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

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Dear Committee Secretary,

RE: INQUIRY INTO CRIMINAL LAW (COERCIVE CONTROL AND AFFIRMATIVE CONSENT) AND OTHER LEGISLATION AMENDMENT BILL 2023

Thank you for providing the opportunity to the Queensland Sexual Assault Network (QSAN) to respond to this Inquiry.

About QSAN

QSAN is the peak body for sexual violence prevention and support organisations in Queensland. We have 23 member services, including specialist services for Aboriginal and Torres Strait Islander women, culturally and linguistically diverse women, women with intellectual disability, young women, men and children and our membership are located throughout Queensland, including in rural and regional locations.

Our network of non-Government services is funded to provide specialist sexual assault counselling, support, and prevention programs in Queensland. QSAN is committed to working towards ensuring all Queenslanders who experience sexual violence recently or historically, regardless of age, gender, sexual orientation, cultural background receive a high-quality response in line with best practice, client-centred principles. Our work and analysis of sexual violence is from a feminist perspective and addressed within a "trauma-informed framework".

QSAN services are trauma specialist servcies. According to the Royal Commission into Institutional Child Sexual Abuse Responses, trauma specialist services are those *with specialist skills in the provision of services designed to address the impacts and effects of trauma and assist them to recover. While many agencies are required to be trauma-informed (i.e., operate with an awareness of the impacts and effects of trauma), trauma specialists are both trauma-informed and deliver trauma-specific interventions or therapeutic treatments.*

QSAN services are committed to engaging with government and other bodies to raise systemic issues of concern and to ensure the voices and experiences of victims-survivors of sexual violence are considered

in the formulation of policy and legislation that impacts on sexual violence victim-survivors in Queensland.

How do sexual violence prevention services differ from domestic and family violence services?

In our experience, many decision makers are familiar with the work of domestic and family violence services but less with the work of sexual violence prevention services and many believe we do the same work. Though we work closely with the DFV sector, there are key differences.

We thought it might be helpful to explain this further.

A key difference from domestic and family violence services is that sexual violence support services respond to abuse in a wide range of relationships and over the course of a person's lifetime. Sexual violence services support a large number of clients who have experienced sexual violence outside of familial and intimate relationships whilst DFV services are geared towards crisis which occurs around separation. Sexual violence support services also respond to clients in crisis for example, following a recent rape but they also provide long-term counselling and support to help people heal from violence and abuse. People impacted by sexual violence can access QSAN services at any time in their lives. Victim-survivors may dip in an out of services throughout their lives to support their healing journey. Specialist sexual violence counselling and support services work with clients to address the deep impacts of trauma. In terms of the National Plan to End Violence Against Women and Children they provide both response and recovery (though the long term recovery aspect of their service delivery is increasingly under pressure because of underfunding and increasing client demand).

Trauma specialist counselling delivered by QSAN services is client centred. Counselling focuses on emotional safety and stabilisation, trauma processing, addressing the impacts of sexual violence, resourcing people with coping mechanisms and developing and enhancing client support networks.

QSAN services also assist victim-survivors with practical issues including with housing, reporting to police, medical referral and support, assistance with relevant applications, including financial applications and referrals to appropriate services. When resources permit, the services support clients to participate in criminal court processes and trials, which can be a retraumatising process for many victim-survivors.

The work of a sexual violence prevention service is specialised and complex. The counsellors are experts in their field, have extensive experience and many have post graduate degrees. The work is demanding and requires a high level of skill to respond appropriately to highly vulnerable and traumatised clients, especially where there is increasing client demand and limited resources.

Thematic reflections on sexual violence in Queensland

Our network has observed a significant increase in service demand over the last decade. There are also changing patterns of demand with not only more clients presenting to specialist services, but services are seeing an increase in the number of young people seeking support, and the violence used is more extreme. This may be for the following reasons:

- The increase in access and at a younger age to pornography, including violent pornography.

- The lack of broad-based and quality sex education in schools. Historically, education has been abstinence and heteronormative focused, instead of adopting a harm minimisation approach.
- The rise in the use of dating apps, gaming and other devices which increases an ability of those with predatory behaviour to access victims.
- The lack of accountability for sexual violence in the criminal justice system.

Overall position

As a general position, QSAN supports the new laws relating to amendments to sexual violence, and thanks the Women's Safety and Justice Taskforce for their report and recommendations, and the Queensland Government for supporting their work and especially for this current bill being considered today.

These amendments, especially to affirmative consent, mistake of fact and jury directions are the culmination of much work and advocacy over decades from victim-survivors and the sexual violence and women's sector.

We hope these changes may assist in improving justice and safety for victim survivors of sexual violence in Queensland.

Because of the Committee's tight timeframes, we have confined our response to issues of mainly affirmative consent, mistake of fact and jury directions.

The statistics

- 115.5% increase over 9 years of reported rape/attempted rape in Queensland.[1]
- Sexual violence prevalence rates are increasing. [2]
- 28.5% of children have been sexually abused
- 22% of women have experienced sexual violence.[3]
- 6.1% of men have experienced sexual violence[4]
- **13%** have reported it to the police
- 20th year of an increase in reported rape and attempted rape in Queensland and rape and attempted rape is one of only three crimes that has increased in this period[5].

The issue is bigger and the impacts more widespread than we previously thought[6]:

- 51% of women in their twenties.
- 34% of women in their forties.
- 26% of women in their late sixties and seventies.
- Approximately 50 sexual assaults per week occur nationally in aged residential care (that we are aware of).

[1] Crime Report, Queensland, 2021-2022, Recorded Crime Statistics.
[2] https://www.abs.gov.au/statistics/people/crime-and-justice/personal-safety-australia/latest-release
[3] https://www.abs.gov.au/statistics/people/crime-and-justice/personal-safety-australia/latest-release
[4] https://www.abs.gov.au/statistics/people/crime-and-justice/personal-safety-australia/latest-release
[5] Data suggests Queensland's crime rate decreasing despite reports of surging youth offences - ABC News
[6] https://anrowsdev.wpenginepowered.com/wp-content/uploads/2022/08/ALSWH-Prevalence_SV.pdf

The need for adequate funding of sexual violence prevention services

QSAN has a well-established public position for more than a decade that our services are not adequately funded to ensure victims survivors of sexual violence in Queensland obtain a timely and quality response, with wait times in some areas being up to 12 months in length. In addition, because of demand pressures many services also must place time limitations around the amount of service they can provide to individual clients, are reluctant to promote their services as much as they would like and have to limit collaborative partnerships, prevention and education activities in the community because of direct client demand pressures.

As previously stated, sexual violence reporting rates are increasing as well as prevalence rates. [7]

As we are all aware from recent high-profile cases in Queensland, sexual violence predators can be prolific in their offending and can inflict a large amount of harm and trauma on numerous victims, which in turn also places additional pressures on services.

Though appreciated, QSAN services only received a small increase in the last budget to make some temporary funding permanent but there remains significant gap because of underfunding for decades and ongoing and expected increases in demands.

Compared to our most closely aligned sector, the sexual violence prevention sector only receives 13% of the funding received by the domestic violence sector in 2022/23 and this gap would have widened this financial year[8]. This is not a criticism of the DFV sector, it merely reflects the reality of the funding landscape.

These new laws will, by their design, encourage more victim survivors to come forward, seek assistance and will motivate many to engage with formal processes in the criminal justice system. Logically this will increase demand on our services again.

This increase in demand on the specialist sexual violence sector was recognised in the Taskforce recommendation 10 where it was stated "*adequate funding for services to meet existing demand and anticipated increases in demand that are likely to flow from recommendations in this report."*

We therefore call on the Government to support victim-survivors of sexual violence in Queensland and to adequately fund the specialist sexual violence sector as a matter of urgency.

Recommendation 1

That the specialist sexual violence sector be adequately funded to provide a timely and quality response to victim-survivors of sexual violence in Queensland, and especially in light of the expected increase in demand on services as a result of these legislative changes.

[7] https://www.abs.gov.au/statistics/people/crime-and-justice/personal-safety-australia/latest-release

[8] Report No. 29 57th Parliament 2022-23 Budget Estimates - Volume of Additional Information, response to Question 17.

Specific feedback

Our specific response to the current inquiry is set out below:

1. **Failure to report offence – Section 229BC**

QSAN is part of a working group of concerned non-government organisations that has been meeting on a regular basis and over a number of years about the failure to report offence its impact, particularly on services who provided responses to youth. The members of this working group include but are not limited to Zig Zag, who is an also a member of QSAN, Queensland Youth Housing Coalition, Women's Legal Service Queensland, Queensland Network of Alcohol and other Drug Agencies, Law Right, Youth Advocacy Centre and other agencies.

Section 229BC in Queensland was a legislative response to the Royal Commission into Institutional Child Sexual Abuse recommendation (Recommendation 32 and 33). The Royal Commission recommended the establishment of an offence but that it be confined to institutions. That is, the recommendation was that:

Each state and territory government should introduce legislation to create a criminal offence of failure to report targeted at child sexual abuse in an institutional context.[9]

QSAN recognises the intent of the failure to report offence was and continues to be the protection of children. There have been however, significant problems created when the introduced offence was broadened from institutions to make every person in Queensland, a mandatory reporter for child sexual abuse or suspected child sexual abuse, for both children and adult survivors of child sexual abuse.

The amendments contained in this bill have gone some way to ameliorate some issues however, inconsistencies and problems remain. We believe agency and decision making about making a decision to report to the police should rest with young people when they have the capacity to do so, and there is no risk to another child being harmed. This is called the Gillick principle and those who work with young people are used to making these kinds of assessments. Such an approach is more consistent with Article 12 of the International Convention of the Rights of the Child[10] that specifically requires state parties to recognise that children have a right to express a view on matters affecting them and that due weight is given to this, in accordance with their age and maturity.

QSAN is regularly advised by victim survivors that the process of reporting to the police about sexual violence and any subsequent criminal process is as traumatic, if not more traumatic, than the actual crime itself. There are therefore very valid reasons that many victim survivors, including children choose not to pursue formal processes and it is our position, this should be respected when they are of the age and maturity to make such a decision and subject to overall safety.

[9] https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_recommendations.pdf page 100.
[10] Convention on the Rights of the Child | OHCHR

Recommendation 2

That Section 22BC (4) (ii) be amended to better reflect the young person's choice and capacity to make a decision to report sexual violence to the police, subject to the need to protect another child from harm or risk of harm.

Though the bill now provides a level of protection from criminal prosecution for relevant professionals, what about other professionals who work in organisations for example, receptionists, intake officers (who may not be counsellors), administrative staff in counselling organisations? They are not strictly covered by these provisions as are not in a "confidential professional relationship" as defined by the proposed Section 229BC (4)e (i) (B).

Other concerning examples include:

Consider the position of parents of a 15-year-old teenage daughter who was raped by her boyfriend, and she has advised them she does not want to report the matter to the police? The parents could face criminal prosecution under these laws if they do not report.

Another example is a 15-year-old girl having consensual sex with her 16-year-old boyfriend. In such a case, if the parents know or later find out, the parents of the girl would be legally obligated to report or face charges themselves, and the 16-year-old could also potentially face charges.

What about the position of academics who want to pursue academic research and undertake focus group with youth? If a disclosure is made to them during the research activity about a sexual assault, they can also be criminally prosecuted, if they do not refer the matter to the police despite the 15-year-old not wanting this to occur.

In relation to the definition of a relevant professional, not all social workers are members of the AASW but are still competent and eligible to practice as social workers and we would recommend this be acknowledge in the legislation rather than the registration.

Recommendation 3

That the Queensland Government commission independent research into the impact of the offence, including adverse impacts and unintended consequences, and provide a report to government with recommendations for change.

Recommendation 4

That the definition of relevant professional is amended for social workers to include eligibility to be a member of the AASW rather than a requirement to be a member of the association.

2. <u>Consent (Section 348) and Circumstances where there is no consent (348 AA)</u>

We would recommend that the definition of consent also include the word 'informed'. This is to get around the situation where a person may consent to certain activities during the sexual engagement but that these activities and risk must be fully understood by the person.

Recommendation 5

That the definition of consent in section 348 also include the word 'informed'.

The law has an important role to play in relation to community education, so we feel it important to be as clear as possible that consent is required continuously at each change/ stage of the sexual acts.

Recommendation 6

That it should be made explicit on the face of the legislation that consent is required for each different, changed, stage of the sexual act.

Recommendation 7

That Section 348 (2) be amended to include these additional words, 'a person may withdraw consent to an act at any time by words or actions.'

There is a lack of clarity between Section 348 (3) and 348AA (1) (a). Both sections deal with the issue of a person not offering physical or verbal resistance to an act, but they are worded slightly differently which will cause confusion. Section 348AA (1) (a) is clearer *stating that a person not saying or doing anything to communicate consent has not consented*. However, Section 348 (3) states *a person who does not offer physical or verbal resistance to an act,* ***is not by reason only of that fact****, to be taken to consent to the act.*

We prefer the wording contained in Section 348AA (1) (a).

Recommendation 8

That Section 348 AA (1) (a) be retained and Section 348 (3) be removed.

Strangulation is commonly being reported to be engaged in during sex and it is therefore very important to ensure the safety of those involved, as much as possible. We suggest the inclusion of an additional exemption in the circumstances where the person does not consent as set out in Section 348AA. For example, a person may be incapable of consenting because they are being strangled.

Recommendation 9

That Section 348AA be amended to include an additional circumstance where a person is incapable of consenting or incapable of withdrawing consent because they are being strangled or because of some other act.

3. Amendment to Mistake of Fact (Section 348A)

QSAN suggests the following amendments to make it clear, there is an expectation at law to check consent at the time of the sexual activity and before each subsequent sexual activity.

Recommendation 10

That Section 348 (3) be amended to remove the word immediately and leave at the time of the act.

Recommendation 11

That Section 348 (3) be amended to include "…..at the time of the act <u>or each subsequent act</u>, say or do something…."

The lack of cognitive ability/ mental health impairment should not only impact on the accused's ability to say or do anything but also their understanding and/or comprehension of what the complainant may have said or action they may have taken.

Recommendation 12

That Section 348 4 (b) be amended to include the additional words as follows:

The impairment was a substantial cause of the person not saying or doing anything <u>and not understanding/ comprehending what may have been communicated to them by words or actions.</u>

Impairments

In general terms, QSAN is concerned about the extent of 'impairments' that may be covered by this excuse. The Mistake of Fact excuse provides, in essence an excuse to a crime, and therefore we should carefully consider who can access it. Though the crime may be excused the impact on the victim remains the same whether or not the law recognises the act as a crime or not.

Obviously getting the balance right is very important and if we do not, there is a concern we can send the wrong message to the community that on the on the one hand people with disabilities are unable to have healthy relationships and consensual sex. And on the other hand, if the excuse is drawn too widely and allows a large percentage of the population to prima facie access it, it may become unworkable, which has impacts on justice, safety, timeliness of trials and ultimately may impact on the victim-survivor's rights to a fair trial.

(a) Cognitive

In relation to cognitive impairment the current drafting is too wide, for example, long covid and brain fog may impact on a person's cognitive ability. This should not be entertained as a possible excuse, but the current wording provides an opportunity for this to be considered. We think the section should be more limited and we make the following recommendations:

Recommendation 13

Consistent with the examples of a cognitive impairment, that Section 348B(b) be amended to include that the impairment be required to be an ongoing, <u>permanent</u> impairment.

Recommendation 14

That Section 348(c) be amended and the phrase "for other reasons" be removed and/or be limited to be of a similar nature to the examples provided in Section 348(2).

(b) Mental Health Impairment

Similarly, QSAN believes the mental impairment excuse should also be further limited in the interests of safety and justice.

We believe the use of the terminology 'emotional wellbeing' is a very generalised term and vague term and not diagnosable. We recommend it be deleted.

Recommendation 15

That Section 348 C 1 (c be amended to remove the term "emotional wellbeing".

We are very concerned about the inclusion of anxiety disorders and affective disorders which are some of the most common mental health disorders that currently exist in the population eg. Anxiety and depression.

We recommend these two disorders be removed.

Recommendation 16

That Section 348 (c) (2) be amended to remove an anxiety disorder and an affective disorder.

If a large percentage of the population is, prima facie able to argue this excuse, this will mean it is potentially open to misuse, unnecessarily lengthening proceedings and could negatively impact victim survivors' engagement with the trial process. When this is interpreted, along with it being a temporary condition, it will mean that an accused who is temporarily depressed, loses their job and separates from their partner could access the excuse, at least on a prime facie basis. The loss of their job and their inability to carry out day to day activities could be regarded as "significant for clinical diagnostic purposes". Is it fair a person in these circumstances can access this excuse? We would argue it is not.

The inclusion of the word 'temporary' may be trying to cover someone having a psychotic episode, which might be a short-term (temporary) acute response. However, it would be an acute response to an underlying existing and ongoing condition. We believe the policy intent was for the impairment to be ongoing and not temporary.

It is important to remove the word temporary from Section 348 (a), otherwise an accused would be able to access the excuse based on a temporary (and voluntarily induced) substance induced mental disorder, which is at odds with the new Section 348(2) that states voluntary intoxication of a person is not honest and reasonable for the purposes of determinations about access to the mistake of fact excuse.

Recommendation 17

That Section 348C (a) be amended to delete the word temporary.

In addition, we recommend the removal of the word "mood'. Mood is defined as the subjective feeling or emotional state of an individual. It is not a term that is diagnosable clinically and we recommend its removal.

Recommendation 18

That Section 348C (a) be amended to delete the word mood.

Similarly, we recommend the removal of the word volition.

Recommendation 19

That Section 348 (a) delete the word volition.

We note the threshold requirement being "significant for clinical diagnostic purposes" and would recommend consideration be given to initial screening/ testing to establish this to limit the length of the trial being impacted when the threshold is not met.

Recommendation 20

That to avoid unnecessary delays in the criminal justice system and to minimise adverse impact on the victim survivor, that a preliminary test be established to determine whether they have a "significant impairment for clinical diagnostic purposes" to vet unworthy applications.

Recommendation 21

That Section 348 (2) be amended to remove the term "any other reason" and/or that it be limited to be of a similar nature to the example provided in Section 348(2) with the exclusion of an anxiety disorder and an affective disorder.

Ingesting a substance according to the dictionary definition involves swallowing. The definition therefore needs to be broadened to take account of other forms of drug taking.

Recommendation 22

That Section 348 (3) be amended to broaden the taking of drugs from just ingesting a substance to ensure that other ways of taking drugs is covered.

4. <u>Another important limitation on reasonableness in Mistake of Fact .</u>

We would recommend the specific provision in the Victorian Jury Directions Act (set out below) also be included as an additional jury direction, as well as legislated.

For example, these provisions should be changed to include a limitation on reasonableness in the mistake of fact excuse.

The Victorian provision is [11]-:

47I Direction on general assumptions not informing a reasonable belief in consent

For the purposes of this Division, a direction on general assumptions not informing a reasonable belief in consent is a direction that informs the jury that—

(a) a belief in consent based solely on a general assumption about the circumstances in which people consent to a sexual act (whether or not that assumption is informed by any particular culture, religion or other influence) is not a reasonable belief; and

(b) if a belief in consent is based on a combination of matters including a general assumption of that kind, then, to the extent that it is based on that general assumption, it is not a reasonable belief.

Recommendation 23

That Section 348 A be amended to include an additional section of a similar nature to the Victorian jury directions on general assumptions:

A belief by a person that another person consented to an act is not reasonable if the belief is based solely on a general assumption (or a combination of matters including a general assumption) about the circumstances in which people consent to a sexual act (whether or not that assumption is informed by any particular culture, religion or other influence).

Recommendation 24

That similarly to Victoria there should also be a jury direction as above.

5. Coercive Control

QSAN does not have a collective position on coercive control, but we are supportive, if it is being introduced of Section 334C (6) that allows for a charge of coercive control to sit alongside another stand-alone offence such as rape. As coercive control will cover a broad range of behaviours such as threats, verbal and economic abuse and surveillance, it will allow a greater amount of evidence to be placed before the jury. When the coercive control offence is combined with a stand-alone offence such as rape, this will increase the historical and contextual evidence and the dynamics of the domestic and family violence relationship that can be considered by the jury. Hopefully this will result in improved justice for victim survivors of intimate partner sexual violence.

A member service Immigrant Women's Support Service raised an issue about a 'cultural defence' being used in these cases as Section 223C (10) allows for a defence of "reasonable in the context of the relationship". That is, that an accused may run the argument that they are not guilty of coercive control as they are merely doing what their father and grandfather did and what is acceptable in their culture. The women may not have consented or approved the behaviour but because of the nature of the relationship and the power dynamics they never had the opportunity to say no or oppose the behaviour.

[11] (https://content.legislation.vic.gov.au/sites/default/files/2023-10/15-14aa014-authorised.pdf)

It raises the issue of the importance of broad community education and specific education for communities in language they understand.

Similarly, to the Victorian jury direction referred to above we would also recommend that Section 334C (10) defence limit the defence of reasonableness, as set out below.

Recommendation 25

Section 334 (10) defence to coercive control be limited as follows:

A course of conduct is not reasonable if it is based on a general assumption or a combination of matters (including a general assumption) about the circumstances in which people consent to living arrangements, interactions and behaviour in a relationship (whether or not that assumption is informed by any particular culture, religion or other influence).

It is also important to note that in Queensland, the definition of 'couple relationship' under the Domestic and Family Violence Act 2012 does not automatically cover boyfriend/ girlfriend relationships. This means victims in these types of relationships may not be able to access a protection order or, indeed these coercive control laws. Dangerous relationships can escalate quickly and our laws should better accommodate this.

6. Jury directions

We think that it should be mandatory for the judge to give 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 allows too much discretion about determinations if 'there is a good reason' or if there is a request by one of the parties. `

Recommendation 26

That the judge must provide relevant jury directions at the beginning of a trial and at any other time when requested by a party to the proceedings.

Section 103ZX is a jury direction and it states if a person knew or believed that a circumstance set out in Section 348AA (1) – which the circumstances where there is no consent, existed then this knowledge or belief is enough to show the defendant did not reasonably believe that the person was consenting is a very important provision and should form part of the law rather than a jury direction.

Recommendation 27

That Section 103ZX relating to mistake of fact and reasonableness be part of the law and not just a jury direction.

7. Miscellaneous provisions

The use of sexual violence experts

QSAN is disappointed that the amendments have not made provision for the establishment of a panel of sexual violence experts, as recommended by the Taskforce at recommendation 80, for use in the trial by the prosecution to explain to the jury about the dynamics of sexual violence, rape myths and other relevant issues. We believe these experts could make a significant difference to case outcomes and recommend they be established as soon as possible.

We note Recommendation 80 required the independent expert sexual violence panel to be established with the advice of the independent sexual violence case review board, which in turn was established under Recommendation 46.

We note this independent case review board has not been established, as yet. The current legislation is therefore established without input from the independent case review panel, which is a concern as it does not allow for diverse opinions to inform the makeup of the expert panel.

Recommendation 28

That the expert sexual violence panel be established in accordance with Recommendation 80 of the Taskforce recommendations.

Publishing identifying material in relation to the complainant – Section 103AAN

These provisions are very complex for complainants to understand and there is a need for community-based information to be available immediately to promote understanding. We also think that some complainants may require legal advice, however there is no lawyers who provide specialised legal advice to victim survivors of sexual violence on a broad range of topics such as publication, defamation, and privacy.

We note all these changes will be subject to a review as recommended by the Women's Safety and Justice Taskforce.

Once again, thank you for this opportunity to contribute to the Inquiry and if more information is required, please do not hesitate to contact the Secretariat.

Kind Regards,

[redacted]

Angela Lynch, Secretariat