

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

Submission No: 15
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Publication: Making the submission and your name public
Attachments: See attachment
Submitter Comments:



27 October 2023

The Committee Secretary
Legal Affairs & Safety Committee
By Email Only: lasc@parliament.qld.gov.au

Dear Committee Secretary,

**Submission – Coercive Control Aspects of the
*Criminal Law (Coercive Control and Affirmative Consent) and
Other Legislation Amendment Bill 2023*
Policing the Kitchen Table Conversation**

In order to punish some horrendous behaviour, this Bill proposes to regulate aspects of intimate and family relationships in ways, and to an extent, that have never been attempted before.

This submission aims to focus the attention of the Committee on some key questions about the breadth of the new offence. It has some predictable, if unintended, perverse consequences.

- 1. Where will the new law draw the line between lawful negotiations in a relationship, and the serious criminal offence?**
- 2. Where will the new law draw the line between lawful financial expectations and “economic abuse”?**
- 3. Where will the new law draw the line between lawful ground rules for a relationship and coercion?**
- 4. Is there a problem, in free and democratic society, with imposing a “reasonable person” standard on the conduct of private relationships? How will imposing such a standard impact upon relationships which deviate from modern norms; e.g. traditional cultural and religious models?**
- 5. Why is “coerce” not defined for the purposes of the coercive control offence (but defined for the purposes of the meaning of “domestic violence”)?**
- 6. What is the likely effect of this change on the way relationship breakdowns are litigated?**



Ken Mackenzie LLB

Turning to the first of these questions.

1. Where will the new law draw the line between lawful negotiations in a relationship, and the serious criminal offence?

Are two angry, insulting, and demanding messages sufficient to establish the serious criminal offence of coercive control?

Example 1 –

Aly's relationship with Bobby is on the rocks. Aly sends a text message to Bobby.

“Bobbyfunt, you [REDACTED]! How many harlots did you bring to our house? I reckon you did the dog too. I hope your cancer comes back. If you don't transfer 50K to my account by 4pm I'll tell Chas what you did to Delta.”

The next day, Aly follows up with a second message.

“You're not going to win this game Bobby. You've always thought you're top dog, but you're just a whiny, manky little Shih-tzu. Stay away from the shops here. If I see you there, I'm transferring the lot to Aunt Mae in Frisco. You won't see a cent. I don't care if you have to drive to the next town to do your shopping. I can't stand the sight of you, you pie-eating [REDACTED].”

Aly and Bobby are in an intimate relationship. The first element of the coercive control offence is satisfied.¹

Both messages are degrading Bobby. The definition of “emotional or psychological abuse”, will be “behaviour by a person towards another that... degrades the other person.”² The definition is satisfied.

An act of “emotional or psychological abuse” will be an act of “domestic violence”.

The two messages are two acts of “domestic violence” which establish a “course of conduct against the other person that consists of domestic violence occurring on more than 1 occasion”. The second element of the coercive control offence is satisfied.³

Aly's intent in both messages is to influence Bobby's behaviour. Not only is there a demand in each, but a consequence threatened. It seems clear enough that Aly's intent in the first message is to compel Bobby to do something Bobby is entitled not to do (transfer money to Aly's account). Aly's intent in the second message is to compel Bobby to refrain from shopping in their home town.

¹ Proposed section 334C(1)(a) *Criminal Code* – Clause 20 page 34 of the Bill

² Proposed definition in section 334A *Criminal Code* - Clause 20 page 31 of the Bill

³ Proposed section 334C(1)(b) *Criminal Code* – Clause 20 page 34 of the Bill

“Coerce” will be defined for the purposes of the “domestic violence” definition⁴ to mean:

“coerce, a person, means compel or force a person to do, or refrain from doing, something”

Applying that statutory definition,⁵ Aly sent both messages with an intent to coerce Bobby. The third element of the coercive control offence is satisfied.⁶

A reasonable person in Bobby’s position, receiving the messages might be upset. “Harm” will be defined to include, “any detrimental effect on the person’s... emotional... wellbeing, whether temporary or permanent.” A few tears would be more than enough. And it will not matter whether Bobby was actually upset.⁷ It will be enough if the messages would, in all the circumstances, be reasonably likely to cause Bobby “harm”.⁸ The fourth and final element of the coercive control offence is satisfied.

Two angry, insulting, and demanding messages will be enough to make a person guilty of the serious criminal offence of coercive control.

Will Aly have any defence? It seems unlikely. Aly could try to argue that the messages were reasonable in the context of the relationship as a whole, but the burden of proving that will be on Aly.⁹ Once an abusive tone is adopted, it is hard to imagine any tribunal finding abusive messages were reasonable.

There is a problem with setting the threshold at this low level. It will capture a vast cohort of people who are not imagined to be the intended targets of this law.

Many people, in the course of a break-up, or a heated argument, will send angry, insulting, demanding messages. Emotions run high. Rationality low. Is it intended that every person who goes through an acrimonious break-up be at risk of prosecution for coercive control? If not, then the threshold must be re-examined.

Often, people who have been beaten with fists retaliate with words. If this is to be threshold, the new offence will apply to a swathe of emotionally vulnerable people whom it was intended to protect.

⁴ But not the offence provision, on which more, later. Proposed section 334B(4) *Criminal Code* -Clause 20 page 34 of the Bill

⁵ Or any ordinary English definition

⁶ Proposed section 334C(1)(c) *Criminal Code* – Clause 20 page 35 of the Bill

⁷ It will be “immaterial whether the course of conduct actually caused harm” proposed section 334D(2)(a) *Criminal Code* – Clause 20 page 37 of the Bill

⁸ Proposed section 334C(1)(d) *Criminal Code* – Clause 20 page 35 of the Bill

⁹ Proposed section 334C(10) *Criminal Code* – Clause 20 page 36 of the Bill

This is only one example of how the nested, complex layers of very broad definitions give the offence an extraordinarily wide range of application. The Minister introducing the Bill to Parliament said, "Coercive control is a pattern of behaviours perpetrated against a person to create fear, isolation, intimidation and humiliation... It is an all-consuming, relentless pattern of behaviour by manipulative perpetrators who gaslight and redefine the victim's reality."¹⁰

The Explanatory Notes contend: "perpetrators of coercive control exert **power and dominance** over their victims using patterns of abusive behaviours **over time** that create **fear** and deny liberty and autonomy."¹¹ Yet, the concepts which I have emphasised in bold have not made their way into the essential, minimum elements of the new offence.

There is a wide gap between the concept of coercive control as described by the Minister, and the meaning of "coercive control" as it is defined in the Bill.

Ordinary people just want to know what they are, and are not, allowed to do. That's a basic function of the criminal law. The answer should not require a three page textual analysis.

2. Where will the new law draw the line between lawful financial expectations and "economic abuse"?

"Economic abuse" will be defined to include "behaviour by a person...that... unreasonably controls another person...—

(a) in a way that denies the second person the economic or financial autonomy the second person would have had...."

"Control" is not defined.

Example 2 –

Delta decides to get a grip on the household finances. She sends Chas an email saying:

"It's time you shape up or ship out. You need to be responsible with money or there's no future for you in Dad's business.

1. No more pokie machines. Not a dollar. If you start, you won't stop, so do not start at all.
2. Your pay goes into our joint account.
3. You don't spend more than \$50 on anything without discussing it with me.
4. You don't spend more than \$50 a week on lunches. Make some at home. And no more pies, you already don't fit the shorts I bought you last month.
5. You don't spend more than \$100 a week in total. You know we've budgeted tightly and that's all we can afford."

¹⁰ Hansard – 11 October 2023 – Page 2908

¹¹ Explanatory Notes – Page 11 first paragraph

These demands clearly restrict the financial autonomy Chas would otherwise have had. Failure to comply could result in Chas losing a livelihood in the business operated by Delta's father. Failure to comply might also result in Chas no longer being able to remain in Australia, perhaps ultimately being deported. The elements of "economic abuse", save perhaps for "unreasonable" are satisfied.

Delta might argue that some of the demands are reasonable. Chas might disagree. And here we enter upon the uncertainty created by the concept of "economic abuse" (as defined in the Bill). If a \$100 spending allowance is reasonable, would \$20 be? Is it reasonable to require your partner to have their wages deposited into a joint account?

3. Where will the new law draw the line between lawful relationship expectations and "emotional or psychological abuse"?

Example 3 –

Delta takes offence at something Chas's mother said on Facebook. Delta sends an email to Chas saying:

"Your Mum is so toxic. She's been manipulating and gaslighting the family for years. She's a coercive controller. I've had enough. I can't keep de-programming you and putting you back together after you see her. Just stop. It's time to cut her off. I don't mind you seeing your Dad or your sister, just no more Edna. If you don't cut her out of our lives, I'm moving to Canada, with the kids."

The definition of "emotional or psychological abuse" will include "behaviour by a person towards another person that torments... the other person".¹²

Examples of "emotional or psychological abuse" given in the Bill include "preventing a person from making or keeping connections with the person's family, friends, kin or culture".

The Bill does not specify how many connections need to be prevented. Would cutting off one member of the extended family be sufficient? Does it make a difference if that person is the parent? Does it make a difference if there is large family with whom connections are maintained, or if the person cut off is the only living relative?

These are questions that people affected by the Bill should know the answers to. Anyone in a domestic relationship in Queensland is affected. The doubt and uncertainty created will be widespread.

Again, Delta may argue that her demand is reasonable. Contact with Edna may really be psychologically damaging to Chas. Estrangement is sometimes the

¹² Proposed section 334A *Criminal Code* – Clause 20 page 31 of the Bill

healthy choice. To decide whether Delta's position is reasonable, a Court may then be required to decide those questions of Edna's character and trawl through what Delta knew about the life-long history of Edna's relationship with Chas. Then Edna will effectively be on trial, although not a party to the case.

Bear in mind too that Examples 2 & 3 together could constitute a course of conduct by Delta sufficient to establish the coercive control offence.

4. Is there a problem, in free and democratic society, with imposing a "reasonable person" standard on the conduct of private relationships? How will imposing such a standard impact upon relationships which deviate from modern norms; e.g. traditional cultural and religious models?

Queensland's criminal law is familiar with use of a "reasonable person" standard.

For example, you may use reasonably necessary force to defend yourself.¹³

Or, your conduct in public may be indecent if it is indecent by the standards of ordinary members of the community.¹⁴

However, in those situations, there is a degree of consensus within the community as to what is reasonable. Individual people should not find it difficult to predict what a jury is likely to regard as excessive force in self-defence, or what would outrage public decency.

Conduct within intimate and family relationships is different. People hold firm, but wildly differing opinions, about what is normal, fair, or reasonable. This is the fodder for what used to be called "agony aunt" columns in newspapers. Now, topics of how people should behave within relationships, their reasonable boundaries and expectations, are debated in internet forums like r/relationships and r/AITAH on Reddit. A wide spectrum of passionately held opinions will be found there.

So, the first difficulty with a "reasonable" threshold is that it creates uncertainty.

Secondly, in a free and democratic State, our most intimate, private lives are not usually constrained by the limits of community opinion. We are free to hold and express opinions that the majority deem unreasonable. In consensual, adult relationships, we are free to engage in sexual behaviour which might outrage or horrify our neighbours. Should we, as consenting adults, also be free to be "unreasonable" in the conditions we require and accept in our personal relationships?

¹³ Section 271 *Criminal Code*

¹⁴ *R v Bryant* [1984] 2 Qd R 545

Example 4 –

Fred belongs to the Entropine, a religious faith with a small congregation in Australia. They operate a match-making website for members around the world. Fred advertises on the site:

“I am looking for my future wife. I want a traditional Entropine marriage based on the values of my culture. Non-negotiable values for me are:

1. To ensure the smooth running of the marriage, one partner has been put in charge. The Entropes appointed the husband to act as a “guardian” over his wife. In return, his wife is expected to obey him.¹⁵
2. Each partner in the marriage has been assigned a particular role. Accordingly, man has been assigned to working outside the home as the breadwinner because of his greater physical strength and psychological abilities; likewise woman is physiologically and emotionally suited to bearing children and has been made responsible for their upbringing and maintaining the home. My wife will stay at home and not go out to work. Our children will be home-schooled.
3. Married women do not have male friends.
4. Friendships outside the congregation of the faithful are discouraged.
5. Conjugal relations are a husband’s right and a wife’s duty. If a husband calls his wife to bed, and she does not come, she is cursed until he is happy with her again.¹⁶ I have strong desires and I am looking for a wife with similar energy. I expect to have sexual intercourse at least 150 times in a year.”

Gita responds to Fred’s advertisement, and within the year moves to Australia and marries Fred.

Fred does not use physical force or threaten Gita with any consequences for breach of his expectations, except this: if his expectations are not met, he will end the relationship.

Gita married Fred knowing his expectations for the relationship.

Having signed up from the beginning to be a “surrendered wife”, has Gita been **made** subordinate to Fred? If so, her decision, despite it apparently being her consent, desire, and an article of her religious faith, is never-the-less a continuing act of “domestic violence” as defined in the Bill.¹⁷

What does that say about the law’s treatment of Gita, as an adult, autonomous person entitled to make her own life choices?

The Bill leaves unclear and uncertain whether an act of free choice by Gita is within or without the definition of “domestic violence”, and so also whether within or without the offence of coercive control.

¹⁵ Cf Al-Quran, 4:34. Ephesians 5:22

¹⁶ Cf Hadith of Abu Hurayrah reported by al-Bukhari, 4794

<https://islamqa.info/en/answers/2006/can-a-wife-refuse-intimacy>

¹⁷ Proposed section 334B(2)(j) *Criminal Code* – clause 20 page 34 of the Bill

Fred would argue that he hasn't **made** Gita do anything. It's hard to know how that question would be decided by a court.

What does that say about the stated educative purpose of the Bill, if we do not know whether this will be domestic violence or not?

Has Gita been **prevented** from seeking employment? Preventing a person from seeking employment is a stand-alone example given of "economic abuse" in the Bill.¹⁸ The example is not preceded by either the word "unreasonably" or "coercing" as most of the other examples are.

The drafting leaves it unclear and uncertain as to whether the example is affected by the words "coercive, deceptive or unreasonably controls" where they appear earlier in the definition of "economic abuse".

One interpretation open to the Courts will be that behaviour which satisfies the example satisfies the definition, without reference to the words "coercive, deceptive or unreasonably controls".

The Bill's drafting leaves it unclear and uncertain whether an act of free, informed choice by Gita is within or without the definition of "economic abuse", and so also whether within or without the offence of coercive control.

Has Gita been **prevented** from keeping connections with male friends? Preventing a person from making or keeping connections with their friends is a specific example of "emotional or psychological abuse" given in the Bill.¹⁹

The drafting leaves it unclear and uncertain as to whether the example is affected by the words "that torments, intimidates, harasses or degrades" where they appear earlier in the definition of "emotional or psychological abuse".

One interpretation open to the Courts will be that behaviour which satisfies the example satisfies the definition, without regard to the words "that torments, intimidates, harasses or degrades".

Are Fred's expectations of the minimum frequency of a satisfactory sex life "sexually abusive"? If so, they may be a continuing act of domestic violence,²⁰ and another basis for a charge of coercive control.

It is unsatisfactory that the Bill creates this uncertainty about the freedom of consenting adults to enter or threaten to leave relationships because of their traditional, cultural, or religious views.

¹⁸ Proposed section 334A *Criminal Code* clause 20 page 31 of the Bill

¹⁹ Proposed section 334A *Criminal Code* – clause 20 page 31 of the Bill

²⁰ Proposed section 334B(1)(a) *Criminal Code* – clause 20 page 32 of the Bill. Putting aside for the purposes of this submission the effect of the proposed amendments in the Bill to the law of sexual consent.

The Minister acknowledges the problem, by saying:

“Some behaviours defined as domestic violence for the purpose of the Bill may be done in furtherance of an individual’s intention to exercise their right to demonstrate their freedom of thought, conscience, religion, or belief. The Bill may, in defining the domestic violence behaviours which may constitute the domestic violence offence, impinge upon traditional religious, personal or cultural beliefs and practices which influence family and cultural gender norms, traditions and practices and understandings of appropriate behaviour within intimate and broader family and community relationships.”²¹

The only justification given for that infringement is:

“The Bill’s limitations on domestic violence behaviours which may be informed by traditional religious, personal and/or cultural beliefs and practices serve the identified purpose.”²²

There is a circularity to this purported justification. The question is: should aspects of traditional, cultural, or religious practice be classified as domestic violence? It is no answer to say that they are so classified, and therefore the purpose of deterring and punishing domestic violence is achieved.

No substantive accommodation is made in the Bill for genuinely held religious, traditional, or cultural beliefs. Nor are the values of the person on the receiving end of the behaviour acknowledged or taken into account.

It is unsatisfactory, and oppressive, that the only mechanism in the Bill to resolve its uncertainties is by reference to what is “reasonable”.

In Wales,²³ the offence of coercive control was set at a much higher threshold. The controlling or coercive behaviour must be engaged in “repeatedly or continuously” (cf. Queensland’s two occasions). It has to have a “serious effect” on the Welsh victim (cf. Queensland’s could have caused emotional detriment to any extent, even if it didn’t). The Welsh offender must know or ought to know that there will be a “serious effect” on the victim (not part of the Queensland offence).²⁴

Even in the more tightly defined framework adopted in Wales, the guidance to prosecutors had to make this significant concession (bold font added for emphasis):

“There might be confusion about where the ‘appropriate’ dynamic of a relationship ends and where unlawful behaviour begins. One way of

²¹ Statement of compatibility – Page 22.

²² Statement of compatibility – page 24

²³ And in England, but Wales is usually the forgotten country, so I will use Wales for brevity instead of “England and Wales”

²⁴ Section 76 *Serious Crime Act 2015 (UK)*

considering this is describe by The College of Policing Authorised Professional Practice on Domestic Abuse which sets out that: “In many relationships, there are occasions when one person makes a decision on behalf of another, or when one partner takes control of a situation and the other has to compromise. The difference in an abusive relationship is that decisions by a dominant partner can become rules that, when broken, lead to consequences for the victim.

Prosecutors should consider the impact on the victim of following, or not following, rules imposed upon them within the wider context of the relationship, where this type of behaviour has occurred within the relationship. It is not necessary for the prosecutor to prove that consequences follow, not least because the fear of consequences is just as powerful. This is intended as a tool by which to recognise a controlling or coercive relationship, rather than a ‘point to prove’.”²⁵

In practice, the CPS guidance is useful in identifying the “confusion” but of little assistance in resolving it. What will be deemed a “compromise”, and what will be deemed a “consequence” remains a value judgment. It will vary with the eye of the beholder.

From the public statements made in support of Queensland’s Bill, it might be inferred that the intention is to punish offenders who have come to completely dominate and terrify their victims. The Bill is aimed at protecting victims from having their free will overborne. The behaviour in mind was beyond the simply unreasonable. It was offending which any right thinking person would condemn.

Yet, the Bill is not crafted to that end.

5. Why is “coerce” not defined for the purposes of the coercive control offence (but defined for the purposes of the meaning of “domestic violence”)?

Many of the operative terms will be defined in section 334A for the purposes of the entire proposed new Chapter 29A dealing with coercive control. But the important word “coerce” is not defined for the chapter.

²⁵ “Controlling or Coercive Behaviour in an Intimate or Family Relationship”, Legal Guidance, Domestic abuse, Crown Prosecution Service 24 April 2023

The word "coerce" is used in defining the elements of the proposed new offence of coercive control. The offender must have an intent to "coerce or control".²⁶ The word "coerce" is not defined for that purpose.

The only definition of "coerce" is given for the purposes of defining "domestic violence" in proposed section 334B, and for that purpose only. The definition begins "in this section".²⁷

It is difficult to imagine any logical reason for defining "coerce" for the purposes of s.334B but not for s.334C.

6. What is the likely effect of this change on the way relationship breakdowns are litigated?

The offence has been drawn and defined so broadly that almost every separating couple will be able to find some basis to accuse each other of coercive control.

One framework for understanding domestic violence postulates that the dynamic is usually between a perpetrator and a victim, and that a perpetrator's response to being found out is to, "DARVO" – deny, attack, and reverse victim and offender.

The Bill's approach to coercive control provides opportunities to DARVO. Dig out the angry, insulting and demanding messages. Print them out. Take them to the police station.

Coming at much the same time as amendments to family law legislation, which will allow findings of domestic violence to weigh more heavily in decisions about property division and parental responsibility for children, we can expect allegations of coercive control to be weaponised in litigation. An over-broad legal definition is just petrol on the fire.

Conclusion

Drafting a coercive control offence is an inherently difficult exercise. Intruding the arms of the State into people's most intimate, private relationships risks over-stepping into policing acts of love. Perhaps it was for that reason that the Taskforce, although it recommended an offence be created, did not attempt to define its scope, nor draft a proposed law.

The legislator's perennial challenge has been explained succinctly thus:

"There are a few general paradigms for crafting criminal laws:

²⁶ Proposed section 334C(1)(c) *Criminal Code* – clause 20 page 35 of the Bill

²⁷ Proposed section 334B(4) *Criminal Code* – clause 20 page 34 of the Bill

1. Write a law that criminalizes the evil you want to prohibit. The problem with this is that while it make[s] the conduct you want to prohibit a crime, it tends to make plenty of other conduct a crime as well, as it fails to appreciate benign conduct that meets the elements.
2. Write a law that criminalizes some of the evil you want to prohibit, but contains exceptions that will allow for benign conduct not to be prohibited. This is really hard to do and lets some criminals walk away. People can't stand this when conduct that they feel is terrible isn't covered by a crim law, and usually ends up with someone writing a new law using 1 above lest any criminal get away.
3. Write a law that is sufficiently precise to cover all the conduct that reflects the evil, but not any of the conduct that doesn't....

Writing laws is hard. Writing good laws is really hard. Appreciating unintended consequences is really, really hard. That's why Blackstone's ratio [better 10 guilty go free than 1 innocent convicted] matters as a guiding principle. And despite our best efforts, it continually results in outcomes that defy our best intentions."²⁸

This poorly drafted Bill falls firmly within the first paragraph. At every possible decision point, the drafters have chosen breadth over targeting, and uncertainty over precision.

The result is an offence which encompasses far more conduct than necessary. One that unduly infringes upon individual rights and freedoms. That confuses the message it was intended to send. That devalues the seriousness of the label "coercive control". That makes criminals of people it was never intended to frighten. That creates confusion for the public and also for the police officers, lawyers, and Courts responsible for applying the law. That will tie up resources with trivialities. That will harm many people it was intended to protect.

It would be abusive if it were applied literally as written, so the protection against abuse will not be contained within the law itself, but will rely upon the good sense of prosecutors to deploy it sparingly. That is an abdication of the legislators' responsibility.

This part of the Bill should be taken back to the drawing board.

Yours sincerely,

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²⁸ Greenfield, S., "Attack of the Killer GIFS (Update)", comment on blog post on 22 March 2017 <https://blog.simplejustice.us/2017/03/21/attack-of-the-killer-gifs/>



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27 October 2023

The Committee Secretary
Legal Affairs & Safety Committee
By Email Only: lasc@parliament.qld.gov.au

Dear Committee Secretary,

**Submission – Sexual Consent Aspects of the
*Criminal Law (Coercive Control and Affirmative Consent) and
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Suppose Heppa says, "I stayed in the relationship and did what I had to do to keep Jodi happy, because I needed the job in Jodi's business, a relationship for my visa, and my family would have shunned me if I left."

Will Jodi be a rapist?

Agreement to sexual intercourse will not be valid consent if given "because of... fear of harm of any type", including "economic harm".¹

Also included, "harm to the person's family, cultural or community relationships."

And "harm to employment".

And "reputational harm".

Note, it need not be a fear induced by other person involved in the sexual activity. Or by any person at all.

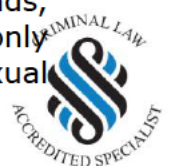
Jodi, on the face of it, will commit a criminal offence for every sexual interaction with Heppa, while Heppa feels these fears.

Some protection for Jodi is provided by the defence of honest and reasonable mistake.² The law presently provides that a person is not guilty if they have an honest and reasonable belief that their partner is consenting.

However, as the list of circumstances in which there is no consent expands, the scope of the reasonable belief extends as well. That is, must Jodi not only have an honest and reasonable belief that Heppa has agreed to sexual

¹ Proposed Section 348AA(1)(f) *Criminal Code* – Clause 13 Page 21 of the Bill

² Section 24 *Criminal Code*



Ken Mackenzie LLB

interaction, but also an honest and reasonable belief that Heppa's consent is free and voluntary – that Heppa is not acting out of fear of losing some money, losing a visa, or bringing shame on the family?

If Jodi knows that Heppa has thought about ending their relationships, but is concerned about the consequences, does that mean that Jodi can no longer hold a reasonable belief in Heppa's consent?

Perhaps the more far-reaching consequence is the effect on Heppa's autonomy. Despite some unhappiness in the relationship, and despite some fear of what would happen if sexual activity with Jodi ceased, can Heppa nevertheless put those concerns aside and desire sexual activity? And two years later, after the relationship is over, which motive will dominate Heppa's recollection?

A related problem between the proposed changes to consent and the proposed changes to the defence of honest and reasonable mistake applies to Jodi. However, it is better illustrated by a second example.

Example 2

Kirra blackmails Luka into having sexual intercourse with Milo. Milo knows nothing about Kirra's threats. Luka finds Milo in bed, climbs in and initiates sexual activity. Milo is surprised but happy about Luka's attentions. Milo does not say or do anything to communicate consent. Milo just passively enjoys what Luka is doing.

Luka's agreement was not voluntary. Milo had sexual intercourse with Luka without consent (in law). The current law provides Milo with a defence. Milo honestly and reasonably believed Luka consented.

The Bill would limit the application of the defence. It will only be available if the accused said or did something "to ascertain whether the other person consented to the act."³

Under the proposed law, Milo would have no defence. Milo will not be able to rely on Milo's entirely justified, honest and reasonable belief, because Milo did not do anything to establish that Luka, who climbed into bed and initiated sexual intercourse, was in fact consenting.

It is absurd and unjust that Milo should be guilty of rape.

Luka will be saved from conviction by Milo's silent agreement.⁴

But, suppose Milo had not welcomed Luka's attentions. If Milo lay there in silent, shocked, unhappy disagreement, then Luka would be guilty of raping

³ Proposed s.348A(3) *Criminal Code* – Clause 14 Page 24 of the Bill

⁴ If "agreement" is to be a state of mind, which may be implied by the Bill's removal of the requirement that consent be "given".

Milo. Luka could not rely on Milo's lack of objection.⁵ Luka could not rely upon an honest and reasonable belief because Luka did not do or say anything to ascertain Milo's consent. Luka might not be able to rely upon the "duress" of Kirra's blackmail, if Kirra didn't threaten serious harm or detriment, or if Luka could reasonably have otherwise dealt with the threat.⁶

The interactions between the consent amendments and the mistake of fact amendment have not been thought through in drafting this Bill.

Returning to the first example, in order to rely upon a defence of honest and reasonable belief in consent, Jodi will also have to establish that Jodi took some action to ascertain whether Heppa consented. Bear in mind that "consent" means "free and voluntary agreement". It may follow that, to avoid being guilty of rape, Jodi must ask Heppa not only whether Heppa agrees, but also whether Heppa's agreement is free and voluntary. Must Jodi ask a question similar to the one asked by a Magistrate before accepting a guilty plea?

"Has anyone offered or threatened you with anything to provide this agreement? Do you agree voluntarily of your own free will? Is your agreement influenced by fear of harm of any type, including fear of economic harm, harm to your reputation, or harm to your family relationships?"

A literal reading of the proposed Section 348AA(1)(f) might require that level of interrogation.

In public discussion about consent, the word is often used as if it equated with "desire". The law has always drawn an important distinction between the two. Consent is agreement. A person may agree, for all sorts of reasons, to a situation they do not desire. If their agreement is freely and voluntarily given, and has not been unfairly obtained, then it is good consent in law.

At first blush, the language of the Bill seems to respect and maintain that distinction. But, in practice, it does not. The end result of the wide "fear of any harm" rule is that almost any "reluctant" consent will now be void.

Example 3 - "I was afraid of how Nino might react if I said no. Last time I said no things turned ugly. That wasn't with Nino though."⁷

There is no requirement that the fear be reasonable.

⁵ Proposed s.348(3) *Criminal Code* – Clause 13 Page 20 of the Bill. Under the current provisions, Milo has not "given" consent.

⁶ Section 38(d) *Criminal Code*

⁷ "Fear of force...regardless of (i) when the...conduct giving rise to the fear occurs" – Proposed Section 348AA(1)(f) *Criminal Code*

Example 4 - "I was afraid Ollie might not drive me home if I didn't, and I'd be stuck there all night."⁸

Example 5 - "I was sick of Purl asking me every time we met at a party. I only said yes to get it over with and stop the pestering."⁹

Example 6 - "I was afraid the other residents of my college would call me frigid, or a tease, if I did nothing for Quinn. I was afraid I'd be left out of the next party trip."¹⁰

Example 7 - "Rolo called me a 'tease'. I was afraid Rolo would tell my friends."

Example 8 - Sierra said, "You enjoyed third base so much, you're going to love the home run. Come on, don't be such a tease."

In examples 7 & 8, Rolo and Sierra's encouragement included a modicum of social pressure. Their partners' consent will be voided by fear of some harm - the reputational harm of being thought of as a tease. No reasonable belief in consent will apply, because Rolo and Sierra created or played upon that fear. Rolo and Sierra will be rapists.

In practice, where desire prevails in the heat of the moment, it is sometimes regretted in the cold light of the following day. Decisions can very easily be attributed to some nebulous "fear". Rationalisations of that kind may be honestly believed. People tend to believe versions of history which reflect better upon themselves. Such reconstructions may also provide some mitigation to infidelity, or the breach of some other code of honourable conduct.

These are not situations with which the criminal law should be concerned.

This is not a set of rules under which responsible, respectful adults can enjoy a sexual life without fear of spurious prosecution.

Yours sincerely,

[Redacted signature]

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⁸ "Harm of any type"

⁹ Fear of "sexual harassment" is given as a specific example of something that will void consent

¹⁰ Fear of "reputational harm" and fear of harm to "community relationships"