addressing Coercive Control and Domestic and Family Violence in Queensland* (Volume 1, 2021) ix; (Volume 2, 2021) 400.

²² Statement of Compatibility, Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023, 23.

justice system.²³ Of particular concern is the potential criminalisation of women who are themselves victims of domestic violence.

24. In weighing up the human rights issues involved with legislating to prohibit coercive control as a stand-alone offence, the Taskforce indicated it was mindful of the special consideration needed to be given to ensuring that Aboriginal and Torres Strait Islander peoples are not further disadvantaged.²⁴
25. A safeguard recommended by the Taskforce to mitigate the impact of unintended consequences involved a legislative review to occur 5 years after the laws come into effect.²⁵ This recommendation was supported by the Queensland Government, which committed to a statutory review as soon as practicable 5 years after commencement of the last amendments.²⁶ However, the Commission has identified that the 5-year statutory review requirement is not included in the current Bill.
26. Effective monitoring and evaluation are critical to guarantee the success of newly enacted laws, and the most reliable approach to achieve this is through a comprehensive, impartial, statutory review. This is especially so because coercive control as a criminal offense is a recent development in Australia, with limited international precedents to serve as a foundation for assessing its effectiveness in addressing violence.
27. Reliable data collection will be needed to conduct an effective evaluation of the impact of the offence after 5 years. The information collected will need to include the demographics of people charged with and convicted of the offence of coercive control, with a particular focus on identifying how many are First Nations people, and in particular how many are First Nations women.
28. The Bill should require the Queensland Police Service and courts to engage in compulsory data collection and reporting in relation to the new coercive control offence.

Refusal of bail and bail conditions

29. The QHRC supports amendments to bail laws to require police officers or the court to consider the likely effect that refusal of bail and the conditions of bail

²³ Rates of adult imprisonment (target 10) has increased based on the latest data. See Australian Government Productivity Commission, *Closing the Gap: Annual data compilation report July 2023*, 'Summary'.

²⁴ Women's Safety and Justice Taskforce, *Hear Her Voice Report One: Addressing Coercive Control and Domestic and Family Violence in Queensland* (Volume 2, 2021) 373.

²⁵ Women's Safety and Justice Taskforce, *Hear Her Voice Report One: Addressing Coercive Control and Domestic and Family Violence in Queensland* (Volume 2, 2021) 400; Volume 3, 781 (Recommendation 84).

²⁶ Queensland Government, *Response to the report of the Queensland Women's Safety and Justice Taskforce, Hear Her Voice – Report One* (2022).

would have on the accused person's dependent family members, the pregnancy of an accused person, and ongoing cultural obligations to family members.²⁷

30. This amendment promotes the rights of families,²⁸ children²⁹ and Aboriginal and Torres Strait Islander cultural rights to maintain family and kinship ties.³⁰
31. These rights must be weighed against any potential reduction of the right to liberty and security of individuals as well as the community as a whole. However, the Commission considers the amendments to bail laws are justified on the basis that women are proportionally more likely than men to be refused bail and held in custody on remand, but are more likely to hold primary care duties.³¹
32. While acknowledging that bail requires thorough consideration on a case-by-case basis, the Taskforce in recommending these laws considered that bail should be preferred for women who are at risk of giving birth on remand or had dependent children, particularly because women and girls do not generally pose the same risks to community safety.
33. The adverse effects of a woman being incarcerated reach well beyond the defendant, causing instability and harm to children, and in some cases resulting in children being placed in out-of-home care.

Sentencing considerations

34. The QHRC supports changing sentencing legislation to require that the court must have regard to the hardship any sentence imposed would have on the offender based on their individual characteristics including their age, disability, gender identity, parental status, race, religion, sex, sex characteristics and sexuality and the person's dependents. Consideration of the person's history of abuse or victimisation, as well as the effect of systemic disadvantage and intergenerational trauma, if the person is Aboriginal and/or Torres Strait Islander³² is supported by the QHRC.
35. The hardship experienced during incarceration by individuals from marginalised communities can be significantly heightened, particularly when they face intersectional disadvantage, such as a First Nations woman with a disability.
36. These reforms promote the right to equality, and the rights of families, children, and cultural rights of Aboriginal peoples and Torres Strait Islander peoples. The

²⁷ Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 (Qld) cls 5, 96–97.

²⁸ *Human Rights Act 2019* (Qld) s 26(1).

²⁹ *Human Rights Act 2019* (Qld) s 26(2).

³⁰ *Human Rights Act 2019* (Qld) s 28(2)(a) and (c).

³¹ Explanatory Notes, Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 (Qld) 3.

³² Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 (Qld) cls 83, 100.

amendments also align with the objects and provisions of the *Anti-Discrimination Act 1991* in seeking to alleviate discrimination based on protected attributes that a person may experience through incarceration.

Affirmative consent, mistake of fact and stealthing

37. The QHRC is supportive, in principle, of reforms to ensure that consent is freely and voluntarily 'agreed' by all parties to a sexual act, and to expand the situations in which a person cannot be seen to have consented because of incapacity or the particular circumstances.
38. The relevant protected human rights for victims of rape and sexual assault include the right to life,³³ freedom from torture and cruel, inhuman or degrading treatment,³⁴ and the right to equality,³⁵ noting that victims of sexual assault are predominantly women.³⁶
39. Though an affirmative consent model could potentially limit an accused's right to a fair trial, this limitation is likely to be reasonable and justifiable, given that the reforms seek to give effect to contemporary standards about sexual behaviour.
40. The QHRC has reservations about 2 proposed inclusions in the circumstances of non-consent set out in proposed s 348AA(1) relating to non-payment of sex workers and the transmission of 'serious disease'.

Should non-payment of sex work be considered fraudulent inducement?

41. The current criminalisation of sex work in Queensland in most circumstances leaves sex workers particularly vulnerable to sexual violence and exploitation. As highlighted by the Queensland Law Reform Commission (QLRC) report, *A decriminalised sex work industry for Queensland*, the intentional non-payment for sex work exemplifies a lack of respect for the role, labour and bodily integrity of sex workers.³⁷
42. The Bill includes a circumstance of non-consent in proposed s 348AA(1) as follows:

³³ *Human Rights Act 2019* (Qld) s 16.

³⁴ *Human Rights Act 2019* (Qld) s 17.

³⁵ *Human Rights Act 2019* (Qld) s 15.

³⁶ The Queensland Government's 2019 publication, *Prevent. Support. Believe. Queensland's Framework to address Sexual Violence*, notes that around one in 5 women and one in 20 men have experienced sexual violence since the age of 15. In 2018, there were almost 6 times more female victims of reported sexual assault than male victims in Queensland. In 2017-18, 95.8% of reported perpetrators of sexual offences in Queensland were identified as male.

³⁷ Z Stardust and H Caldwell, 'Archetypal Sluts: Payment of Sex Workers as a Condition of Consent' in K Gleeson and Y Russell (eds), *New Directions in Sexual Violence Scholarship* (Routledge, 2023 forthcoming) as cited in Queensland Law Reform Commission, *A decriminalised sex work industry for Queensland* (Report 1, 2023) 188 [8.10].

(l) the person is a sex worker and participates in the act because of a false or fraudulent representation that the person will be paid or receive some reward for the act.

43. If non-payment of sex workers were to be categorised as fraudulent inducement for the purposes of consent, it would mark a significant change in Queensland's consent laws. Such a change would implicate an individual's rights in criminal proceedings, necessitating careful consideration of its potential impact on the presumption of innocence.³⁸
44. In *A decriminalised sex work industry for Queensland* the QLRC examined fraudulent promises to pay in the context of sex work. The QLRC considered competing considerations as to whether Queensland's consent laws should be amended to include fraudulent promises to pay, and ultimately concluded that s 348 should not be amended to specifically include fraudulent promises to pay sex workers. The existing laws, in conjunction with the proposed framework for decriminalising sex work, were considered to provide appropriate protections to sex workers.³⁹
45. The QLRC did recommend the introduction of a 'coercion' offence, which would (amongst other actions) criminalise inducing a person through false representation, pretence, or other forms of fraud, to provide or continue to provide commercial sexual services.⁴⁰
46. The QHRC recommends that the Committee seek further information from the government to explain the departure from the recommendations of the QLRC, and why they have failed to move forward with a coercion offence, as opposed to extending the scope of fraudulent inducement as reflected in the Bill.

Should fraudulent inducement extend to representations made about serious disease?

47. The Bill extends the circumstances in which there is no consent to a sexual act to include situations where a person has expressly and fraudulently told their sexual partner they did not have a serious sexually transmitted disease (STD) or sexually transmitted infection (STI), knowing this to be untrue, and where a transmission of the disease has occurred.⁴¹
48. The Explanatory Notes to the Bill indicate that the provision intends to address a situation where a person participates in an act because they were misled about their partner having a serious disease. While HIV and STIs are primarily public

³⁸ *Human Rights Act 2019* (Qld) s 32(1).

³⁹ Queensland Law Reform Commission, *A decriminalised sex work industry for Queensland* (Report 1, 2023) 189 [8.18].

⁴⁰ Queensland Law Reform Commission, *A decriminalised sex work industry for Queensland* (Report 1, 2023) 189 [8.20].

⁴¹ Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 (Qld) cl 13.

health issues, the Explanatory Notes indicate that lack of information about the risk of obtaining a serious sexually transmitted disease ‘strikes at the heart’ of a person’s right to make a free an informed decision about whether to participate in the sexual act. The Explanatory Notes make no mention of diseases other than sexually transmitted diseases including HIV.⁴²

49. In the context of sexual relationships, when one person enquires about their potential partner’s STD or STI status before engaging in sexual activity, they have a right to receive truthful information. The consent they subsequently provide is likely to be based on the accepted veracity of that response. If the person deliberately gives false information, this undermines the other person’s right to make an informed decision and consent could not be seen as being given freely and voluntarily. Consequently, this undermines their right to life, privacy, and protection from torture, cruel, inhuman or degrading treatment.
50. At the same time, consideration should also be given to the effect of such measures on the right to privacy and right to equality of people living with HIV and other diseases, and may contribute to further marginalisation of people living with these conditions. The proposed amendment, however, does not impose a positive obligation on individuals to disclose this information. If a person is asked the question specifically by a potential sexual partner, and they do not want to disclose this information, they could elect to discontinue the sexual encounter.
51. When the rights of both people are balanced, extending fraudulent misrepresentation could be seen as a reasonable limitation on the rights of people with particular diseases. Nevertheless, the reasonableness of this limitation largely hinges on the definition of what constitutes a ‘serious’ disease.
52. The QHRC does not consider that the ‘serious disease’ definition in the *Criminal Code* provides sufficient clarity and precision, and notes that it is not confined to sexually transmitted diseases. This may mean, for instance, that misleading a sexual partner about a COVID-19 positive status and then passing on COVID-19 during sex may amount to a serious crime of rape or sexual assault, which does not appear to be a proportionate outcome.
53. The QHRC considers that, in balancing the potential limitation on the right to liberty of an accused person with the right to freely consent to a sexual act for a potential victim, this definition should be appropriately confined to address the issue at hand – the transmission of serious, sexually transmitted diseases only.

Giving evidence in sexual offence trials

54. The QHRC supports proposed changes to the hearing process to alleviate the trauma and humiliation that victims of sexual crimes may experience during the trial process. The Bill expands the duties of the court to disallow improper questions and irrelevant questions and cross-examination on the complainant’s

⁴² Explanatory Notes, Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 (Qld) 8.

sexual reputation and history.⁴³ The Bill further seeks to safeguard the privacy and reputation of victims by the exclusion of the public from hearings when a complainant is giving evidence.⁴⁴

55. These reforms follow concerns by stakeholders that a victim's sexual history can be 'fair game' during cross-examination, and reports that some victims experience 'badgering' and 'intimidation.' In recommending these reforms, the Taskforce aimed to improve the experience of victims in court and ensure that juries only hear relevant evidence.⁴⁵
56. Amending the law will limit the rights of defendants to a fair hearing, and more specifically the right to examine, or have examined, witnesses against the person. However, the right in s 32(2)(g) of the HR Act is expressed in general terms and does not indicate an intention that cross-examination be unlimited in its nature and scope.
57. Sexual crimes are seriously underreported;⁴⁶ few alleged offenders are charged,⁴⁷ and even fewer matters result in a conviction.⁴⁸ The manner in which cross-examination can be used by defendants to dissect the private lives of victims of sexual offences has received increasing media attention in recent years, and may deter victims of crime from pursuing justice, reducing community safety as a result.
58. Reforms to ensure that questions and cross-examination involving highly sensitive information regarding the victim's sexual history are limited to where they are of probative value will help to protect and preserve the rights of victims to privacy and reputation.⁴⁹
59. Beyond reducing the distress and embarrassment of individual victims of crime, the QHRC considers that the amendments may have a broader positive societal effect in encouraging victims of crime to come forward and may increase the successful prosecution rate of these crimes. The QHRC considers that the

⁴³ Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 (Qld) cl 56, 59.

⁴⁴ Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 (Qld) cl 59.

⁴⁵ Women's Safety and Justice Taskforce, *Hear Her Voice Report Two: Women and girls' experiences across the criminal justice system* (Volume 1, 2022) 263, 271.

⁴⁶ Between 2006 and 2016, as few as 13% of female victims of sexual assault in Australia contacted police about the most recent incident. See Australian Bureau of Statistics, *Personal Safety, Australia: Statistics for family, domestic, sexual violence, physical assault, partner emotional abuse, child abuse, sexual harassment, stalking and safety 2016* (Catalogue No 4906.0, 18 November 2017).

⁴⁷ Around 20% of sexual assault cases reported to police result in charges. See Australian Institute of Criminology, *Guilty outcomes in reported sexual assault and related offence incidents* (Factsheet No 162, December 2007).

⁴⁸ Around 40% of defendants who plead not guilty are found guilty. See Australian Institute of Criminology, *Guilty outcomes in reported sexual assault and related offence incidents* (Factsheet No 162, December 2007).

⁴⁹ *Human Rights Act 2019* (Qld) s 25.

proposed changes to complainant evidence in sexual offence trials are reasonable and balanced.

Conclusion

60. The Bill introduces substantial reforms to the criminal justice system and, on the whole, strikes a careful balance in addressing complex societal issues.
61. The QHRC observes that there are limits to what the criminal law is practically and properly able to achieve in terms of changing social practices, and legislative amendment is only one means of addressing these issues. Consistent with its human rights obligations, the government must continue to work with key stakeholders, including victims, on non-legislative measures to address these complex social issues in the long term.
62. Thank you for the opportunity to comment on this Bill.