

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

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Submission to the Legal Affairs and Community Safety Committee - Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023

Zig Zag Young Women's Resource Centre Inc ('Zig Zag') welcomes the opportunity to provide a written submission to the **Legal Affairs and Community Safety Committee - Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 ('the Bill')**. We respectfully submit recommendations relating to specific areas of expertise based on our extensive knowledge and experience in providing specialist sexual assault support and prevention services to young women aged 12-25 years who have been victims of violent crime, specifically sexual offences, in Queensland, since 1988.

Zig Zag was established to respond to the specific identified needs of young women, namely sexual violence, accommodation, and the provision of a safe and confidential place for young women to obtain information, advice, and support. Zig Zag is an incorporated community managed organisation that currently receives funding from the Department of Justice and Attorney General (DJAG) to provide three specialist sexual assault support and prevention programs to young women in the Wider Brisbane, Brisbane North, and Brisbane Southwest regions; and funding from the Department of Communities, Housing and Digital Economy (DCHDE) to provide a specialist homelessness program to young women in the Wider Brisbane region.

As a general position, Zig Zag welcomes and supports the proposed Bill in relation to the introduction of an affirmative model of consent, and amendments to mistake of fact, jury directions relating to sexual offences, and failure to report provisions. The current definition of consent and operation of mistake of fact within the Criminal Code have had significant negative impacts on the reporting, investigation, charge and prosecution of sexual offences, that has resulted in injustice to many sexual assault survivors in Queensland. The proposed legislative reform is greatly welcomed by sexual assault survivors and specialist sexual assault services after many decades of advocacy work.

Due to significant time constraints, this submission will focus on recommendations relating to the following specific areas:

- 1. Failure to Report Offence (Section 229BC)**
- 2. Consent (Section 348) and Circumstances Where There Is No Consent (Section 348AA)**

3. **Mistake of Fact (Section 348A)**
4. **Jury directions Relating to Sexual Offences**
5. **Coercive control (Section 334A)**

Prevalence of Sexual Violence

It is important to firstly acknowledge that sexual violence continues to have the lowest rates of reporting, investigation, prosecution, and conviction of any violent crime in Australia, making it difficult to statistically measure the prevalence of sexual violence in the community. Data indicates that sexual violence is endemic in Australia with a disproportionately high incidence of sexual violence being perpetrated against young women as shown in the following statistics:

- *One in three young women experiencing some form of sexual violence before the age of 18 yearsⁱ*
- *84% of recorded sexual assault crimes from 2021-2022 involved female victims with most common age at incident being between 10-17 years (42%)ⁱⁱ*
- *Over half (51%) of young women in their 20's have experienced sexual violenceⁱⁱⁱ*

Sexual violence is a largely hidden crime that often occurs within the family and other private contexts. Sexual violence is primarily perpetrated by males who are known to the victim such as family members, intimate partners, friends, colleagues, neighbours, and acquaintances. Evidence suggest that *most victims/survivors of sexual violence do not report the crime to the police*, and many do not access specialist support services available until weeks and/or years after the offences took place. Children and young people face additional barriers in disclosing and reporting experiences of sexual assault and accessing appropriate, free, and confidential support services due to a range of factors including their age, level of knowledge of support services available, ability to travel, difficulties obtaining parental consent, safety concerns, mistrust of the Police or Child Safety, and poor perceptions of the criminal justice system being observed as the primary deterrents for child and adolescent victims of sexual offences^{iv}. Zig Zag observe significant barriers for young people in identifying and reporting experiences of sexual violence perpetrated by an intimate partner, including safety concerns and fear of further violence; stigma and shame; limited understanding as to what constitutes 'consent'; lack of recognition of sexual assault as being a crime; and lack of trust in police and/or judicial responses^v. Many young women who experience intimate partner sexual violence may have difficulty identifying the experience as 'sexual assault' as male partners who engage in domestic violence often apply a range of subtle, coercive and/or violent behaviours to deny their partner capacity to voluntarily consent to sexual activity^{vi}.

Failure to Report Offence (Section 229BC)

Zig Zag is an active member of the Failure to Report Working Group (FRWG) that was established by non-Government organisations and peak bodies in Queensland in response to concerns over the establishment of a Failure to Report offence in Queensland that came into effect in July 2021. The FRWG has held forums and prepared resources to assist the women's services, youth homelessness, and drug and alcohol service sectors to better understand, monitor, and review the impact of this legislation on children and young people, in particular their access and engagement with support services where mandatory reporting was now required.

Zig Zag has strongly advocated for changes to the Failure to Report offence and we welcome the proposed amendments. We recommend consideration for minor changes to the following proposed amendments:

- (1) **Section 229BC(4)(c) instead of 'turns 16 years' Zig Zag suggest this be amended to: 'a Gillick competent child' (preferred) or if an age must be set Zig Zag recommend lowering this to '10 years'**. The assessment of Gillick competency is commonly used to determine a child or young person's capacity for independent decision making on issues that affect their lives across a wide range of areas including healthcare, legal/judicial, and education settings. Such an approach is more consistent with Article 12 of the International Convention of the Rights of the Child that specifically requires State Parties to assure that children have a right to express their views freely on all matters affecting them and that due weight is given to this, in accordance with their age and maturity. Furthermore, it is recognised best practice internationally for the provision of trauma informed sexual

assault responses that victims/survivors be supported to have as much choice, control and determination as possible following experiences of sexual violence irrespective of their age. The decision on whether to report sexual offences to the Queensland Police Service has significant implications for children and young people. The proposed amendment will continue to deny choice and self-determination for young people under 16 years of age.

- (2) **Section 229BC (3)(e) instead of ‘a person who is a member of the Australian Association of Social Workers’ Zig Zag suggest this be amended to: ‘a person who is a member or eligible to become a member of the Australia Association of Social Workers’.** The Australian Association of Social Workers (AASW) recognises that social work is a self-regulating profession. It is important to note that the majority of qualified social workers are not members of the AASW with less than 50% of all social workers being members.
- (3) **Section 229BC(2)(ii) instead of ‘serious harm’ Zig Zag suggest this be amended to: ‘significant harm’.** Serious harm is not adequately defined however the use of the term ‘significant harm’ is currently defined within the Child Protection Act 1999 and is more commonly understood in relation to considerations for mandatory reporting.

Consent (Section 348) and Circumstances Where There Is No Consent (Section 348AA)

Zig Zag welcomes the introduction of an affirmative model of consent to sexual activity in Queensland and supports the proposed amendments to Section 348. We respectfully submit the following recommendations:

- (1) **Section 348 (1) instead of ‘consent means free and voluntary agreement’ Zig Zag suggest this be amended to: ‘consent means, free, voluntary and informed agreement’.** The definition of consent should also include the word ‘informed’ to ensure that the nature and risks associated with any sexual acts are fully understood by a person when giving consent.
- (2) **Section 348AA (2) instead of ‘If a person, against whom an offence under this chapter is alleged to have been committed, suffers grievous bodily harm as a result of, or in connection with, the offence, the grievous bodily harm suffered is evidence of the lack of consent on the part of the person unless the contrary is proved’ Zig Zag suggest this be amended to: ‘If a person, against whom an offence under this chapter is alleged to have been committed, suffers serious physical injury as a result of, or in connection with, the offence, the serious physical injury suffered is evidence of the lack of consent on the part of the person unless the contrary is proved’.** The use of the definition ‘grievous bodily harm’ is a particularly high threshold of harm generally defined as causing severe, life threatening and/or permanent injuries. This definition does not include other serious physical injuries that may be caused as a result of a sexual offence. Serious physical injury could therefore include any physical trauma to the body by an external force that requires medical treatment.
- (3) **Section 348AA be amended to include an additional circumstance where ‘a person is incapable of consenting or withdrawing consent because they are being strangled or because of some other act’.** The use of strangulation is not uncommon and may be engaged by people during sexual activity. It is therefore very important to ensure the safety of those involved by including an additional exemption in the circumstances where the person does not consent as set out in Section 348AA. For example, a person may still be conscious but unable to communicate their distress and lack of consent because of an act of strangulation.
- (4) **Additional amendment to include a history of domestic, family, and/or intimate partner violence be expressly required to be considered in sexual violence offences, where relevant.**

Mistake of Fact (Section 348A)

Zig Zag welcomes the proposed amendments to the defence of mistake of fact as it has long been inadequate when applied to sexual offences in Queensland. These important amendments better reflect contemporary understandings of the circumstances and facts surrounding sexual offences. Zig Zag has strongly advocated for reversing the onus of proof on the prosecution to shift to the defendant in relation to sexual offences to demonstrate that the defendant took *positive and reasonable steps by words and actions*

at the time of the sexual act and/or each subsequent sexual act, to ascertain that the other person is giving consent to the sexual act/s.

Zig Zag respectfully makes the following recommendations:

- (1) Section 348 (3) instead of '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' Zig Zag suggest this be amended to: '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 and/or at the time of any subsequent act, say or do anything to ascertain whether the other person consented to the act or any subsequent act'.** This change would recognise that consent is required to be obtained *throughout* and *for all sexual acts* and would provide for appropriate application to situations where a sexual encounter may have begun consensually but changed in nature, e.g., where a condom is removed without the consent of the other person; or the refusal for payment as previously negotiated in sex work; or where the situation becomes violent in the use of strangulation or a physical assault which may render the victim unable to verbally withdraw consent. In an affirmative consent model, consent is continuous and can be withdrawn by any person at any time, therefore consent must be sought and/or reaffirmed at *every stage of the sexual activity*.
- (2) Section 348B(b) instead of 'the person has an ongoing impairment in comprehension, reason, judgment, learning or memory so as to affect functioning in daily life to a material extent' Zig Zag suggest this be amended to: 'the person has an ongoing, *permanent* impairment in comprehension, reason, judgment, learning or memory so as to affect functioning in daily life to a material extent'.** Zig Zag believe that appropriate considerations should be made to ensure a 'safeguarding' provision for people with a cognitive impairment however we have concerns that the current amendment is too broad and may encompass temporary or common conditions where it is reasonable to consider that most people with that condition are still able to say or do something to ascertain the consent of the other person. Given its scope there is the potential for misuse by defendants and it is critical that the threshold for cognitive impairment is better defined in the interests of safety and justice if it remains in legislation.
- (3) Section 348C(1)(a) Zig Zag suggest this section be amended to align with existing, relevant legislation: 'the person has a condition characterised by a clinically significant disturbance of thought, mood, perception or memory', as currently defined in section 10(1) of the Mental Health Act 2016.**
- (4) Section 348B(1)(c) instead of 'the disturbance impairs the emotional wellbeing, judgment or behaviour of the person so as to affect functioning in daily life to a material extent' Zig Zag suggest this be amended to: "a clinically significant disturbance that impairs judgment or behaviour of the person so as to affect functioning in daily life to a material extent'.** Use of the term 'emotional wellbeing' is too broad and provides the potential for misuse by defendants and it is critical that the threshold for mental health impairment is better defined in the interests of safety and justice if it remains in legislation.
- (5) Section 348C(2) be amended to remove (a) an anxiety disorder and (b) an affective disorder.** Zig Zag have serious concerns about the inclusion of anxiety disorders and affective disorders like depression which are two of the most common mental health disorders that currently exist in the adult population. We believe that the inclusion of these disorders will enable the mistake of fact defence to be misused by many in the population that would, arguably not currently have access to the current defence and will unnecessarily lengthen proceedings, may enable unjust outcomes for rape and sexual assault victim/survivors, and contribute to the perpetuation of misconceptions about rape and sexual assault. Given its scope there is the potential for misuse by defendants and it is critical that the threshold for mental health impairment is better defined in the interests of safety and justice if it remains in legislation.

Jury Directions Relating to Sexual Offences

Zig Zag welcomes the proposed amendments to jury directions relating to sexual offences to directly address and respond to common, pervasive and persistent myths and misconceptions surrounding sexual violence within our society. Rape myths can be defined as *pervasive stereotypes that somehow shift the blame for the incident onto the complainant because of her actions such as drinking, voluntarily going somewhere alone with a man not well known to her or being dressed or acting provocatively as in some way contributing to or even causing the offender's behaviour.*^{vii} These myths and misconceptions have been found to be held by members of the Queensland Police Service, legal professionals, and juror members within the criminal justice system, negatively affecting outcomes relating to the investigation and/or prosecution of sexual offences.

A national survey of community attitudes towards violence against women found the prevalence of various misconceptions about sexual offending^{viii}, included:

- 42% Australians agreed that it is 'common for sexual assault accusations to be used as a way of getting back at men'.^{ix}
- 31% Australians agreed that 'a lot of the times women who say they were raped had led the man on then had regrets'.^x
- 33% Australians are unaware that a woman is more likely to be sexually assaulted by someone she knows, than by a stranger^{xi}.
- 16% Australians agreed that many of the allegations of sexual assault made by women are false.^{xii}
- 11% Australians 'thought it likely that a woman who waited weeks or months to report sexual assault was lying'.^{xiii}
- 7% Australians agreed that if 'a woman doesn't physically resist - even if protesting verbally - then it isn't really rape'.^{xiv}
- 33% Australians believe that 'rape results from men being unable to control their need for sex.'
- 28% Australians believe that, when sexually aroused, 'men may be unaware a woman does not want to have sex.'

In light of the prevalence and pervasive nature of misconceptions about sexual offending, Zig Zag submits the following recommendations for mandatory jury directions for all criminal proceedings that is a trial by jury or by judge sitting alone; and that relates, wholly or partly, to charge of a sexual offence:

- (1) **Section 103ZQ be amended to include: 'The judge must provide relevant jury directions at the beginning of a trial and at any other relevant time when requested by a party to the proceedings'.** The current provision under Section 103ZQ(1) allows too much discretion about determinations by limiting this to 103ZQ(1) (a) 'if there is a good reason to give the direction' or 103ZQ(1) (b) 'if requested to give the direction by a party to the proceeding'.

Coercive Control (Section 334A)

In response to the introduction of a standalone criminal offence of coercive control, Zig Zag has continuing concerns for anticipated adverse consequences associated with the introduction of this new offence, given the known systemic challenges with Queensland Police Service responses to domestic and family violence and within the criminal justice system, where there is frequent misidentification of the predominant aggressor leading to increasing criminalisation of women and girls.

There are multiple, complex challenges in designing an effective legislative response to the cumulative, complex interplay of coercive control tactics primarily used by men against women to gain or retain power and control over a person with whom they are in an intimate partner or family relationship with. We identify significant challenges for the Queensland Police Service to appropriately identify, respond, and charge a new offence of coercive control. **For these reasons, Zig Zag does not support the maximum penalty being 14**

years and would recommend a more conservative approach like New South Wales which carries a maximum penalty of 7 years imprisonment.

Whilst not currently in scope within the Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 which limits this new criminal offence of coercive control to adults, Zig Zag would like to reiterate that we do not support the introduction of a criminal offence of coercive control extending to anyone under age 18 years.

Zig Zag acknowledges that this written submission has been developed within significant time constraints and invites opportunities to provide further comment to any recommendations made herein.

For further information or commentary please contact: Stephanie Anne, CEO, Zig Zag Young Women's Resource Centre Inc on:

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Yours sincerely,
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- ^{ix} Webster & colleagues, 2018:48-50.
- ^x Webster & colleagues, 2018: 86.
- ^{xi} Webster & colleagues, 2018: 6.
- ^{xii} Webster & colleagues, 2018:48-50.
- ^{xiii} Webster & colleagues, 2018: 84.
- ^{xiv} Webster & colleagues, 2018:48.